Santa Clara University School of Law

Santa Clara Law Review

Volume 44 | Number 3 Article 1

1-1-2004

Relation Back of Amended Complaints: The California Courts Should Adopt a More Pragmatic Approach

Walter W. Heiser

RELATION BACK OF AMENDED COMPLAINTS: THE CALIFORNIA COURTS SHOULD ADOPT A MORE PRAGMATIC APPROACH

Walter W. Heiser*

I. INTRODUCTION

Most jurisdictions have adopted some form of doctrine that will permit an amended complaint to relate back to the date of the filing of the original complaint, for purposes of avoiding the bar of the statute of limitations. For example the federal court doctrine, set forth in Rule 15(c)(2) of the Federal Rules of Civil Procedure, states that an amendment relates back to the date of the original pleading when the claim asserted in the amended pleading "arose out of the conduct, transaction, or occurrence" set forth in the original pleading.[1] California's relation-back doctrine is the product of judge-made law and provides, in general terms, that an amended complaint relates back if it rests on the "same general set of facts" as alleged in the original complaint.[2]

When the California Supreme Court announced this modern relation-back standard in *Austin v. Massachusetts Bonding & Insurance Co.*, the avowed purpose was to broaden the right of a party to amend a pleading without incurring the bar of the statute of limitations.[3] The modern rule was intended both to avoid the danger of narrow construction that older tests involved and to further the policy that cases

* Professor of Law, University of San Diego School of Law. B.A., 1968, University of Michigan; J.D., 1971, University of Wisconsin; LL.M., 1978, Harvard University. I am grateful to the University of San Diego for the financial support of this project in the form of a summer research grant.

1. FED. R. CIV. P. 15(c)(2). Rule 15(c)(1) provides an alternative basis for relation back when "permitted by the law that provides the statute of limitations applicable to the action." *Id.* at 15(c)(1).

2. Austin v. Mass. Bonding & Ins. Co., 364 P.2d 681 (Cal. 1961).

3. *Id.* at 683.

should be decided on their merits.[4] However, subsequent California court decisions have placed additional restrictions on the "same general set of facts" standard. These decisions typically state the current relation-back doctrine as requiring that the amended complaint must (1) rest on the "same general set of facts," (2) involve the "same accident and same injuries," and (3) refer to the "same offending instrumentality," as the original complaint.[5]

This Article proposes that the current restrictions on the core "same general set of facts" standard should not be prerequisites to relation back of amended complaints that do not name new defendants. More importantly, the "same general set of facts" standard should be applied in a pragmatic manner, as opposed to the formalistic approach evident in many recent appellate court rulings. This pragmatic approach would focus on the same factors relevant to the determination of whether the trial court should grant a plaintiff permission to file an amended complaint generally, regardless of any relation-back issue. The most important of these factors is whether the defendant will be unfairly surprised and therefore unduly prejudiced by the allegations in the proposed amendment. More specifically, the key inquiry is whether, during the course of pretrial discovery, the defendant was already made aware of, and has already gathered facts responding to, the new allegations in the proposed amendment.

Part I of this Article discusses the various factors relevant to a trial court's determination of whether to permit a party to amend a complaint, regardless of any relation-back issue. The most significant factor influencing the trial court's discretion is the extent to which the defendant will be unduly prejudiced by the proposed amendment.[6] Part I also demonstrates how the courts apply these various factors in a pragmatic manner which seeks to determine whether pretrial discovery has already prepared the defendant to meet the new allegations contained in the proposed amendment.[7]

Part II focuses on California's relation-back doctrine for

4. *See id.* at 682-84.

5. *See, e.g.*, Norgart v. Upjohn Co., 981 P.2d 79, 96 (Cal. 1999); Barrington v. A. H. Robins Co., 702 P.2d 563, 565 (Cal. 1985); Smeltzley v. Nicholson Mfg. Co., 559 P.2d 624, 629 (Cal. 1977).

6. *See infra* notes 30-38 and accompanying text.

7. *See infra* notes 38-76 and accompanying text.

amended complaints. After a brief discussion of the traditional view of relation back, Part II examines the evolution of the modern approach and explains why the formal restrictions in the relation-back doctrine currently applied by the California courts are inconsistent with the liberal view embodied in the modern approach.[8] Part II then discusses why the relation-back doctrine and the related doctrine of equitable tolling are consistent with the policies behind statutes of limitations.[9] The discussion addresses the relation-back doctrine in two contexts: where the amended complaint names the same parties as those named in the original complaint, and where the amended complaint names new defendants.[10] In the context of an amended complaint that names the same defendant, the real concern of relation back should be whether the original complaint has misled, and thereby prejudiced, that defendant with respect to fact investigation and preservation.[11]

Part III begins with a demonstration of why California's current relation-back doctrine needs clarification. Part III then attempts to tie together all the various themes discussed in Parts I and II, and uses these themes to explain why the relation-back doctrine should be applied in a pragmatic manner. Under this pragmatic approach, a trial court would consider many of the same factors relevant to the determination of whether to permit an amended complaint generally.[12] Finally, Part III explains why this pragmatic approach to relation back should also apply to supplemental complaints.

II. CALIFORNIA'S PRAGMATIC APPROACH TO AMENDED PLEADINGS, GENERALLY

The main purpose of a relation-back doctrine is to permit a plaintiff to amend a complaint to allege different or additional theories of recovery after expiration of the applicable statute of limitations, typically after discovery has disclosed new information. The doctrine of relation back has two components. First, the court must determine, in its discretion, whether to grant the plaintiff permission to file an amended

8. *See infra* notes 108-61 and accompanying text.
9. *See infra* notes 162-201 and accompanying text.
10. *See infra* notes 202-20 and accompanying text.
11. *See infra* notes 221-22 and accompanying text.
12. *See infra* notes 257-94 and accompanying text.

pleading, regardless of any relation-back issue.[13] Second, if the trial court is disposed to grant such permission, the court may be asked to determine whether the amended complaint relates back to the original complaint's filing date for statute of limitations purposes. Both components are governed by distinct standards which, when combined, are ultimately addressed to the trial court's discretion. More specifically, although the relation-back determination itself is not a matter of discretion, the decision whether to permit *any* amendment at all is an exercise of discretion.[14]

A. California's Liberal Policy of Permitting Amended Pleadings

The California courts have long followed a policy of liberally allowing amendments to pleadings at any stage of the proceedings.[15] Code of Civil Procedure section 473 provides that "in furtherance of justice" a trial court may allow a party to amend its pleadings.[16] Whether such amendments should be allowed rests in the sound discretion of the trial court.[17]

---

13. Any pleading may be amended once by the party as a matter of course at any time before an answer or demurrer is filed, or if a demurrer is filed, before the determination of the issue of law raised in the demurrer. *See* CAL. CIV. PROC. CODE § 472 (West 2004). Any amendment after that time requires permission of the court. *Id.* § 473(a)(1). To obtain the trial court's permission, a plaintiff must file a notice motion for leave to amend. *Id.*; *see also* Leader v. Health Indus. of Am., Inc., 107 Cal. Rptr. 2d 489, 497 (Ct. App. 2001); Loser v. E.R. Bacon Co., 20 Cal. Rptr. 221, 222-23 (Ct. App. 1962).

14. *See infra* notes 15-22, 97-114, and accompanying text.

15. *See, e.g.*, Weingarten v. Block, 162 Cal. Rptr. 701, 705 (Ct. App. 1980) (observing that liberality in permitting amendments is the rule); Nestle v. City of Santa Monica, 496 P.2d 480, 493 (Cal. 1972) (applying the general liberal standard for allowing amendments where a request for amendment was made immediately prior to trial); Permalab-Metalab Equip. Corp. v. Md. Cas. Co., 102 Cal. Rptr. 26, 30 (Ct. App. 1972) (observing that courts should generally be liberal in permitting amendments to pleadings); Klopstock v. Superior Court, 108 P.2d 906, 910 (Cal. 1941) (discussing and applying California's liberal policy of permitting amendments to complaints in furtherance of justice); McDougald v. Hulet, 64 P.2d 278 (Cal. 1901) (applying the rule that a trial court should liberally allow amendments to pleadings, even during trial).

16. CAL. CIV. PROC. CODE § 473 (West 2004). Similarly, section 576 of the California Code of Civil Procedure provides that "at any time before or after commencement of trial" a judge may allow the amendment of any pleading "in the furtherance of justice" and "upon such terms as may be proper." *Id.* § 576.

17. *See, e.g.*, Hulsey v. Koehler, 267 Cal. Rptr. 523, 527 (Ct. App. 1990); *Permalab-Metalab*, 102 Cal. Rptr. at 30; *Klopstock*, 108 P.2d at 910; Dos Pueblos Ranch & Improvement Co. v. Ellis, 67 P.2d 340 (Cal. 1937); Tolbard v. Cline, 180 P. 610 (Cal. 1919).

