Study J-1300 December 11, 1997

First Supplement to Memorandum 97-82

Trial Court Unification: Revision of Code of Civil Procedure

In addition to the points discussed in Memorandum 97-82, the Commission should consider the following issues in revising the Code of Civil Procedure to implement SCA 4:

SECTION 77: APPELLATE DIVISION

The Commission's proposed amendment of Code of Civil Procedure Section 77(a) sets criteria for appointments to the appellate division. (Memorandum 97-82, pp. 1-5.) A letter from the State Bar Committee on Administration of Justice ("CAJ") reports that CAJ voted to approve the proposed amendment but "one of the two CAJ sections disapproved of one provision." (Memorandum 97-81, Exhibit p. 7.) Specifically,

> …The CAJ North Section voted 9-2-2 that Appellate Division judges should not be appointed from outside a particular county unless there are too few judges to fill the necessary Appellate Division positions. The concern was that out-of-county judges would not be accountable to the electorate in the county where they ruled as Appellate Division judges. The CAJ South Section endorsed out-of-county appointments by a vote of 11-2, believing that such appointments would contribute to the independence of appellate decisions.

(*Id.*) This split decision reinforces the staff's assessment (Memorandum 97-81, p. 5) that the proposed amendment strikes an appropriate balance between competing concerns. As before, we recommend leaving the amendment in its current form.

The Los Angeles County Superior Court suggests deleting a comma in Section 77(d). (Memorandum 97-81, Exhibit p. 1.) The Commission should not make this change, because it is unrelated to implementation of SCA 4.

SECTIONS 395.9, 399.5, 400, 430.10, 430.80: MISCLASSIFICATION AS LIMITED CASE OR OTHERWISE

Proposed Sections 395.9, 399.5, 400, 430.10, and 430.80 specify procedures for challenging a litigant's classification of a civil case as a limited case or otherwise. These provisions largely track existing provisions on lack of jurisdiction, on the theory that misclassifying a case as a limited case (or otherwise) is akin to suing in superior court instead of municipal court (or vice versa). Because lack of jurisdiction is a very fundamental defect, it can be raised at any time, by a variety of means. The tentative recommendation solicited input on whether similar treatment was appropriate for misclassification of a case as a limited case (or otherwise) in a unified superior court.

The State Bar Litigation Section comments that such misclassification should not be a ground for demurrer:

> …A demurrer should be used to attack the sufficiency of the complaint or cross-complaint, not to dictate what procedures will apply to the litigation as a whole. Whether the matter should have been within traditional municipal court jurisdiction may not appear on the face of the complaint or cross-complaint, so a demurrer would not lie.

(Memorandum 97-66, Exhibit pp. 14.) The Litigation Section recommends use of a motion to strike: "If an opponent disagrees with the designation in a civil cover sheet or declaration filed concurrently with the complaint or cross-complaint, then the proper remedy would be a motion to strike the cover sheet or declaration, accompanied by a declaration showing why the document claiming Chapter 5.1 civil matter status was inaccurate." (*Id.*) Under Code of Civil Procedure Section 437, however, the grounds for a motion to strike must "appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice."

Like the Litigation Section, Professor Gregory Ogden does "not believe that misclassification of a case in a unified court … is the same as a lack of jurisdiction challenge." (Memorandum 97-82, Exhibit p. 1.) He would treat misclassification like a venue issue, "because one is in the right court system, i.e., the unified court for that county, but not in the right part of that court system." (*Id.*)

On reflection, the staff believes that a challenge to the classification of a case (as a limited case or otherwise) does not fit cleanly in any existing procedural

category. It is a new procedural situation, which should be addressed by a new provision clearly specifying the applicable rules. Proposed Section 395.9 (together with proposed Section 399.5) does this to some extent, but it closely tracks existing Section 396, which governs transfers for lack of subject matter jurisdiction. The staff suggests (1) omitting the proposed amendments of Sections 430.10 and 430.80, which relate to demurrers, and (2) revising proposed Section 395.9 as follows for purposes of clarification:

> 395.9. (a) In a county in which there is no municipal court, if the caption of the complaint ~~or petition~~, cross-complaint, petition, or other initial pleading erroneously states or fails to state, pursuant to Section 422.30, that the action or proceeding is a limited case, the action or proceeding shall not be dismissed, except as provided in Section 399.5 or subdivision (b)(1) of Section 581, but shall, on the application of either party within 30 days after service of the initial pleading, or on the court's own motion at any time, be reclassified as a limited case or otherwise. The action or proceeding shall then be prosecuted as if it had been so commenced, all prior proceedings being saved. If summons is served prior to the reclassification of the action or proceeding, as to any defendant, so served, who has not appeared in the action or proceeding, the time to answer or otherwise plead shall date from service upon that defendant of written notice of the reclassification.
>
> (b) If an action or proceeding is commenced as a limited case or otherwise pursuant to Section 422.30, and it later appears from the verified pleadings, or at the trial, or hearing, that the determination of the action or proceeding, or of a cross-complaint, will necessarily involve the determination of questions inconsistent with that classification, the court ~~must~~ shall, on the application of either party within 30 days after the party is or reasonably should be aware of the grounds for misclassification, or on the court's own motion at any time, reclassify the case.
>
> (c) An application for reclassification pursuant to this section shall be supported by a declaration, affidavit, or other evidence if necessary to establish that the case is misclassified. A declaration, affidavit, or other evidence is not required if the grounds for misclassification appear on the face of the challenged pleading.
>
> ~~(c)~~ (d) An action or proceeding which is reclassified under the provisions of this section shall be deemed to have been commenced at the time the complaint or petition was initially filed, not at the time of reclassification.
>
> ~~(d)~~ (e) Nothing in this section shall be construed to preclude or affect the right to amend the pleadings as provided in this code.

~~(e)~~ (f) Nothing in this section shall be construed to require the superior court to reclassify any action or proceeding because the judgment to be rendered, as determined at the trial or hearing, is one which might have been rendered in a limited case.

~~(f)~~ (g)In any case where the erroneous classification is due solely to an excess in the amount of the demand, the excess may be remitted and the action may continue as a limited case.

~~(g)~~ (h) Upon the making of an order for reclassification, proceedings shall be had as provided in Section 399.5 of this code. Unless the court ordering the reclassification otherwise directs, the costs and fees of those proceedings, and other costs and fees of reclassifying the case, including any additional amount due for filing the initial pleading, are to be paid by the party filing the pleading that raised the question inconsistent with the original classification.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel