Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2020

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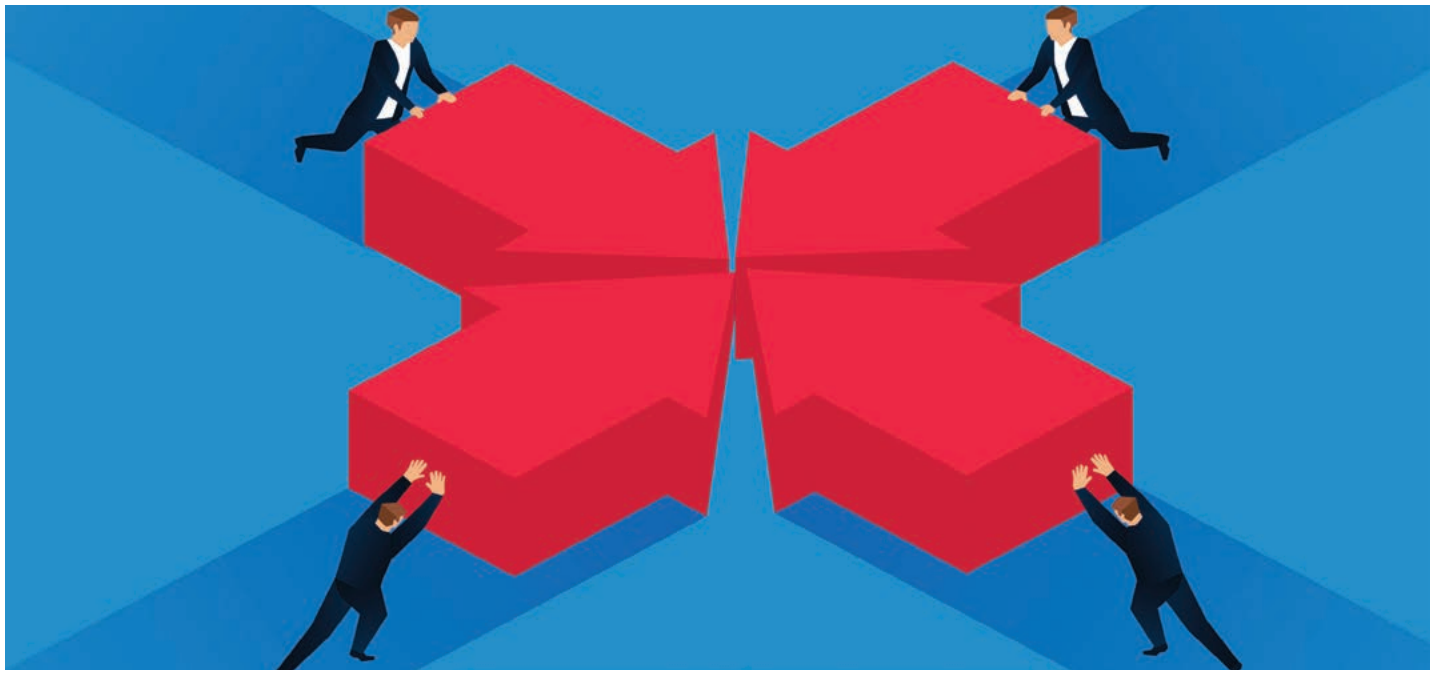

Assignment of claims

AN UNTRADITIONAL APPROACH TO COMBINING THE CLAIMS OF PLAINTIFFS; HOW IT DIFFERS FROM CLASS ACTIONS, JOINDER, CONSOLIDATION, RELATION AND COORDINATION

A large class of plaintiffs engages you to bring a common action against a defendant or set of defendants. As counsel, you resolve to combine the plaintiffs' various claims into a single lawsuit. In this article, we touch on some of the traditional approaches, such as a class action, joinder, consolidation, relation, and coordination. To that list, we add as an approach the assignment of claims, a procedural vehicle validated by the United States Supreme Court, but not typically employed to combine the claims of numerous plaintiffs.

Class actions

In *Hansberry v. Lee* (1940) 311 U.S. 32, the United States Supreme Court explained that "[t]he class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree." (*Id.* at pp. 41-42.)