But this exercise of discretion must be reasonable and not arbitrary. As one court astutely observed:

> If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion.[18]

With respect to requests for leave to file an amended complaint, two primary factors are relevant to the trial court's exercise of discretion. One is whether the plaintiff, through lack of diligence, has unreasonably and inexcusably delayed the presentation of the motion to amend.[19] The other is whether this delay has resulted in substantial and uncorrectable prejudice to the defendant.[20] A consideration relevant to both factors is whether the proposed amendment, if permitted, will necessitate a postponement of the trial so that the defendant may properly respond to any new issues raised by the amendment.[21] Additional, less frequently relied-upon factors include whether the proposed amendment states a viable cause of action, and whether rejection of a proposed amended complaint will cause prejudice to the *plaintiff*.[22]

---

18. Redevelop. Agency v. Herrold, 150 Cal. Rptr. 621, 626 (Ct. App. 1978) (quoting Morgan v. Superior Court, 343 P.2d 62, 64 (Dist. Ct. App. 1959)). In *Mesler v. Bragg Management Co.*, the California Supreme Court explained the role of an appellate court in reviewing a trial court's denial of leave to amend as follows:

> When a request to amend has been denied, an appellate court is confronted by two conflicting policies. On the one hand, the trial court's discretion should not be disturbed unless it has been clearly abused; on the other, there is a strong policy in favor of liberal allowance of amendments. This conflict "is often resolved in favor of the privilege of amending, and reversals are common where the appellant makes a reasonable showing of prejudice from the ruling."

Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 604 (Cal. 1985) (quoting 3 WITKIN, CAL. PROCEDURE, Pleading, § 1042 (2d ed. 1971)).

19. *See* cases cited *infra* notes 23-24. A recent amendment to the California Rules of Court now requires that a separate declaration accompany a motion to amend a pleading which specifies when the facts giving rise to the amended allegations were discovered and the "reasons why the request for amendment was not made earlier." CAL. CT. R. 327(b) (2002).

20. *See* cases cited *infra* notes 25-27 & 31-38; *see also* Forman v. Davis, 371 U.S. 178 (1962) (observing that in the absence of undue delay, bad faith, futility, or undue prejudice to the opposing party caused by an amendment, leave to amend a complaint should be freely given under FED. R. CIV. P. 15(a)).

21. *See* cases cited *infra* notes 77-85 and accompanying text

22. *See* cases cited *infra* notes 86-92 and accompanying text.

These various factors are examined in more detail below.

1. Inexcusable Delay by the Plaintiff: A Significant Factor

The California courts often note that the "long-deferred presentation of a proposed amendment, without a showing of excuse for the delay, is a significant factor in support of the trial court's discretionary denial of leave to amend."[23] Some appellate courts have observed that unwarranted delay by the plaintiff in presenting the amended complaint may, by itself, be a reason to deny leave to amend.[24] However, trial courts rarely base their denial solely on such delay, even inexcusable delay.[25] Instead, the defendant must also demonstrate that it was harmed by the delay.[26] In other words, the most significant factor influencing the trial court's discretion is the extent to which the defendant will be unduly prejudiced by the proposed amendment.[27]

---

23. *See* Del Mar Beach Club Owner's Ass'n v. Imperial Contracting Co., 176 Cal. Rptr. 886, 895 n.4 (Ct. App. 1981) (quoting Dep't of Pub. Works v. Jarvis, 79 Cal. Rptr. 175, 178 (Ct. App. 1969)); *see also* cases cited *infra* notes 85-87.

24. *See, e.g.*, Record v. Reason, 86 Cal. Rptr. 2d 547, 557 (Ct. App. 1999); Yee v. Mobilehome Park Rental Rev. Bd., 73 Cal. Rptr. 2d 227, 239-40 (Ct. App. 1998); Roemer v. Retail Credit Co., 119 Cal. Rptr. 82, 90-91 (Ct. App. 1975). The *Roemer* court noted "even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial." *Id.*; *see also* Bedolla v. Logan & Frazer, 125 Cal. Rptr. 59, 72-73 (Ct. App. 1975) (ruling that a deferred presentation of a proposed amendment without a showing of excuse for the delay was a sufficient justification for denying leave to amend).

25. *See, e.g.*, Magpali v. Farmers Group, Inc., 55 Cal. Rptr. 2d 225, 235-36 (Ct. App. 1996); *Del Mar Beach Club*, 176 Cal. Rptr. at 895; Estate of Murphy v. Gulf Ins. Co., 147 Cal. Rptr. 258, 261-62 (Ct. App. 1978); Permalab-Metalab Equip. Corp. v. Md. Cas. Co., 102 Cal. Rptr. 26, 29-30 (Ct. App. 1972).

26. *See, e.g.*, Hulsey v. Koehler, 267 Cal. Rptr. 523, 537 (Ct. App. 1990) (affirming the trial court's denial of motion to amend answer during trial to assert a res judicata defense because the plaintiffs would not have the opportunity to evaluate the risks and exposure that the particular proposed amendment would create); *Permalab-Metalab*, 102 Cal. Rptr. at 29-30; Rainer v. Cmty. Mem'l Hosp., 95 Cal. Rptr. 901, 910 (Ct. App. 1971) (holding that the trial court abused its discretion in denying the plaintiff leave to amend the complaint during trial where the defendants made no showing of prejudice); Deetz v. Carter, 43 Cal. Rptr. 321, 324-25 (Dist. Ct. App. 1965) (affirming the trial court's order permitting the plaintiff to amend the complaint on the day of trial despite the fact that the plaintiff failed to explain the delay in seeking the amendment, where the defendant failed to demonstrate any real injury or prejudice caused by the last minute amendment).

27. *See, e.g.*, *Rainer*, 95 Cal. Rptr. at 908-12 (ruling that the trial court abused its discretion in denying leave to amend complaint during a medical

Thus, delay in seeking leave to file an amended complaint is not determinative when the defendant will not be prejudiced by the amendment.[28] Motions to amend have been appropriately granted as late as the first day of trial or even during trial if the defendant has been alerted to charges by the factual allegations, no matter how framed, and the defendant will not be prejudiced.[29] Even if the plaintiff may have unreasonably delayed moving to amend, it is an abuse of discretion to deny leave to amend where the defendant was not

---

malpractice trial where no prejudice to the defendants was demonstrated, but that the court did use appropriate discretion in allowing leave to amend for allegations of respondeat superior because there was evidence to show prejudice related to those claims); Higgins v. Del Faro, 176 Cal. Rptr. 704, 706-08 (Ct. App. 1981) (reversing the trial court's denial of the plaintiff's motion to amend complaint on the day of trial because the defendant could not have been prejudiced or surprised by the amendment); Estate of Hunter, 15 Cal. Rptr. 556, 560 (Ct. App. 1961) (upholding an amendment made without notice to the defendant where the defendant suffered no prejudice and the amendment had no effect on the defendant's preparation for trial); *see also* William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1053 (9th Cir. 1982) (observing that although several factors may be relevant in determining whether leave to amend should be granted under Federal Rule 15(a), the most important factor is whether the amendment would result in undue prejudice to the opposing party); Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973) (holding that the trial court abused its discretion in refusing to permit the amendment five years after the original complaint was filed, where the defendant made no showing of prejudice). The court in *Howey* also observed that no federal case has held that delay alone is sufficient ground to deny a Rule 15(a) motion to amend. *Id.*

28. *See* cases cited *infra* notes 29-30. Inexcusable delay may be the determinative factor in circumstances where the plaintiff has failed to file an amended complaint within the time specified by the court. For example, pursuant to section 581 of the California Code of Civil Procedure, the trial court may dismiss the complaint when "after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal." CAL. CIV. PROC. CODE § 581(f)(2) (West 2004); *see also* Leader v. Health Indus. of Am., Inc., 107 Cal. Rptr. 2d 489, 497 (Ct. App. 2001) (finding that the trial court did not abuse its discretion in dismissing an action after the plaintiff inexcusably failed to file an amended complaint within the time specified).

29. *See, e.g.*, Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 603-04 (Cal. 1985) (reversing the trial court's denial of a request to amend the complaint within six weeks of the date set for trial); Honig v. Fin. Corp. of Am., 7 Cal. Rptr. 2d 922, 925-26 (Ct. App. 1992); *Higgins*, 176 Cal. Rptr. at 704; *Rainer*, 95 Cal. Rptr. at 908-10; Young v. Bank of Am., 190 Cal. Rptr. 122, 126 (Ct. App. 1983) (affirming permission to amend complaint given on the day before the damage phase of trial, where the defendant was neither prejudiced nor surprised by such amendment); Hirsa v. Superior Court, 173 Cal. Rptr. 418 (Ct. App. 1981) (reversing the trial court's denial of a request made on the eve of arbitration to amend a complaint to add a new cause of action).

misled or prejudiced by the amendment.[30]

2. *Prejudice to the Defendant: The Most Important Factor*

The California courts have not stated a comprehensive definition of what constitutes "prejudice" in this context, but their decisions do provide some general guidelines. Prejudice will likely justify denial of leave to amend when a plaintiff seeks to amend her complaint during trial, where the defendant had no notice of the new issues and was therefore not prepared to defend against them.[31] For example, when the jury is in the box, trial is ready to proceed, and discovery has been completed on the only issue raised by the initial pleadings, the trial court does not abuse its discretion when it refuses to permit a proposed amendment opening up an entirely new field of inquiry.[32]

Prejudice may also justify the denial of an amendment where, because of the delay in presenting the proposed amendment, the opposing party has lost the opportunity to assert certain legal rights or to undertake protective legal action that would have been available if the amendment were

30. *See, e.g.*, Berman v. Bromberg, 65 Cal. Rptr. 2d 777, 781-82 (Ct. App. 1997); Kittredge Sports Co. v. Superior Court, 261 Cal. Rptr. 857, 859-60 (Ct. App. 1989); *Honig*, 7 Cal. Rptr. 2d at 926; *Rainer*, 95 Cal. Rptr. at 910-11. In *Barrows v. Am. Motors Corp.*, the court found that a defendant must show that the plaintiff delayed in requesting to amend, and that the defendant suffered specific prejudice from the plaintiff's delay in amending the complaint under the grounds for unreasonable delay outlined in California Code of Civil Procedure section 474. 192 Cal. Rptr. 380 (Ct. App. 1983); *see also* cases cited *supra* note 29.

