#71 9/3/71

First Supplement to Memorandum 71-57

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

Attached are four additional letters on the tentative recommendation. Exhibit I is a letter from Mr. Elmore of the State Bar. He raises many problems with the tentative recommendation and would introduce many additional issues that would require background studies.

Exhibit II is a letter from Jordan A. Dreifus, who is particularly concerned about the effect of the tentative recommendation on various complex contractual relationships, such as government and construction contracts. He suggests that the parties to such a contract should be able to agree to limit the litigation to only one issue, rather than having to litigate various independent breaches of different provisions of the contract. It would appear that this problem now exists for the defendant who waives a compulsory cross-complaint by failure to assert it. This is a matter that would require a background study before a provision of this nature could be inserted into the proposed legislation.

Exhibit III is a letter from Robert C. Todd, expressing approval of the tentative recommendation.

Exhibit IV is a letter from the California State Automobile Association, indicating opposition to the tentative recommendation on the ground it would preclude an insurance company from later litigating its subrogated property damage claim after the plaintiff has brought his personal injury action. It appears that this is a clear case for collateral estoppel. We believe that correspondence with the California State Automobile Association might result in a withdrawal of their opposition, but we cannot be sure of that.

We have not as yet received comments from the Judicial Council or the California Trial Lawyers Association.

The staff believes that the Commission should not attempt to put in a bill on this subject at the 1972 session. We do not believe that we should take action on this matter until we have comments from the Judicial Council and the California Trial Lawyers Association. It might be desirable to drop the matter entirely in view of the many collateral matters raised by Mr. Elmore. Or, as an alternative, the staff could prepare an analysis of the various matters raised in the attached exhibits for consideration sometime during 1972 and attempt to eliminate the opposition of the California State Automobile Association.

Respectfully submitted,

John H. DeMoully
Executive Secretary

First Supp. Memo 71-57 EXHIBIT I

THE STATE BAR OF CALIFORNIA

601 MCALLISTER STREET
SAN FRANCISCO 94102
TELEPHONE 922-1440
AREA CODE 415

August 31, 1971

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Re: S.B. 201 (1971) - Further provisions for Mandatory Joinder of Causes of Action

Dear John:

Thank you for your recent letter explaining the Commission's action and the purpose in distributing the tentative recommendation to interested persons on your normal mailing list.

As you probably know, the CAJ does not meet during the summer months and upon the resumption of meetings at the end of September or the first part of October one priority Agenda item of the CAJ will be the status of the "compulsory joinder" problem and the Commission's intentions.

We will appreciate it therefore if you will keep us currently advised so that if the problem is to be continued we can shape our own thinking and plans in the light of the Commission's latest tentative text or whatever is later being considered by the Commission.

I am enclosing for your files an Extract from the Minutes of the CAJ for June 19, 1971, relating to the joint conference at Los Angeles; also page 7 of a tentative memorandum prepared by the writer (copy of which you have) suggesting alternatives. The CAJ did not have time to consider these alternatives last year. However, I intend to take up with it the "second" suggestion on page 7

which has to do with enlarging the superior court's authority to consolidate cases and order transfers.

It is by no means clear that the CAJ will react favorably to the principle, but it is a possible solution to the problems of res judicata and multiple litigation, if in fact mandatory joinder or single cause of action provisions are not adopted.

Yours very truly,

Garrett H. Elmore

Garrett H. Elmore

GHE:jc
Encls.

cc: Messrs. Legge, Pfaelzer,
Horton, Eades

EXTRACT FROM JUNE, 1971,
GENERAL MEETING MINUTES

(Gen. Mtg. 6/18-19/71)

AGENDA 70-29.5, 70-49.40, 70-49.41 - S.B. 201 - JOINDER, CROSS COMPLAINTS

ACTION TAKEN: In response to request of Chairman Stanton for views on whether further study is warranted (1) as to separate statement, recommend against further study, 16 Yes, 1 Abstention; (2) as to compulsory joinder of causes of action by plaintiff and cross complaint, recommend against further study, 9 Yes, 8 No.

DISCUSSION: Thomas E. Stanton, Jr., Chairman, John D. Miller, Vice-Chairman, and John H. DeMoully, Executive Secretary, Law Revision Commission, joined the meeting (June 19, 1971, 10:15 a.m.) for a discussion of the two matters. These remain unresolved between the two groups. S.B. 201 has been amended to delete them. Mr. DeMoully presented the LRC's new tentative texts, copies of which were previously distributed by the LRC. There was a general discussion and interchange of individual views. Mr. Stanton, during the discussion, stated his desire to have the committee's views on whether further study by his group was warranted. After conclusion of the joint meeting at 11:15 a.m., a motion was made to advise the LRC that in the committee's view the study of both proposals should be dropped. By a vote of 9 to 6, a motion to divide the two matters was adopted. Thereupon, a motion was adopted (16 Yes, 1 Abstention) to oppose the LRC recommendation concerning separate statement; a further motion to recommend further study of the "mandatory joinder" subject was defeated, 8 Yes, 9 No. Under the general understanding, this vote was deemed the converse action.