In California's state courts, class actions are authorized by Code of Civil Procedure section 382, which applies when the issue is "'one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.'" (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 968; see also, e.g., Cal. Rules of Court, rules 3.760-3.771.) "The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous

See Posner & Serlin, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2020

class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) "The community of interest requirement involves three factors: '(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; see Civ. Code, § 1750 et seq. [Consumers Legal Remedies Act]; cf. Fed. Rules Civ.Proc., rule 23(a) [prerequisites for federal class action].)

Joinder

Parties, acting as co-plaintiffs, can also obtain economies of scale by joining their claims in a single lawsuit. Under California's permissive joinder statute, Code of Civil Procedure section 378 (section 378), individuals may join in one action as plaintiffs if the following conditions are met:

> (a)(1) They assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action; or (2) They have a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action.
>
> (b) It is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for. Judgment may be given for one or more of the plaintiffs according to their respective right to relief.

This strategy of joining multiple persons in one action has been referred to as a "mass action" in some decisions involving numerous plaintiffs. (See *Aghaji v. Bank of America, N.A.* (2016) 247 Cal.App.4th 1110, 1113; *Petersen v. Bank of America Corp.* (2014) 232 Cal.App.4th 238, 240 (*Petersen*); cf. 28 U.S.C. § 1332(d)(11)(B) [federal definition of "mass action"].)

In *Petersen*, for example, 965 plaintiffs who borrowed money from Countrywide Financial Corporation in the mid-2000's banded together and filed a single lawsuit against Countrywide and related entities. (*Petersen*, *supra*, 232 Cal.App.4th at pp. 242-243.) The plaintiffs alleged Countrywide had developed a strategy to increase its profits by misrepresenting the loan terms and using captive real estate appraisers to provide dishonest appraisals that inflated home prices and induced borrowers to take loans Countrywide knew they could not afford. (*Id.* at p. 241.) The plaintiffs alleged Countrywide had no intent to keep these loans, but to bundle and sell them on the secondary market to unsuspecting investors who would bear the risk the borrowers could not repay. (*Id.* at pp. 241, 245.) Countrywide and the related defendants demurred on the ground of misjoinder of the plaintiffs in violation of section 378. The trial court sustained the demurrer without leave to amend and dismissed all plaintiffs except the one whose name appeared first in the caption. (*Id.* at p. 247.) The Court of Appeal reversed and remanded for further proceedings. (*Id.* at p. 256.)

Petersen resolved two questions. First, it concluded the operative pleading alleged wrongs arising out of "'the same . . . series of transactions'" that would entail litigation of at least one common question of law or fact. (*Petersen, supra,* 232 Cal.App.4th at p. 241.) The appellate court noted the individual damages among the 965 plaintiffs would vary widely, but the question of liability provided a basis for joining the claims in a single action. (*Id.* at p. 253.) Second, the appellate court concluded "California's procedures governing permissive joinder are up to the task of managing mass actions like this one." (*Id.* at p. 242.)

Consolidation

Code of Civil Procedure section 1048, subdivision (a) provides that, "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." (See also Fed. Rules Civ.Proc., rule 42.)

There are two types of consolidation. The first is a consolidation for purposes of trial only, when the actions remain otherwise separate. The second is a complete consolidation or consolidation for all purposes, when the actions are merged into a single proceeding under one case number and result in only one verdict or set of findings and one judgment. (*Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1147 (*Hamilton*).)

Consolidation is designed to promote trial convenience and economy by avoiding duplication of procedure, particularly in the proof of issues common to the various actions. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleadings, § 341, p. 470.) Unless all parties in the involved cases stipulate, consolidation requires a written, noticed motion (Cal. Rules of Court, rule 3.350(a); *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 514), and is subject to the trial court's discretion. (*Hamilton, supra,* 22 Cal.4th at p. 1147.)

Relation

In a procedure somewhat similar to consolidation, under California Rules of Court, rule 3.300(a), a pending civil action may be related to other civil actions (whether still pending or already resolved by dismissal or judgment) if the matters "[a]rise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact" or "[a]re likely for other reasons to require substantial duplication of judicial resources if heard by different judges." (*Id.*, rule 3.300(a)(2), (4).) An order to

See Posner & Serlin, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2020

relate cases may be made only after service of a notice on all parties that identifies the potentially related cases. No written motion is required. (*Id*., rule 3.300(h)(1).) The Judicial Council provides a standard form for this purpose. When a trial court agrees the cases listed in the notice are related, all are typically assigned to the trial judge in whose department the first case was filed. (*Id*., rule 3.300(h)(1)(A).)

Related cases are not consolidated cases. Related cases maintain their separate identities but are heard by the same trial judge. Consolidated cases, in contrast, essentially merge and proceed under a single case number.

Coordination

Under Code of Civil Procedure section 404, the Chairperson of the Judicial Council is authorized to coordinate actions filed in different courts that share common questions of fact or law. (See Cal. Rules of Court, rule 3.500 et seq.) The principles underlying coordination are similar to those that govern consolidation of actions filed in a single court. (See *Pesses v. Superior Court* (1980) 107 Cal.App.3d 117, 123; see also 28 U.S.C. § 1407 [complex and multidistrict litigation].)

Thus, for example, in *McGhan Med. Corp. v. Superior Court* (1992) 11 Cal.App.4th 804 (*McGhan*), the plaintiffs petitioned for coordination of 300 to 600 breast implant cases pending in 20 different counties. Coordination was denied because the motion judge found that common questions did not predominate "in that the cases involve[d] different implants, different designs, different warnings, different defendants, different theories of defect, different modes of failure, and different injuries." (*Id.* at p. 808.) Among other factors, the trial court concluded that it was impractical to send hundreds of cases to a single county and that the benefits of coordination could be best achieved by voluntary cooperation among the judges in the counties where the cases were pending. (*Id.* at p. 808, fn. 2.)

The Court of Appeal reversed in an interlocutory proceeding, ruling the trial court had misconceived the requirements of a coordinated proceeding. (*McGhan, supra,* 11 Cal.App.4th at p. 811.) As the appellate court explained, Code of Civil Procedure section 404.7 gives the Judicial Council great flexibility and broad discretion over the procedure in coordinated actions. (*Id.* at p. 812.) Thus, on balance, the coordinating judge would be better off confronting the coordination drawbacks (including difficulties arising from unique cases, discovery difficulties, multiple trials, the necessity of travel, and occasional delay) because the likely benefits (efficient discovery and motion practice) were so much greater. (*Id.* at pp. 812-814.)

Assignment of claims

Civil Code section 954 states "[a] thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner." The term "thing in action" means "a right to recover money or other personal property by a judicial proceeding." (Civ. Code, § 953.) California's Supreme Court has summarized these provisions by stating: "A cause of action is transferable, that is, assignable, by its owner if it arises out of a legal obligation or a violation of a property right. . . ." (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003.) The enactment of Civil Code sections 953 and 954 lifted many restrictions on assignability of causes of action. (*Wikstrom v. Yolo Fliers Club* (1929) 206 Cal. 461, 464; *AMCO Ins. Co. v. All Solutions Ins. Agency, LLC* (2016) 244 Cal.App.4th 883, 891 (*AMCO*).)

Thus, California's statutes establish the general rule that causes of action are assignable. (*AMCO, supra*, 244 Cal.App.4th at pp. 891-892.) This general rule of assignability applies to causes of action arising out of a wrong involving injury to personal or real property. (*Time Out, LLC v. Youabian, Inc.* (2014) 229 Cal.App.4th 1001, 1009; see also, e.g., *Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1381 ["'assignability of things [in action] is now the rule; nonassignability, the exception. . .'"].)

Although the assignment of claims on behalf of others to an assignee, or group of assignees, is not unique, it has not typically been used as a procedural vehicle for combining the claims of numerous plaintiffs. But, that's not to say it can't be done.

In fact, the United States Supreme Court has sanctioned such an approach. In *Sprint Communications Co., L.P. v. APCC Services, Inc.* (2008) 554 U.S. 269 (*Sprint*), approximately 1,400 payphone operators assigned legal title to their claims for amounts due from Sprint, AT&T, and other long-distance carriers to a group of collection firms described as "aggregators." (*Id.* at p. 272.) The legal issue presented to the United States Supreme Court was whether the assignees had standing to pursue the claims in federal court even though they had promised to remit the proceeds of the litigation to the assignor. (*Id.* at p. 271.) The Court concluded the assignees had standing.