31. *See, e.g.*, Cota v. County of Los Angeles, 164 Cal. Rptr. 323, 329-30 (Ct. App. 1980), *cert. denied*, 449 U.S. 1014 (1980); Del Mar Beach Club Owner's Ass'n v. Imperial Contracting Co., 176 Cal. Rptr. 886, 895 (Ct. App. 1981) (ruling that a plaintiff's unexcused lack of diligence in seeking to amend the complaint prejudiced the defendants because relevant evidence was no longer available); *Rainer*, 95 Cal. Rptr. at 912 (upholding the trial court's denial of leave to file amended complaint where the plaintiff requested leave on the third day of trial and five years after the original complaint was filed, noting that the defendant had not had the opportunity to conduct discovery or prepare to defend the new theory); City of Stanton v. Cox, 255 Cal. Rptr. 682, 685-86 (Ct. App. 1989) (affirming the trial court's denial of a motion to amend the complaint made by the plaintiff during trial because the defendant was not prepared to defend against a new unexpected issue).

32. *See, e.g.*, Estate of Murphy, 147 Cal. Rptr. 258, 261-62 (Ct. App. 1978); Magpali v. Farmers Group, Inc., 55 Cal. Rptr. 2d 225, 234-36 (Ct. App. 1996).

presented in a timely fashion.[33] Likewise, such prejudice may exist where the opposing party demonstrates that, as a result of undue delay, important information has been irretrievably lost because of destroyed evidence or missing witnesses.[34]

In contrast, the courts often conclude that prejudice does not result from the plaintiff's delay where the defendant is not "surprised" by the allegations in the proposed amended complaint.[35] "Surprise" in this context really means an unfair surprise that causes obvious prejudice.[36] The key inquiry in

---

33. For example, the court in *Permalab-Metalab* upheld the trial court's decision to deny leave to amend the answer to include a new affirmative defense where the defendant requested leave three years after filing the original answer. 102 Cal. Rptr. at 26. The court found irremediable prejudice to the plaintiffs because this three-year delay precluded them from attaching property or taking other action against a defendant contractor, who went out of business during the period of delay. *Id.* at 29-30. In *Husley*, the court upheld the denial of amended answer that raised a new affirmative defense, three years after the original answer was filed. 267 Cal. Rptr. 523, 527 (Ct. App. 1990). The court found that the delay prejudiced the plaintiffs, who had a right to know risks and weigh exposure prior to the trial. *Id.*

34. *See, e.g.*, *Honig*, 7 Cal. Rptr. 2d at 926 n.2 Kolani v. Gluska, 75 Cal. Rptr. 2d 257, 263 (Ct. App. 1998); Aldrich v. San Fernando Valley Lumber Co., 216 Cal. Rptr. 300, 308-09 (Ct. App. 1985); Lamont v. Wolfe, 190 Cal. Rptr. 874, 877-78 (Ct. App. 1983).

35. *See, e.g.*, Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 604 (Cal. 1985) (concluding that the defendant could hardly be surprised by a new legal theory alleged in an amended complaint when discovery and legal argument had already been conducted with respect to that new issue and related theories were alleged in the original complaint); Higgins v. Del Faro, 176 Cal. Rptr. 704, 706-08 (Ct. App. 1981); Redevelop. Agency v. Herrold, 150 Cal. Rptr. 621, 627 (Ct. App. 1978) (concluding that the trial court's denial of the defendant's motion to amend the answer was an abuse of discretion because the plaintiff was made aware of the proposed new theory through earlier interrogatories and would suffer no prejudice as a result). *Cf.* Estate of Hunter, 15 Cal. Rptr. 556, 560 (Dist. Ct. App. 1961) (observing an amendment that effects no change in the nature of the case can cause no surprise or prejudice to the adverse party); *Ranier*, 95 Cal. Rptr. at 910 (finding that the trial court abused its discretion in denying leave to amend the complaint during trial where the defendants did not claim that they were surprised by the new theory alleged).

36. Some litigation surprises do not rise to the requisite level of prejudice to the opposing party. *See* Posz v. Burchell, 25 Cal. Rptr. 896, 902 (Dist. Ct. App. 1962). As explained by the *Posz* court in affirming leave to amend granted on the first day of trial after the case had been pending nearly five years:

> Counsel on the firing line in an actual trial must be prepared for surprises, including requests for amendments of pleading. They cannot ask that a judgment afterwards obtained be set aside merely because their equilibrium was slightly disturbed by an unexpected motion. In order to reverse a case on any such ground there must be a showing that actual unfairness or obvious prejudice has resulted from the allowance of such an amendment.

determining "surprise" is whether the defendant, during the course of its pretrial preparations, was already made aware of the factual and legal theories alleged in the proposed amendment.[37] A defendant cannot demonstrate unfair surprise where it has already deposed witnesses who would support, and otherwise marshaled evidence to oppose, the new allegations contained in the proposed amendment.[38]

a. Importance of Pretrial Discovery to Determination of Prejudice

Two recent cases illustrate the important role that pretrial discovery plays in determining whether a proposed amendment should have been allowed. In *Honig v. Financial Corp. of America*,[39] the court of appeal held that the trial court's denial of the plaintiff's request for leave to file an amended complaint was an abuse of discretion.[40] Plaintiff Honig, a savings and loan executive, filed a complaint on February 5, 1988, while still employed by the defendant institution.[41] His complaint alleged a campaign of harassment and intimidation by his employer in retaliation for his objection to being forced to misrepresent the nature of the certificates of deposit he was selling.[42] His initial complaint asserted several causes of action, including attempted constructive termination, fraud, breach of contract, and intentional infliction of emotional distress.[43] The plaintiff feared his discharge was imminent and filed suit as a "preventive measure."[44]

After his initial complaint was filed, Honig was summoned before a meeting of the defendant savings and loan's

---

Id.

37. *See, e.g.*, *Mesler*, 702 P.2d at 604; Edwards v. Superior Court, 112 Cal. Rptr. 2d 838, 845 (Ct. App. 2001); *see also Honig*, 7 Cal. Rptr. at 925-26; Magpali v. Farmers Group, Inc., 55 Cal. Rptr. 2d 225, 234-36 (Ct. App. 1996); *Redevelop. Agency*, 150 Cal. Rptr. at 626-27; *Higgins*, 176 Cal. Rptr. at 706-08.

38. *See, e.g.*, cases cited *supra* note 35; *see also* Cal. Cas. Gen. Ins. Co. v. Superior Court, 218 Cal. Rptr. 817, 820-21 (Ct. App. 1985) (observing that a party could hardly have been unduly surprised by an amended pleading when discovery was ongoing and the original pleading suggested the amendment), *disapproved on other grounds by*, Kransco v. Am. Empire Surplus Lines Ins. Co., 2 P.3d 1, 12-13 n.11 (Cal. 2000).

39. *Honig*, 7 Cal. Rptr. 2d at 922.

40. *Id.* at 925-27.

41. *Id.* at 923-24.

42. *Id.*

43. *Id.*

44. *Id.* at 924.

ethics committee.[45] When the committee denied Honig's request to have counsel present, Honig refused to discuss the pending lawsuit with the committee.[46] Subsequently, on April 15, 1988, the defendant discharged Honig, stating that he was fired for insubordination.[47] The plaintiff's lawsuit was assigned to a fast track court. The parties conducted extensive discovery. For seven days the defendant thoroughly deposed Honig on the events which occurred subsequent to the filing of his original complaint, including the events surrounding the ethics committee and Honig's subsequent discharge.[48] When the defendant questioned Honig about his search for employment after being fired, Honig explained that he thought he had difficulty finding employment because he was blackballed and because he told prospective employers he had been fired.[49]

Approximately two months prior to trial, and nearly two years after his filing of the original complaint, the plaintiff moved to amend his complaint to add facts that occurred after the initial complaint.[50] The proposed amended complaint asserted a cause of action for wrongful discharge in violation of public policy, and contended that the charge of insubordination was created as a pretext for the termination.[51] The amended complaint also pled a cause of action for defamation, asserting that the pretextual reason for the discharge was repeated to others after the termination, and that plaintiff was forced to reveal the reason to prospective employers.[52] The trial court denied Honig's motion to amend, and he appealed.