Among the comments made were the following:

Joinder of Causes of Action. (1) There is a 3 year statute of limitations on actions for property damage, and a 1 year statute of limitations on actions for personal injury. Will the joinder requirements impliedly repeal the 3 year statute in some cases? It appears to be the LRC intent that there must be a joinder if an insurer is not "completely subrogated", and the 3 year statute is moot. (2) In Ohio the appellate courts have had problems in determining whether an insurer subrogee has a separate cause of action, so that it may proceed independently, without violating the rule against "splitting a cause of action". In Ohio the "single cause of action" concept is followed (unlike California). At first the courts held the insurer could proceed independently; later they

held that the insurer had no separate standing. The question was asked whether the insurance subrogation would create a problem in California under the LRC proposal. It appears that the LRC intent or position is (a) that intercompany arbitration will take care of the matter (though not all companies now are parties); (b) if there is "complete subrogation" the subrogee has a separate cause of action, i.e., it is the same as a full assignment, as noted in the tentative comments. The question was then asked why there should not be specific statutory provisions dealing with subrogation, as opposed to the "comment" treatment of the matter. Also, there was a query as to the effect of customary "deductibles" which may prevent a "complete subrogation". (3) On the provisions re intercompany arbitration (LRC Report, page 11) should there be further clarification as to res judicata and collateral estoppel in converse situations? (4) Is there a problem in connection with two sets of counsel being involved, if an injured person must sue for property damage as well as personal injury? (5) Would a "single cause of action" approach be more direct? (6) The present law discriminates between the plaintiff and the defendant who must assert such related causes of action by cross complaint. (7) The present law is unsatisfactory because of the res judicata and collateral estoppel problems, i.e., a municipal court suit for property damage where personal injuries are also involved. (8) A mandatory joinder reduces the volume of court cases, and prevents harassment of defendant.

Separate Statement. The present LRC proposal is to eliminate "separate statement" as a ground of demurrer, and let the matter be handled by a demurrer for "uncertainty". The reasons in support are the criticisms of Mr. Witkin who suggests this solution. Note: 1970 Conf. Res. 3-1 also favoring this resolution was disapproved by the CAJ as part of its action on S.B. 201, and such action was affirmed by the Board. However, this does not preclude further consideration by the CAJ. End of Note. The discussion on this matter revolved mainly about philosophical differences. It was suggested by some that the two proposals, taken together, appeared to be, undesirably, in the direction of "notice pleading". This leads to jumbled pleadings. The thrust of most comments from committee members was that the present system is working reasonably well and should not be disturbed. Though it may not be legally necessary to plead theories of causes of action, this is the way it is being done now by most lawyers. It makes for easier identification of the issues, pleading, etc. and is desirable. The prolixity mentioned by Mr. Witkin does not seem to be a problem of great importance and is not sufficient reason for changing the present system. By reason of time limitations, discussion of this matter was somewhat curtailed.

There are many disputes of importance that can arise in connection with long term contracts or leases. By example, plaintiff may sue to reform a lease or contract, and the defendant is in default in several rent payments under clauses not in controversy. Here it would seem that plaintiff should not be compelled to bring both causes of action in the superior court, and either await the protracted trial of the reformation count or seek a severance of the rent count involving only $1500. Two suits, one in the superior court for reformation, and one in the municipal court for rent due appear more reasonable.

Other examples could be given of controversies over property where the "big issue" would obscure the "little issue" under the proposal.

An Alternative

Two proposals are submitted for consideration on the basis that they will resolve most of the problems at which "plaintiff's mandatory joinder" is directed.

> First, that the rule of collateral estoppel be changed for motor vehicle cases only,by providing that where the issues determined in an action in a municipal or justice court are not the same in all respects as the issues involved in an action in the superior court, issues determined in the municipal or justice court action shall be admissible on the same issue in the superior court action[and shall be prima facie evidence of the facts so determined]; and
>
> Second,that the superior court be given authority to remove to itself an action pending in an inferior court and consolidate it or have it tried together with the case in the superior court (NYCPLR 602 (b)) and to order an issue of fact in an action pending in the superior court be tried in the municipal or justice court of the same or another county, except an action relating to real property (cf. NYCPLR 604).

As to "First," it is a recognition of economic realities of today and would do much to readjust the rigid California rule of res judicata. State Bar disciplinary proceedings follow this format.

As to "Second," precedent is provided by New York provisions which unlike the federal rules were drawn in the light of state practice requirements in a populous state.

G. H. Elmore

First Supp. Memo 71-57 **EXHIBIT II**

SCHWARTZ & DREIFUS
ATTORNEYS AT LAW

ARNOLD M. SCHWARTZ
JORDAN A. DREIFUS

5670 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90036
(213) 937-5311
CABLE ADDRESS: SCHWARD

August 30, 1971

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

Re: Tentative Recommendation #71 dated July 12, 1971
"Compulsory Joinder of Causes of Action"

Gentlemen:

The above-referenced tentative recommendation has just come to my attention. At the same time I have just become aware of the enactment of Chapter 244 of the 1971 Statutes on a related subject.

In view of your deadline date, this letter will be necessarily brief.

This proposal, and the already enacted Chapter 244, appear to be directed primarily at common types of tort and accident litigation.

I question whether you have given consideration to other types of litigation in which the "splitting" of causes of action may actually be desirable in the interests of justice and in fact may be agreed to by the parties. I refer to various complex contractual relationships, the most illustrative of which are government and construction contracts in which the parties enter into long-term relationships calling for a series or a sequence of performances. It is frequently desirable to provide for settlement or litigation of disputes or controversies without breaking or terminating the contractual relationship.

I would hope that the express enactment of statutes declaring a policy against splitting of causes of action would not prevent parties from contracting in advance to do so in whatever manner they consider desirable; or from agreeing to do so after the controversy has arisen.

An argument can sometimes be made that agreement is not necessary because in many instances in which parties agree to split or postpone some part or aspect of a matter, the situation is really one in which the cause of action has not yet accrued or

arisen, etc. But no responsible lawyer would want to himself attempt to be the final judge of when a cause of action has or has not accrued. It is preferable to make some kind of agreement that even if the cause of action has accrued, the action may be postponed, etc.

I could give many illustrations of these problems if you desire but I shall not do so in the interests of getting this off to you.

I strongly recommend that you insert an express disclaimer that neither the tentative proposal nor Chapter 244 prohibit parties from splitting causes of action by agreement made either before or after the controversy arises.

Where parties to contract are businessmen (other than retail consumers) they ought to have at least some flexibility in arranging these types of matters. It is incongruous that there is a wide-ranging discretion to insert whatever procedures the parties want if they agree to an arbitration clause. I do not care for arbitration and I am sure many attorneys feel likewise, because of the possibility that the results may truly be "arbitrary" with absolute finality and unreviewability, expense of the arbitrators, etc. I should think that the policy of the law would be to permit the parties to agree to some flexibility of procedural arrangements while at the same time permitting them to keep their disputes in the courts before experienced judges in whom they have confidence.

For your information my practice is in the area of government construction contract litigation and disputes settlement.

Very truly yours,

JORDAN A. DREIFUS

JAD:lm

First. Supp. to Memorandum 71-57 EXHIBIT III

RUTAN & TUCKER

ATTORNEYS AT LAW

THE BANK OF CALIFORNIA BUILDING
401 CIVIC CENTER DRIVE WEST
POST OFFICE BOX 1976
SANTA ANA, CALIFORNIA 92702
(714) 835-2200

LOS ANGELES OFFICE
550 SOUTH FLOWER STREET, SUITE 533
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 620-0482

LAGUNA HILLS OFFICE
23521 PASEO DE VALENCIA, SUITE 300
LAGUNA HILLS, CALIFORNIA 92653
TELEPHONE (714) 835-2200

ANAHEIM OFFICE
SUITE 812 BANK OF AMERICA BUILDING
300 SOUTH HARBOR BOULEVARD
ANAHEIM, CALIFORNIA 92805
TELEPHONE (714) 835-2200

IN REPLY PLEASE REFER TO

September 1, 1971

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

Attention: John H. DeMoully
Executive Secretary

Gentlemen:

Please excuse the delay in my reply to your "letter of transmittal" pertaining to "Compulsory Joinder of Causes of Action".

The tentative recommendation of the California Law Revision Commission, regarding "Compulsory Joinder", is well reasoned and seems in order. This letter will simply serve to confirm my concurrence with your recommendation.

Sincerely,

Robert C. Todd

Robert C. Todd

RCT:dk

1st Supp. to Memo 71-57 EXHIBIT IV

California State Automobile Association

SERVING THE MOTORIST SINCE 1900

926 J STREET • ROOM 523
SACRAMENTO, CALIFORNIA 95814
AREA CODE 916 • TELEPHONE 443-2577

GOVERNMENTAL AFFAIRS DEPARTMENT
VIRGIL P. ANDERSON, MANAGER

August 30, 1971

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

Re: Compulsory Joinder of Causes of Action

Dear Mr. DeMoully:

We have reviewed the material sumbitted concerning compulsory joinder of causes of action and are concerned that the Commission's tentative recommendations may well be counter-productive to the well intended purpose.

The language of Section 426.20 would require that all personal injury lawsuits include a cause of action for the entire property damage since the assignor is still the beneficial owner of the assigned cause of action and failure to do so would bar a later suit on the assigned cause by the insurer for its subrogated interest.

The practical consequences of such a requirement would be to bring about insurance company intervention in all such claims in order to protect its own rights from being compromised. This in turn would complicate and lengthen the litigation process and measurably add to the cost of administering justice.

We therefore strongly urge amendments that would preserve the right of a carrier to pursue subrogation apart from involvement in its own insureds personal injury litigation and unhampered by the threat of estoppel.

Very truly yours,

Brian Hill
Assistant Manager
Governmental Affairs

BH/bc