In support of its conclusion, the Court recognized the long-standing right to assign lawsuits:

> . . . [C]ourts have long found ways to allow assignees to bring suit; that where assignment is at issue, courts – both before and after the founding – have always permitted the party with legal title alone to bring suit; and that there is a strong tradition specifically of suits by assignees for collection. We find this history and precedent 'well nigh conclusive' in respect to the issue before us: Lawsuits by assignees, including assignees for collection only, are 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'

(*Sprint*, *supra*, 554 U.S. at p. 285.)

On this basis, the Court concluded:

> Petitioners have not offered any convincing reason why we should depart from the historical tradition of suits by assignees, including assignees

See Posner & Serlin, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2020

> for collection. In any event, we find that the assignees before us satisfy the Article III standing requirements articulated in more modern decisions of this Court.

(*Sprint*, *supra*, 554 U.S at pp. 285-286.)

The Court also considered the argument that the aggregators were attempting to circumvent the class-action requirements of Federal Rule of Civil Procedure 23. (*Sprint*, *supra*, 554 U.S. at pp. 290-291.) The Court rejected this argument as a barrier to aggregation by assignment on the grounds that (1) class actions were permissive, not mandatory, and (2) "class actions constitute but one of several methods for bringing about aggregation of claims, i.e., they are but one of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum. [Citations.]" (*Id.* at p. 291.)

Granted, *Sprint* arose in the context of Article III, a "prudential standing" analysis. However, in reaching its decision that assignees had standing, the Court relied significantly on three California state decisions addressing assignment of rights under California law. (See *Sprint*, *supra*, 554 U.S. at pp. 294-296.)

Under California law, assignment of claims is not a panacea. Not all claims can be assigned. In California, assignment is not allowed for tort causes of action based on "wrongs done to the person, the reputation or the feelings of an injured party," including "causes of action for slander, assault and battery, negligent personal injuries, seduction, breach of marriage promise, and malicious prosecution." (*AMCO*, *supra*, 244 Cal.App.4th at p. 892 [exceptions to assignment also include "legal malpractice claims and certain types of fraud claims"].) Other assignments are statutorily prohibited. (See, e.g., Civ. Code, § 2985.1 [regulating assignment of real property sales contracts]; Gov. Code, § 8880.325 [state lottery prizes not assignable].)

Likewise, because a right of action cannot be split, a partial assignment will require the joinder of the partial assignor as an indispensable party. (See, e.g., *Bank of the Orient v. Superior Court* (1977) 67 Cal.App.3d 588, 595 ["[W]here . . . there has been a partial assignment all parties claiming an interest in the assignment must be joined as plaintiffs . . . "]; 4 Witkin, Cal. Procedure, *supra*, Pleadings, § 131(2), p. 198 ["If the assignor has made only a partial assignment, the assignor remains beneficially interested in the claim and the assignee cannot sue alone"].)

That said, California's rules of law regarding standing and assignments do *not* prohibit an assignee's aggregation of a large number of claims against a single defendant or multiple defendants into a single lawsuit. To the contrary, no limitations or conditions on this type of aggregation of assigned claims is imposed from other rules of law, such as California's compulsory joinder statute. (See *Sprint*, *supra*, 554 U.S. at p. 292 [to address practical problems that might arise because aggregators, not payphone operators, were suing, district "court might grant a motion to join the payphone operators to the case as 'required' parties" under Fed. Rules Civ. Proc., rule 19].)

Conclusion

There are many procedural approaches to evaluate when seeking to combine the claims of multiple plaintiffs. Class actions and joinders are more traditional methods that trial counsel rely on to bring claims together. Although a largely unexplored procedural approach, assignment appears to be an expedient way of combining the claims of numerous plaintiffs. It avoids the legal requirements imposed for class actions and joinders, and it sidesteps a trial judge's discretion regarding whether to consolidate, relate, or coordinate actions. Indeed, under the right circumstances, an assignment of claims might provide a means of bypassing class action waivers in arbitration agreements. Perhaps an assignment of claims should be added to the mix of considerations when deciding how to bring a case involving numerous plaintiffs with similar claims against a common defendant or set of defendants.

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