The court of appeal held that the trial court abused its discretion when it denied plaintiff Honig leave to file an amended complaint, noting the strong policy in favor of liberal allowance of amendments, even when the amendment requires postponing the trial.[53] The court described the proposed amendments as finishing "the story begun in the origi-

45. *See Honig*, 7 Cal. Rptr. 2d at 924.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 924.
50. *Id.*
51. *Honig*, 7 Cal. Rptr. 2d at 924.
52. *Id.*
53. *Id.*

nal complaint."[54] The parties were fully aware of the events that occurred after the original complaint but before the actual discharge.[55] Additionally, the *Honig* court reasoned that the defendant was "fully aware of [plaintiff's] claim that he had been blackballed and that he was unable to find new employment because he told prospective employers he had been fired."[56] Because the defendant fully deposed Honig on these new issues, the court concluded that "no prejudice to the defendant would have resulted had the proposed amendments been permitted."[57] Therefore, the defendant's knowledge of the new issues, gained through pretrial discovery, was central to the *Honig* court's finding that the trial court had abused its discretion in denying leave to amend.[58]

In contrast, the court of appeal in *Magpali v. Farmers Group, Inc.*,[59] affirmed the trial court's denial of the plaintiff's request for leave to amend his complaint. Magpali brought suit against Farmers for breach of contract, fraud, and intentional infliction of emotional distress arising out of his tenure as an insurance agent for Farmers.[60] The trial court dismissed his breach of contract claim prior to trial during motions in limine and granted the defendant's motion for nonsuit as to the other claims.[61] One day prior to trial, the plaintiff sought to add a claim for violation of the Unruh Civil Rights Act,[62] alleging that Farmers had a policy of prohibiting agents from selling insurance to members of certain ethnic

54. *Id.* at 925. The court also characterized the added assertions as "the continuation of events asserted in the initial pleadings." *Id.* One court has distinguished *Honig* because "the events giving rise to new causes of action transpired subsequently to the filing date of the initial complaint," in contrast to cases in which amendments arise from the same conduct as the original complaint. *See* Record v. Reason, 86 Cal. Rptr. 2d 547, 557 (Ct. App. 1999). The *Record* court never fully explained why this formal distinction should make any difference to the trial court's exercise of discretion. Perhaps there is typically less delay in seeking an amendment to add a subsequently arising cause of action, although that was certainly not the case in *Honig*.

55. *Honig*, 7 Cal. Rptr. 2d at 925-26.

56. *Id.* at 926.

57. *Id.*

58. The *Honig* court also ruled that this amended complaint related back to the original complaint because both pleadings referred to the same general set of facts. *Id.* at 925-26; *see also infra* notes 235-38 and accompanying text.

59. 55 Cal. Rptr. 2d 225 (Ct. App. 1996).

60. *Id.* at 228.

61. *Id.* at 227-28.

62. CAL. CIV. CODE § 51 (West 2004).

groups.[63] The trial court denied leave to amend, and the plaintiff appealed.[64]

The court of appeal affirmed, finding no abuse of discretion in the denial of the plaintiff's request for leave to amend.[65] The *Magpali* court first noted that the plaintiff proposed his amended complaint on the eve of trial nearly two years after the complaint was originally filed.[66] Because Magpali gave no explanation for leaving the Unruh Act claim out of the original complaint or for bringing the request to amend so late, the court found inexcusable delay on the part of the plaintiff.[67]

In addition, the *Magpali* court found clear prejudice to the defendant because, in preparing for trial on claims of breach of contract, misrepresentation, and intentional infliction of emotional distress, the defendant

> had not discovered or deposed many of the witnesses who would support the new allegations, and had not marshaled evidence to oppose the contention that a system-wide discriminatory policy existed. Although courts are bound to apply a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings, up to and including trial this policy should be applied only "where no prejudice is shown to the adverse party."[68]

The *Magpali* court found denial of leave to amend appropriate because the plaintiff's proposed amendment "'opened up an entirely new field of inquiry without any satisfactory explanation as to why this major change in point of attack had not been made long before trial.'"[69] Of particular significance to the court was the plaintiff's admission that his Unruh Act claim depended on several witnesses who had not been previously identified in discovery or deposed prior to the time of trial.[70] The court expressed concern that "adding the new cause of action would have changed the tenor and com-

63. *Magpali*, 55 Cal. Rptr. 2d at 228-30, 234-35.
64. *Id.* at 230.
65. *Id.* at 234-36.
66. *Id.* at 235.
67. *Id.* at 235-36.
68. *Id.* at 235 (quoting Higgins v. Del Faro, 176 Cal. Rptr. 704, 707-08 (Ct. App. 1981)).
69. *Magpali*, 55 Cal. Rptr. 2d at 235 (quoting Estate of Murphy, 147 Cal. Rptr. 258, 261-62 (Ct. App. 1978)).
70. *Id.* at 235-36.

plexity of the complaint from its original focus on representations and demands made to Magpali by his superiors to an exploration of Farmer's activities and practices in the entire Southern California area."[71] Noting the plaintiff's concession that addition of the new claim would have necessitated at least a continuance to allow the defendant to depose new witnesses, the court concluded that denial of leave to amend was the only appropriate outcome: "Where the trial date is set, the jury is about to be impaneled, and the only way to avoid prejudice to the opposing party is to continue the trial date to allow further discovery, refusal of leave to amend cannot be an abuse of discretion."[72]

Although the courts of appeal reached different conclusions in *Honig* and *Magpali*, pretrial discovery was central to each court's determination of whether the defendant would be prejudiced by the new allegations asserted in the proposed amended complaints.[73] *Honig* and *Magpali* stand for the proposition, repeatedly endorsed in other decisions, that where no additional discovery is required to meet the new issues raised in a proposed amended complaint, the trial court's refusal to permit the amendment would constitute an abuse of discretion.[74] Likewise, the California Supreme Court has also concluded that a defendant cannot claim prejudice in the form of unfair surprise where the parties have already conducted much discovery on the new issues raised in the proposed amended complaint.[75] Where no prejudice to the defendant is shown, the liberal rule of allowance of amendments prevails.[76]

---

71. *Id.* at 236.

72. *Id.*

73. *See supra* notes 53-58 & 65-72 and accompanying text.

74. *See, e.g.*, Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 604 (Cal. 1985); Higgins v. Del Faro, 176 Cal. Rptr. 704, 707-08 (Ct. App. 1981) (holding that the trial court's denial of the plaintiff's motion to amend the complaint was an abuse of discretion where all evidence relevant to the proposed amendment was already in the court file); Rainer v. Cmty. Mem'l Hosp. 95 Cal. Rptr. 901, 909-10 (Ct. App. 1971); *see also* Redevelop. Agency v. Herrold, 150 Cal. Rptr. 621, 626-27 (Ct. App. 1978) (concluding that the trial court abused its discretion in denying the defendant's motion to amend its answer to allege a new defense, where earlier interrogatories alerted the plaintiff to the new claim).

75. *See Mesler*, 702 P.2d at 602-04.

76. *See Higgins*, 176 Cal. Rptr. at 707-08; *see also* cases cited *supra* note 74.

b. Postponement of Trial to Avoid Prejudice

An important concern in both *Honig* and *Magpali* was whether the amended complaint would necessitate a postponement of trial in order to permit additional discovery.[77] When an amendment renders postponement necessary, the trial court has specific statutory authority to postpone the trial and to condition the amendment on the payment of costs to the adverse party.[78] Even when the case has been set for trial and the amended complaint will require a continuance, several courts have concluded that the resulting delay will not by itself constitute prejudice sufficient to justify denial of leave to amend.[79]

However, the judicial attitude toward postponement of trial has changed with the adoption of "fast track" rules pursuant to the Trial Court Delay Reduction Act.[80] This Act promotes the public policy of efficient disposition of civil actions and directs trial judges to resolve all litigation without delay.[81] Therefore, a superior court may be less willing to view a trial date as established solely for the benefit of the parties. This changed attitude is certainly apparent with respect to requests for continuances generally, even requests joined by both parties, which are now disfavored under most fast track schemes.[82] However, in contexts analogous to post-

77. *Magpali*, 55 Cal. Rptr. 2d at 235-36; *Honig*, 7 Cal. Rptr. 2d at 926-27.

78. *See* CAL. CIV. PROC. CODE § 473(a)(2) (West 2004); *see also* Fuller v. Vista Del Arroyo Hotel, 108 P.2d 920, 921-23 (Cal. 1941) (affirming the trial court's decision granting the defendant leave to file amended answer, postponing trial to allow the plaintiff time to prepare, and requiring the defendant to pay all expenses incurred by the plaintiff due to the delay).

79. *See, e.g.*, *Mesler*, 702 P.2d at 604; *Redevelop. Agency*, 150 Cal. Rptr. at 627; *Higgins*, 176 Cal. Rptr. at 706-07. *But see* Sawyer v. First City Fin. Corp., 177 Cal. Rptr. 398, 406 (Ct. App. 1981) (concluding that where the pleadings are complete, the parties have had adequate time for discovery, the issues are joined, and one side is fully prepared for trial, the court is not required to grant a continuance of trial even though the moving party alleges newly discovered facts or issues which suggest new discovery); *Magpali*, 55 Cal. Rptr. 2d at 236.

80. *See* CAL. GOV'T CODE § 68600 (West 2004); *see also* CAL. CT. R. 204.1-213 (2004).

81. *See* CAL. GOV'T CODE §§ 68603, 68607 (West 2004). California Rule of Court 208(c) was originally adopted to advance the case disposition time goals of the Act, and now specifies that the trial judge has the responsibility effectively to resolve civil cases "through active management and supervision of the pace of litigation." CAL. CT. R. 208(c) (2004).

