Unpacking a rare split decision on permissive joinder

By Dan Jacobson

In a rare split decision by the 4th District Court of Appeal, Division 3, the court delved into an area of civil procedure that rarely sees much attention: permissive joinder of plaintiffs. On Dec. 11, 2014, the court published [Petersen v. Bank of America], 232 Cal. App. 4th 238, a case that had 965 individual plaintiffs and a 3,142-page complaint. The majority and the dissent offer an exemplar of how the outcome of a case can depend on whether a judge looks for the forest in a case or the trees in a case.

The plaintiffs alleged that Countrywide Financial engaged in deceptive and dishonest tactics to sell home loans and thus increase profits. The case was not a class action. Writing for the majority, Justice William Bedsworth (with Justice David Thompson concurring) dubbed the lawsuit a "mass action." The majority framed the issues framed as (a) whether Code of Civil Procedure Section 378 (permissive joinder of plaintiffs) applies, and (b) "whether California's procedures governing permissive joinder are up to the task of [managing] mass actions."

Section 378(a)(1) says, "All persons may join in one action as plaintiffs if: They assert any right to relief ... arising out of the same ... series of transactions." Bedsworth said, "While many procedural statutes commit discretion to the trial [judge], this statute commits discretion ... to the [plaintiffs themselves]." Further, California has an "affinity for economies of scale [that] manifests itself in [inter alia, the] statutory provision [which allows for] permissive joinder in section 378." "[T]he key words on which [the [Petersen] plaintiffs'] choice turns are 'same ... series of transactions.'" Bedsworth quoted [Joerger v. Pacific Gas & Electric Co.], 207 Cal. 8 (1929), a case decided soon after the 1927 enactment of Section 378: "'To permit a joinder where possible makes manifestly for the expeditious disposition of litigation without working hardship to any party defendant, and for this reason statutes relating to joinder [should be liberally construed, unless expressly forbidden], to the end that a multiplicity of suits may be prevent.' (Italics added.)"

The majority said that the "most instructive case" exemplifying the requirement for "[b]road construction of section 378" is [Amaya v. Superior Court], 160 Cal. App. 3d 228 (1984). In [Amaya], which had 200 plaintiffs, the court rejected the defense argument that "lots of differences in the individual [damages] sustained by the plaintiffs" precludes permissive joinder of those plaintiffs. The majority found that [Amaya]'s analysis clarified that "The 'point' of section 378 ... is to allow joinder where '[any] question of law or fact common to all plaintiffs will arise.'" The [Amaya] court allowed the joinder of the 200 individual plaintiffs.

After emphasizing that [Petersen] involved essentially only one lender (a notion with which the dissent disagreed) and that "joinder is permissible based ... on commonality regarding liability, not damages," the majority "observe[d] that two overall policies of the law are served by joinder in this [case]." One of those policies is "access to justice," and the other is "the conservation of judicial resources." Bedsworth said that the decision announced by the majority served both policies, and indicated that Section 378 did apply.

On the second issue raised by the majority, whether California's procedures governing permissive joinder are up to managing mass actions, the majority answered in the affirmative but offered guidance to the trial court because, "sending this 3,000-plus page [operative] complaint back to the trial court without guidance would be nothing less than oppressive. If we're going to send Moby Dick back to the trial court, we should at least provide a harpoon or two." The majority ruled that the trial court could require the plaintiffs' counsel 'to whip the [operative] complaint's desultory and scattered allegations ... into a tightly-structured set of manageable subclaims and subclasses. Our decision does not require [the trial court] to commence jury selection at Anaheim Stadium." The majority also recognized that [Petersen] was obviously a "complex" case, and that the trial court had wide authority "to identify phases for the litigation and set time limits on those phases, and adjudicate legal and evidentiary sub-issues pretrial." The majority found that California's procedural rules are up to the task of handling "mass actions," and it remanded the case to the trial court.

Justice Richard Fybel dissented, saying that "[t]he result of the majority's decision ... will be as breathtaking as it is legally unsupported." While agreeing that a broad construction of Section 378 is required by the law, the dissent said that "broad construction is not a substitute for rigorous application of the statutory standards to the Complaint," and that "a panel of [Division 3 of the 4th District, the court ruling on [Petersen]] said, albeit in a different context, 'liberal construction can only go so far.'" [Soria v. Soria], 185 Cal. App. 4th 780, 789. ([Soria] was penned by Fybel.)

The dissent distinguished each case cited by the majority, and relied on federal cases to support its conclusion that Section 378 cannot be successfully applied to [Petersen]. A reason for the dissent's reliance on federal cases is that "section 378 is based on rule 20 of the Federal Rules of Civil Procedure."

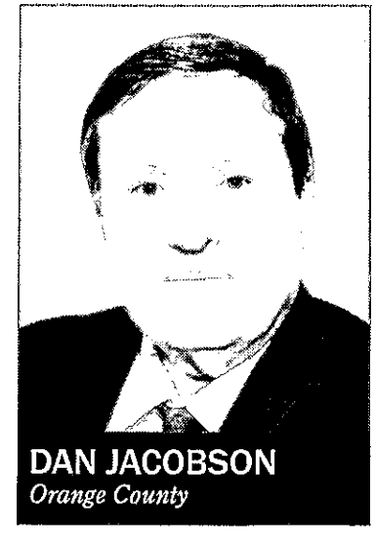
The dissent said, "The majority opinion, at a minimum, oversimplifies commonality amongst the diverse claims of [the] Appealing Plaintiffs." While the majority said there was "essentially one lender," the dissent pointed out there were, "many third party originators and lenders." Both the majority and the dissent appear to be correct on this point, especially with the majority's use of the word "essentially." It's just that the majority took a more hyperopic view and the dissent takes a more myopic view. The same metaphors can be applied to the dissent's complaint that the plaintiffs' claims did not arise from the same transaction or series of transactions. The majority summarized the massive complaint as such, "Sometime in the mid-2000's, Countrywide changed the normal gameplan of any home mortgage lender from making a profitable loan that is paid back over time to a new gameplan by which it would make its profits by [originating] loans, then tranching them (chopping them up into little bits and pieces) and selling them on the secondary market to unsuspecting investors who would themselves assume the risk the borrowers couldn't repay. At root, everything in the [operative] complaint is an elaboration on that theme insofar as it directly affected these plaintiff-borrowers." In framing the transactions this way, the majority displayed a series of transactions that indeed have common legal or factual issues.

On the other hand, the dissent's view of the transactions was narrower and more specific. "The loan transactions were made at different times over a six-year period; some loans were purchase money loans, while other loans refinanced existing ones. Each loan transaction was secured by a different parcel of real property ... and involved a different appraisal. The loans had various terms and were at different interest rates; some were fixed rate loans, while others were variable rate loans." In framing the transactions this way, the dissent displayed dissimilar transactions that don't have common questions of legal or factual issues.

The dissent also disagreed on the nomenclature chosen by the majority. While the majority seems to have founded a simple handle for a lawsuit that is not a class action, but has many plaintiffs, "mass action," the dissent said that the majority had misapplied this language. "The majority erroneously calls this lawsuit a 'mass action[,]' but that is a term found in the Class Action Fairness Act of 2005, 28 United States Code section 1332(d)(11)(B), and Defendants chose not to remove this action to federal court." The majority recognized this federal designation, but seems to have given the courts and lawyers a simple phrase to use in describing cases such as [Petersen].

Both the majority and the dissent claimed the mantle of broad interpretation. But the dissent was looking at the trees, while the majority was looking at the forest. The view of the forest won the day; the judgment of dismissal against the appealing plaintiffs was reversed.

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