82. *See, e.g.*, CAL. GOV'T CODE § 68616(d) (West 2004) (permitting parties to stipulate to a single continuance not to exceed thirty days); *id.* § 68607(f) (directing judges to commence trials on the date scheduled); *id.* § 68607(g) (directing

ponements caused by amended pleadings, the courts have ruled the fact that a lawsuit is a fast track case does not annul previous statutes and case law.[83] As the court in one recent case observed, when there is a head-on collision between the policy behind the Trial Court Delay Reduction Act and the guiding principle of deciding cases on their merits rather than on procedural deficiencies, "the strong policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency."[84] Not surprisingly, the court in another recent fast track case found an amendment to a complaint appropriate even though, as a consequence, a trial postponement may be necessary.[85]

3. Prejudice to Plaintiff; Sham Pleadings: Other Relevant Factors

Prejudice to the *plaintiff* caused by the rejection of a proposed amended complaint is also relevant to the determination of whether a trial court abused its discretion when denying plaintiff permission to amend.[86] Denial of leave to amend is proper where, based on the allegations in the initial complaint, the plaintiff is able to introduce the same evidence as

---

judges to "adopt and utilize a firm, consistent policy against continuances, to the maximum extent possible and reasonable, at all stages of the litigation"); *see also* CAL. CT. R. 375(a) (West 2004) (providing that "continuances before or during trial in civil cases are disfavored" and "shall not be granted except on an affirmative showing of good cause"); *id.* App. I, § 9 (setting forth good cause standards for continuing trial dates).

83. *See, e.g.*, Bahl v. Bank of Am., 107 Cal. Rptr. 2d 270 (Ct. App. 2001) (holding that the trial court abused its discretion in a fast track case by denying the plaintiff's request for a continuance related to the decision on the defendant's motion for summary judgment); Goldstein v. Superior Court, 50 Cal. Rptr. 2d 459 (Ct. App. 1996) (permitting the plaintiff to amend a complaint to allege claims for punitive damages only three months before the established trial date, in spite of applicable fast track and statutory rules requiring parties to obtain orders granting such an amendment at least nine months before trial); Estate of Meeker, 16 Cal. Rptr. 2d 825 (Ct. App. 1993) (ruling that even in a fast track case a request for a continuance of a trial should generally be granted if supported by a showing of good cause); Prudential-Bache Sec., Inc. v. Superior Court, 247 Cal. Rptr. 477 (Ct. App. 1988) (directing the trial court to vacate the trial date and stay proceedings pending resolution of an appeal from a denial of a motion to compel arbitration).

84. *See Bahl*, 107 Cal. Rptr. 2d at 278.

85. Honig v. Fin. Corp. of Am., 7 Cal. Rptr. 2d 922 (Ct. App. 1992) (holding that the trial court abused its discretion by denying the plaintiff leave to amend his complaint two months before the scheduled trial in a fast track case).

86. *See, e.g.*, Record v. Reason, 86 Cal. Rptr. 2d 547, 557 (Ct. App. 1999); Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 604 (Cal. 1985).

would be permitted under the amended complaint.[87] But denial constitutes an abuse of discretion where the new allegations in the proposed amended complaint are integral to plaintiff's theory of recovery and will not unfairly surprise the defendant.[88]

Another relevant factor is whether the proposed amendment states a viable cause of action.[89] For example, if an amended complaint merely seeks to omit an incurable defect in the original complaint, or contradicts allegations of fact made in a verified complaint, the trial court may consider the proposed amended complaint a "sham" pleading.[90] Moreover, the trial court may properly reject a proposed amended complaint which is untimely under the applicable statutes of limitations, or is clearly barred by res judicata.[91] However, when the only objection is that the proposed amended complaint arguably does not state a cause of action as a matter of substantive law, the preferred approach may be to permit the amendment and allow the parties to test its legal sufficiency by demurrer.[92]

---

87. In *Record*, the court held that the trial court did not abuse its discretion in rejecting the plaintiff's motion to amend the complaint after the defendant moved for summary judgment. 86 Cal. Rptr. 2d at 557. Further, rejecting the amendment did not prejudice the plaintiff because the proposed amendment contained evidence that was nearly identical to facts stated in the plaintiff's opposition to the motion for summary judgment. *Id.*

88. *See Mesler*, 702 P.2d at 603-04; *Honig*, 7 Cal. Rptr. 2d at 926; Berman v. Bromberg, 65 Cal. Rptr. 2d 777, 781-84 (Ct. App. 1997) (reversing the trial court's denial of an amended verified complaint alleging a new legal theory where the facts showed that the amendment corrected erroneous allegations in prior complaints).

89. *See, e.g.*, Congleton v. Nat'l Union Fire Ins. Co., 234 Cal. Rptr. 218, 225 (Ct. App. 1987) (observing that such denial is proper when the amended pleading is insufficient to state a cause of action or contradicts an admission in the original pleading or in a stipulation); Cal. Cas. Gen. Ins. Co. v. Superior Court, 218 Cal. Rptr. 817, 820-21 (Ct. App. 1985) (ruling that such denial may be appropriate where controlling precedent establishes that the proposed amendment is clearly insufficient and cannot be cured), *disapproved on other grounds by*, Kransco v. Am. Empire Surplus Lines Ins. Co., 2 P.3d 1, 12 n.11 (Cal. 2000).

90. *See, e.g.*, *Berman*, 65 Cal. Rptr. 2d at 781-82 (finding that an inadvertent error did not indicate a sham pleading); Vallejo Dev. Co. v. Beck Dev. Co., 29 Cal. Rptr. 2d 669, 678-79 (Ct. App. 1994).

91. *See, e.g.*, Yee v. Mobilehome Park Rental Review Bd., 73 Cal. Rptr. 2d 227, 239-40 (Ct. App. 1998); CAMSI IV v. Hunter Tech. Corp., 282 Cal. Rptr. 80, 87-88 (Ct. App. 1991).

92. *See, e.g.*, Kittredge Sports Co. v. Superior Court, 261 Cal. Rptr. 857 (Ct. App. 1989) (directing the trial court to grant the plaintiff leave to file an amended complaint alleging a questionable cause of action); Cal. Cas. Gen. Ins.

B. Summary: The Relevant Factors Are Applied in a Pragmatic Manner

In summary, the California courts have found the following factors most relevant when determining whether to permit an amended complaint: (1) whether the plaintiff, through lack of diligence, has unreasonably delayed presentation of the motion to amend and (2) whether this delay has resulted in substantial prejudice to the defendant.[93] These factors are applied in a pragmatic manner designed to permit an amendment unless it will unfairly surprise, and thereby unduly prejudice, the defendant in preparation for trial.[94] The most important inquiry is whether the defendant as a result of pretrial discovery is already prepared to respond to the new factual and legal theories alleged in the proposed amendment.[95] A defendant cannot claim prejudice in the form of unfair surprise where the parties have already completed discovery on these new issues.[96]

As will be explained later, these same factors, applied by a trial court in the same pragmatic manner, should also determine whether an amended complaint relates back to the original complaint for purposes of avoiding the statute of limitations bar. The reasons for this pragmatic approach can be better appreciated after an examination of California's current relation-back doctrine.

III. THE CALIFORNIA RELATION-BACK DOCTRINE

A. The Evolution of California's Relation-Back Doctrine

As formulated by the California Supreme Court, California's current relation-back doctrine provides that an amended complaint relates back to the original complaint, and thus avoids the statute of limitations as a bar, if it rests on the "same general set of facts" as the original complaint.[97] Ac-

---

Co. v. Superior Court, 218 Cal. Rptr. 817 (Ct. App. 1985).

93. *See supra* notes 23-38 and accompanying text.

94. *See supra* notes 23-38 and accompanying text.

95. *See supra* notes 39-76 and accompanying text.

96. *See supra* notes 39-76 and accompanying text.

97. *See, e.g.*, Norgart v. Upjohn Co., 981 P.2d 79, 96 (Cal. 1999); Barrington v. A. H. Robbins, 702 P.2d 563, 565 (Cal. 1985); Marasco v. Wadsworth, 578 P.2d 90, 91-92 (Cal. 1978); Smeltzley v. Nicholson Mfg. Co., 559 P.2d 624, 628-29 (Cal. 1977).

cording to the California Supreme Court in *Austin v. Massachusetts Bonding & Insurance Co.*,[98] this modern rule is "the result of a development which, in furtherance of the policy that cases should be decided on their merits, gradually broadened the right of a party to amend a pleading without incurring the bar of the statute of limitations."[99]

California's traditional relation-back rule was far more restrictive. Some early California cases held that an amendment stating any new cause of action could not relate back, and that a plaintiff could not amend so as to change the legal theory of the plaintiff's action.[100] Subsequent cases held that a mere change in legal theory would not prevent an amendment from relating back.[101] But these same cases also ruled that an amended complaint would not relate back if it set forth "a wholly different cause of action" or "a wholly different legal liability or obligation."[102] This traditional relation-back doctrine remained in effect until the *Austin* court replaced it with the modern doctrine.[103]

The "wholly different cause of action" rule resulted in confusion and undue restrictions on the right to amend.[104] This was due to the difficulties encountered in defining the parameters of a "cause of action," as well as in determining whether a newly alleged cause of action was "wholly different."[105] Therefore, in adopting the "same general set of facts" rule, the *Austin* court specifically did not use the term "cause of action."[106] Instead, the *Austin* court emphasized that rela-

98. 364 P.2d 681 (Cal. 1961).

99. *Id.* at 683.

100. *See, e.g.*, Hackett v. Bank of Am., 57 Cal. 335, 336 (1881); Atkinson v. Amador & Sacramento Canal Co., 53 Cal. 102, 105-06 (1878); Anderson v. Mayers, 50 Cal. 525, 527 (1875).

101. *See, e.g.*, Wells v. Lloyd, 56 P.2d 517, 526 (Cal. 1936); Frost v. Witter, 64 P. 705, 706-08 (Cal. 1901); *see also* Klopstock v. Superior Court, 108 P.2d 906, 910-11 (Cal. 1941) (holding an amendment proper under the "wholly different cause of action" test).

102. *See* cases cited *supra* note 101.

103. The *Austin* court noted that a few later cases relied solely on the modern rule without mentioning the older test. *Austin*, 364 P.2d at 683.

104. *See id.*

105. *See* cases cited *supra* note 101. For a discussion of the problems encountered by the California courts when determining what constitutes a "cause of action" for res judicata purposes, see Walter W. Heiser, *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 559 (1998).

106. *Austin*, 364 P.2d at 683.

tion back under the modern rule does not depend upon whether or not the amended complaint alleges "a wholly different cause of action."[107]

1. *The "Same General Set of Facts" Standard*

When originally adopted by the California Supreme Court in *Austin*, the modern rule simply stated that "where an amendment is sought after the statute of limitations has run, the amended complaint will be deemed filed as of the date of the original complaint provided recovery is sought in both pleadings on the *same general set of facts*."[108] The *Austin* court characterized the new "same general set of facts" standard as more liberal in allowing amendments to avoid the statute of limitations bar than the older standards.[109] The court likened the liberality of this new standard to the same "conduct, transaction, or occurrence" test set forth in Rule 15(c) of the Federal Rules of Civil Procedure, which it viewed as also adopting the modern relation-back rule.[110]

Except for this reference to the federal rule and the application of the new standard to the facts before it, the *Austin* court did not further elaborate on how to determine whether two general sets of facts were the "same" as opposed to "different."[111] However, certain aspects of the "same general set

---

107. *Id.* The *Austin* court observed that the results required by the new "same general set of facts" rule may be reached under the "wholly different cause of action" test by interpreting the term "cause of action" to refer to the facts upon which the rights of action are based, rather than the rights or obligations arising therefrom. *Id.* The court also noted "but the term has been used so often to mean legal liability or obligation that its use in connection with the problem of relation back of amendments results in confusion and undue restrictions on the right to amend." *Id.*

108. *Id.* (emphasis added). The *Austin* court also emphasized that the policy in favor of litigating cases on their merits applies whether a defendant is sued under his fictitious or true name. *Id.* at 684.

109. *Id.* at 683.

110. *Austin*, 364 P.2d at 683 n.2. The *Austin* court quoted Federal Rule of Civil Procedure 15(c) and noted that this rule "does not use the term 'cause of action' and thus avoids the danger of narrow construction." *Id.* at 683.

111. The *Austin* case involved an original complaint against a securities broker seeking recovery of securities and money the broker had received on plaintiffs' behalf but had refused to deliver. *Id.* at 682. The amended complaint alleged a new cause of action against a new defendant, Massachusetts Bonding, based on a surety bond executed by that company for the faithful performance of the broker's duties. *Id.* The supreme court held that the amended complaint against Massachusetts Bonding related back to the original complaint, and that the amendment was not barred by the statute of limitations because both plead-

of facts" test are apparent from the *Austin* opinion. First, the new standard was designed to be more liberal than the traditional "same cause of action" test, a restrictive test that the *Austin* court expressly eschewed.[112] Second, the new standard furthers the policy of litigating cases on their merits rather than dismissing them on pleading technicalities, by broadening the right of a party to amend without incurring the bar of the statute of limitations.[113] Third, the new standard anticipates factual variations, even substantial ones, in the proof necessary to establish liability under the amended complaint as compared to the original complaint.[114]

Subsequent decisions embellished the simple "same general set of facts" standard by adding new requirements which, over the years, have placed unnecessary restrictions on the relation-back doctrine. These restrictions include the additional requirements that the amended complaint must refer to the "same accident," "same injury," and "same instrumentality" as those alleged in the original complaint. These new requirements are discussed below.

2. *The "Same Accident" and "Same Injury" Requirements*

The California Supreme Court first employed the "same

---

ings alleged the same defalcations. *Id.* at 684.

112. The *Austin* court noted that the modern rule avoids the narrow construction of relation back present in the older tests, and that it reflects a policy favoring litigation on the merits of each case. *Id.* at 683; *see also* Espinosa v. Superior Court, 248 Cal. Rptr. 2d 375, 380 (Ct. App. 1988) (Poche, J., dissenting) (characterizing *Austin's* modern relation-back test as one endorsing liberality of amendment and designed to promote a policy of litigating cases on the merits); Marasco v. Wadsworth, 578 P.2d 90, 91-93 (Cal. 1978) (applying the policy favoring liberal allowances for amendment of pleadings); Grudt v. City of Los Angeles, 468 P.2d 825, 829 (Cal. 1970) (discussing the elements of the modern rule noted by the court in *Austin*).

113. *See Austin*, 364 P.2d at 683; *see also* cases cited *supra* note 112.

114. This is apparent from the facts in *Austin*. *See* discussion *supra* note 111; *see also* Smeltzley v. Nicholson Mfg. Co., 559 P.2d 624, 629 (Cal. 1977) (characterizing *Austin* as a case in which the facts necessary to prove liability under the amended complaint differed significantly from those required to prove liability under the original complaint); *Grudt*, 468 P.2d at 826-29 (holding that an amended complaint that added a significant new dimension to the lawsuit met the same general set of facts tests); Elkins v. Derby, 525 P.2d 81, 87 n.7 (Cal. 1974) (noting that a defendant is not prejudiced under the relation-back rule when an amended complaint changes the theory of the action after the running of the limitations period even if the defendant has to gather additional evidence).

accident" and the "same injury" analyses in *Smeltzley v. Nicholson Manufacturing Co.*,[115] a case in which the plaintiff's original complaint alleged injuries caused by his employer's failure to provide him a safe place to work. Filed after the statute of limitations had run, the plaintiff's amended complaint added a cause of action alleging that his injuries resulted from a defective machine manufactured by the newly-named defendant manufacturing company.[116] In determining that the two pleadings satisfied *Austin's* "same general set of facts" test, the *Smeltzley* court explained that the "plaintiff's amended complaint, by seeking recovery for the same accident and injuries as the original complaint, complies with that test."[117]

What is apparent from the *Smeltzley* opinion is that the court employed the "same accident and injuries" analysis to demonstrate when two pleadings will satisfy the "same general set of facts" test. In other words, the court used this standard as a rule of inclusion. However, the California courts now apply this standard as a formal prerequisite to relation back.[118] An amended complaint that does not refer to the "same accident and injuries" alleged in the original complaint is automatically excluded from the category of amendments that are based on the "same general set of facts." What started as a rule of inclusion has now become one of exclusion.[119] As a rule of exclusion, the "same accident and inju-

115. 559 P.2d at 624.

116. *Id.* at 626.

117. *Id.* at 629.

118. Many cases employ the "same accident and injuries" test. *See, e.g.*, Marasco v. Wadsworth, 578 P.2d 90, 91-93 (Cal. 1978) (holding that an amendment to a wrongful death complaint to name the driver of the automobile in which plaintiff's decedent was a passenger related back to the original complaint because both pleadings referred to the same accident and injuries); *Smeltzley*, 559 P.2d at 627-29; Hirsa v. Superior Court, 173 Cal. Rptr. 418, 419-21 (Ct. App. 1981); *see also* Goldman v. Wilsey Foods, Inc., 265 Cal. Rptr. 294, 299 (Ct. App. 1989); Olson v. Volkswagen of Am., 247 Cal. Rptr. 719, 722-23 (Ct. App. 1988); Barrows v. Am. Motors Corp., 192 Cal. Rptr. 380, 382 (Ct. App. 1983).

119. *See, e.g.*, Espinosa v. Superior Court, 248 Cal. Rptr. 375 (Ct. App. 1988) (holding that an amended complaint did not relate back because it referred to a different accident and different injury than alleged in the original complaint); Foxborough v. Van Atta, 31 Cal. Rptr. 2d 525, 532-33 (Ct. App. 1994) (holding that the amended complaint did not relate back because it referred to a different incident of legal malpractice than alleged in the original complaint, even though both incidents alleged the same resulting injury); Lee v. Bank of Am., 32 Cal. Rptr. 2d 388, 393-98 (Ct. App. 1994) (holding that an amended complaint

ries" requirement is inconsistent with *Austin's* liberal approach to relation back.[120] Moreover, as will be explained later, this formalistic requirement should give way to a pragmatic approach which assesses whether relation back, in the context of an individual case, is consistent with the purposes of statutes of limitations and the policy of deciding cases on their merits.

3. The "Same Accident" Requirement May Be Too Restrictive

The "same accident" requirement is perhaps the least objectionable of the new relation back requirements. On a basic level, this requirement is similar to the "same conduct, transaction, or occurrence" test in Federal Rule 15(c)(2).[121] Indeed, some courts have restated the "same accident" restriction more generally as a requirement that the amended complaint must refer to the "same incident" as the original complaint.[122] As a rule of inclusion invoked to demonstrate what categories of amendments will relate back, the "same accident" requirement is a reasonable interpretation of the "same general set of facts" standard. But as a rule of exclusion employed to deny relation back, this requirement is more problematic. A narrow view of what constitutes the "same accident" may cause a court to lose track of whether the two pleadings refer to the same *general* set of facts, contrary to the liberal view endorsed in *Austin*.[123] Unfortunately, the California courts are prone to view this requirement narrowly, refusing to permit relation back where the amended complaint refers to a different incident temporally, even though the amendment refers to the same operative facts.[124]

---

alleging wrongful termination did not relate back to the original complaint alleging wrongful demotion because the two pleadings referred to different wrongful acts and injuries).

120. *See supra* notes 106-14 and accompanying text.

121. FED. R. CIV. P. 15(c)(2).

122. *See, e.g.*, *Foxborough*, 31 Cal. Rptr. 2d at 532; Carrier Corp. v. Detrex Corp., 6 Cal. Rptr. 2d 565, 569-70 (Ct. App. 1992).

123. *See supra* notes 106-14 and accompanying text.

124. *Compare* Coronet Mfg. Co. v. Superior Court, 153 Cal. Rptr. 366, 368-69 (1979) (finding no relation back because the amended complaint alleged electrocution by defective table lamp, a different accident than one alleged in the original complaint involving electrocution by a hair dryer); *Espinosa*, 248 Cal. Rptr. at 378-79 (holding that amendments alleging witness intimidation by agents of defendant city on May 10 did not refer to or relate back to the inci-

4. The "Same Injury" Restriction Resurrects the Previously Rejected "Same Cause of Action" Requirement

Even where an amended complaint refers to the "same accident" as the original complaint, the amended complaint will not relate back unless it also alleges the "same injury."[125] For example, an amended complaint seeking damages for personal injuries caused by an automobile accident may not relate back to an original complaint seeking property damages caused by the same accident, because the amended complaint did not seek recovery for the "same injury."[126] *Rowland v. Superior Court*[127] illustrates the use of the "same injury" test, as well as the inherent ambiguity of this requirement.

In *Rowland*, the plaintiff's son was electrocuted in the pool area of a hotel.[128] The plaintiff's original complaint alleged a wrongful death claim against the hotel and other defendants, seeking damages for the loss of care and support of the decedent, as well as funeral and burial expenses.[129] After the statute of limitations had expired, the plaintiff amended his complaint to add allegations that he personally witnessed

---

dents alleged in the original complaint, which included assault, false arrest, and false imprisonment on May 7); *and Lee*, 32 Cal. Rptr. 2d at 388 (holding that an amended complaint alleging wrongful termination did not relate back to the original complaint for wrongful demotion because the amended complaint referred to different wrongful conduct); *with* Honig v. Fin. Corp. 7 Cal. Rptr. 2d 922, 926 (Ct. App. 1992) (holding that an amended complaint for wrongful discharge and defamation related back to the original complaint for harassment because the facts alleged in the amended complaint "were in the chain of events which were originally pled"); Travelers Ins. Co. v. 633 Third Assoc., 14 F.3d 114, 125 (2d Cir. 1994) (holding that an amended complaint alleging fraudulent distribution of assets in 1992 by defendant partnership related back to original complaint alleging waste by the defendant in 1990 because the allegations in the amended complaint were based on the same "series of transactions and occurrences alleged in the original complaint"); *and* Davis v. Univ. of Chic. Hosp., 158 F.R.D. 129, 131-32 (N.D. Ill. 1994) (finding that an amended complaint alleging retaliation related back to the original complaint alleging employment discrimination even though it did not refer to the exact same conduct, because the alleged retaliation arose out of the alleged discrimination).

125. *See, e.g.*, Dudley v. Dep't of Transp., 108 Cal. Rptr. 2d 739 (Ct. App. 2001); Goldman v. Wilsey Foods, Inc. 265 Cal. Rptr. 294 (Ct. App. 1989); Rowland v. Superior Court, 217 Cal. Rptr. 786 (Ct. App. 1985); Shelton v. Superior Court, 128 Cal. Rptr. 454 (Ct. App. 1976).

126. *See* Sidney v. Superior Court, 244 Cal. Rptr. 31, 36 n.4 (Ct. App. 1988).

127. 217 Cal. Rptr. 786 (Ct. App. 1985).

128. *Id.* at 787.

129. *Id.*

his son's death, and sought damages for emotional distress against each defendant.[130] The defendant hotel argued that the amended complaint was not based on the "same general set of facts" because it sought a different recovery based on different injuries. The *Rowland* majority rejected this argument, observing that the defendant had confused the concept of "injury" with the concept of "damages."[131] Because "the amendment adding the emotional distress causes of action to the wrongful death causes of action seeks recovery for the same accident—the electrocution—and for the same injury—[plaintiff's] loss of his son," the *Rowland* majority concluded the amended complaint did relate back.[132] The dissent in *Rowland* agreed that the amended complaint referred to the same accident, but concluded that the amended complaint sought recovery for injuries different than those originally claimed and therefore did not relate back.[133]

There are several problems with the "same injury" requirement. As *Rowland* illustrates, the meaning of "injury" in this context is ambiguous. A second, more serious problem is that the "same injury" test often is applied in a manner that resurrects the old "same cause of action" restriction. Nowhere is this link between the current "same injury" and the old "same cause of action" restrictions more evident than in the *Shelton v. Superior Court*,[134] a court of appeal decision issued several years after *Austin*.

The *Shelton* plaintiffs, husband and wife, were injured in a traffic accident and filed a joint complaint for recovery of damages for their personal injuries.[135] The plaintiffs sought to amend their complaint to also seek recovery for loss of consortium, after the statute of limitations had expired.[136] The court concluded that the amended complaint did not relate back to the original complaint because, although both pleadings referred to the same accident, they alleged violations of two different primary rights.[137]

Relying on cases defining a "cause of action" for purposes

130. *See id.*
131. *Id.* at 788.
132. *Id.*
133. 217 Cal. Rptr. at 789-90 (Sonenshine, J., dissenting).
134. 128 Cal. Rptr. 454 (Ct. App. 1976).
135. *Id.* at 455-57.
136. *See id.* at 457.
137. *See id.* at 461-64.

of California's res judicata doctrine, the *Shelton* court observed that the violation of one primary right constitutes a single cause of action.[138] A cause of action, the court explained, "is comprised of the plaintiff's primary right and defendant's corresponding duty, combined with the defendant's breach of such right and duty."[139] The court then found that the amended complaint alleged the violation of a different primary right—the right to be free of the loss of consortium resulting from injury to a spouse—than the violation of the primary right to be free of injury caused by the tortious act of another alleged in the original complaint.[140] Consequently, even though the *Shelton* court acknowledged that the plaintiffs' amended complaint referred to the same facts as their original complaint, the amended complaint referred to different primary injuries and therefore could not relate back!

The *Shelton* court was correct when it stated that the primary rights approach defines a "cause of action" for res judicata purposes in California.[141] The court's use of primary rights reveals the reason for the "same injury" requirement. As explicitly acknowledged in *Shelton*, the reason for this restriction on relation back is to prevent a plaintiff from alleging a different cause of action from the one alleged in the original complaint.[142] Therefore, the "same injury" requirement is nothing more than the "same cause of action" restriction imposed by the California courts under the traditional relation-back rule.[143] This old "same cause of action" rule was rejected by the California Supreme Court in *Austin*, and should not be resurrected as part of the modern rule.

---

138. *See id.* at 463-65.

139. *See id.* at 464 n.6.

140. *Shelton*, 128 Cal Rptr. at 463. The court also noted that under primary rights analysis, injuries to person and to property are separate causes of action, and that a spouse's damage for loss of consortium is not an injury to that spouse's person. *Id.* at 464.

141. *See* Heiser, *supra* note 105, at 565-67, 571-83.

142. *See Shelton*, 128 Cal. Rptr. at 465. The *Shelton* court viewed numerous prior cases, including *Austin* and its progeny, as authorizing relation back where the primary right claimed by the plaintiff in the original complaint was not changed in the amended complaint. *Id.* at 462-63.

143. *See supra* notes 100-07 and accompanying text.

5. The "Same Instrumentality" Requirement Imposes an Unnecessary Restriction on Relation Back

In addition to the "same accident" and the "same injury" requirements, some cases also discuss whether the pleadings refer to the same offending instrumentality.[144] The first case to explicitly impose this "same instrumentality" requirement as part of the relation-back test was *Coronet Manufacturing Co. v. Superior Court.*[145]

The plaintiffs in *Coronet*, the parents of a teenage girl who was electrocuted in her home, brought their original wrongful death complaint against a hair dryer manufacturer (the Sunbeam Corporation) and several Doe defendants, alleging that their daughter was electrocuted while using a defective hair dryer.[146] Their amended complaint substituted the Coronet Manufacturing Company for a Doe defendant, and alleged that their daughter was electrocuted by a table lamp with a defective socket and switch manufactured by the defendant Coronet.[147] Plaintiffs also dismissed their action against Sunbeam.[148] The court of appeal in *Coronet* held that the amended complaint was barred by the statute of limitations.[149] Although the pleadings both alleged the same injury (death of child), the amended complaint did not relate back because the pleading alleged different accidents (use of hair dryer versus use of table lamp) and different offending instrumentalities (defective hair dryer versus table lamp with defective socket and switch).[150]

---

144. *See, e.g.*, Espinosa v. Superior Court, 248 Cal. Rptr. 375, 379 (Ct. App. 1988); Nelson v. A. H. Robins Co., 197 Cal. Rptr. 179, 182-83 (Ct. App. 1983); Coronet Mfg. Co. v. Superior Court, 153 Cal. Rptr. 366, 368-69 (Ct. App. 1979); *see also* Norgart v. Upjohn Co., 981 P.2d 79, 96 (Cal. 1999) (applying the "same instrumentality" requirement as part of a discussion on relation back); Barrington v. A. H. Robins Co., 702 P.2d 563, 565-66 (Cal. 1985) (discussing the "same instrumentality" test with apparent approval).

145. 153 Cal. Rptr. 366 (Ct. App. 1979).

146. *Id.* at 367.

147. *Id.*

148. *See id.*

149. *Id.* at 367-69.

150. *See id.* The *Coronet* court explained the necessity for the "same instrumentality" restriction as follows:

> The difference between being electrocuted by a hair dryer and being electrocuted by a table lamp is as great as being electrocuted by the hair dryer and being poisoned by some improperly processed food found on the kitchen shelf. Although they relate to a single death at a single

The California Supreme Court seemed to endorse this "same instrumentality" requirement in *Barrington v. A. H. Robbins Co.*,[151] another case in which a new defendant was added in the amended complaint. In her original complaint, the plaintiff sued her doctor, the manufacturer of the drug Darvon, and several Doe defendants alleging that she became sterile as a result of medical malpractice and negligent failure to warn of the dangers involved in taking the drug.[152] The plaintiff subsequently sought to amend her complaint to add a cause of action against the manufacturer of the Dalkon Shield intrauterine device, alleging that her sterility resulted from the use of this defective product.[153] Although the amended complaint alleged the same injury as the original complaint, the supreme court observed that the amended complaint alleged a different offending instrumentality and accident.[154] The *Barrington* court concluded the amended complaint alleged a new cause of action based on different operative facts, and therefore did not relate back to the original complaint.[155]

As applied to amended complaints which do not name new defendants, the "same instrumentality" requirement is subject to much the same criticism as the "same injury" limitation. The "same instrumentality" requirement stands for the proposition that an amended complaint must not change the factual cause of the plaintiff's injury from that alleged in the original complaint.[156] Why this should matter to the rela-

---

location they are different "accidents" and involve different instrumentalities.

Id. at 369.

151. 702 P.2d 563 (Cal. 1985); *see also Norgart*, 981 P.2d at 96 (describing the relation-back doctrine as including the "same instrumentality" requirement).

152. *Barrington*, 702 P.2d at 564.

153. *See id.*

154. *See id.* at 565-66.

155. *Id.* at 564-66. The *Barrington* court did not apply the relation-back doctrine in the usual context of seeking to avoid the bar of statute of limitations, but rather in the context of failure to serve the complaint within three years, as required by Code of Civil Procedure section 583.210(a). *Id.* Consequently, the plaintiff argued that the new cause of action against the newly named defendant did *not* relate back, and the defendant argued that it did. *Id.* at 566-68.

156. The *Coronet* court suggested this rationale for the "same instrumentality" requirement when it observed the amended complaint naming defendant Coronet might still relate back if Coronet can be shown to be in the "chain of causation" of the originally pleaded cause of action involving the hair dryer.

tion-back doctrine is never fully explained by the courts invoking this restriction. Apparently, the concern is that by changing offending instrumentalities, an amended complaint makes too drastic a change in the factual basis for recovery to permit relation back.[157] The "same instrumentality" requirement therefore conclusively presumes that allegations of a different factual cause for liability in an amended complaint are not based on the "same general set of facts" set forth in the original complaint. Viewed in this manner, the "same instrumentality" requirement operates in much the same manner as the "wholly different cause of action" and "wholly different legal theory" restrictions overruled by the California Supreme Court in *Austin*.[158]

Alleging a different offending instrumentality may indeed change the factual basis for recovery, even drastically, but no more so than alleging a new cause of action or a new legal theory. Moreover, the liberal relation-back standard announced in *Austin* certainly anticipates factual variations between the original and amended complaints.[159] Indeed, the California Supreme Court in *Smeltzley* recognized that rela-

---

Coronet Mfg. Co. v. Superior Court, 153 Cal. Rptr. 366, 369 (Ct. App. 1979). In other words, relation back would be permitted if the plaintiff can truthfully plead that the hair dryer was connected to the lamp with its defective switch and socket, which was manufactured by defendant Coronet. *Id.* at 369; *see also* Barnes v. Wilson, 114 Cal. Rptr. 839 (Ct. App. 1974). In *Barnes*, the plaintiff was injured by an intoxicated assailant in the defendant's bar, and the court held that an amended complaint related back to the original complaint when it alleged that a neighboring tavern owned by another defendant failed to protect the plaintiff because it also furnished liquor to the intoxicated assailant. *Id.*

157. *See, e.g.*, Kim v. Regents of the Univ. of Cal., 95 Cal. Rptr. 2d 10 (Ct. App. 2000). In *Kim*, the court relied on the same accident and same instrumentality requirements in concluding that an amended complaint alleging wrongful discharge due to age discrimination did not relate back to the original complaint alleging tortious breach of an employment contract, because the "two sets of factual allegations do not match up." *Id.* at 15-16.

158. *See supra* notes 100-12 and accompanying text. The dissenting opinion in *Espinosa*, disagreeing with the majority's use of these restrictions to deny relation back of an amended complaint, made the following observation:

> I reject the majority's invitation to return to the thrilling and limiting tests of yesteryear. Accident, injury, and instrumentality, whatever those terms may mean, suffer from the same vice that the Supreme Court in *Austin* saw in the tests they were repudiating, e.g., new cause of action, change of legal theory, a wholly different cause of action, or a wholly different legal theory or obligation.

Espinosa v. Superior Court, 248 Cal. Rptr. 375, 380 (Ct. App. 1988) (Poche, J., dissenting).

159. *See supra* note 114 and accompanying text.

tion back is appropriate under the same general set of facts standard, even though "the facts necessary to prove liability under the amended complaint differed *significantly* from those required to prove liability under the original complaint."[160]

6. The Relation-Back Rules Should Be Applied in a Pragmatic Manner

As explained above, the "same accident," "same injury," and "same instrumentality" requirements are inconsistent with the liberal view of relation back adopted in *Austin* when applied as rules of exclusion which deny relation back if not satisfied. But there is another, more fundamental objection to these requirements. These requirements operate as formalistic rules without regard to whether or not the relation back of a particular amendment is consistent with the purposes of the statute of limitations. As formalistic rules of exclusion, they also fail to promote the policy of litigating cases on their merits, and they ignore the practical needs of plaintiffs. As discussed below, the California courts do apply other equitable tolling doctrines that reflect all these policy concerns.[161] The relation-back doctrine should also be applied in a similar manner.

B. The Relation-Back and Other Equitable Tolling Doctrines Are Consistent with the Policies Behind Statutes of Limitations

The primary purpose of statutes of limitations is to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available.[162] Statutes of limitations re-

160. Smeltzley v. Nicholson Mfg. Co., 559 P.2d 624, 629 (Cal. 1977) (emphasis added); *see also* Elkins v. Derby, 525 P.2d 81 (Cal. 1974); Grudt v. City of Los Angeles, 468 P.2d 825, 829 (Cal. 1970) (holding that an amended complaint that added a significant new dimension to the lawsuit met the same general set of facts test).

161. *See infra* notes 166-200 and accompanying text.

162. *See, e.g.*, Norgart v. Upjohn Co., 981 P.2d 79, 86 (Cal. 1999) (noting that the purpose is "to protect defendants from the stale claims of dilatory plaintiffs"); Jolly v. Eli Lilly & Co., 751 P.2d 923, 928 (Cal. 1988); Addison v. State, 578 P.2d 941, 943 (Cal. 1978); Davies v. Krasna, 535 P.2d 1161, 1168 (Cal. 1975) (stating "the fundamental purpose of such statutes is to protect potential defendants by affording them an opportunity to gather evidence while facts are still fresh"); Elkins v. Derby, 525 P.2d 81, 86 (Cal. 1974).

quire a plaintiff to put the defendant on notice by filing a complaint within a statutorily prescribed period. This filing satisfies the statute of limitations because it warns the defendant to collect and preserve evidence in reference to the suit. The defendant's fact-gathering process usually occurs after the complaint has been filed, typically through informal investigation and formal discovery. The defendant may choose to commence fact investigation immediately after being served with the complaint, may defer investigation until later, or may decide to forgo investigation altogether. Consequently, a defendant's actual fact-gathering, if any, usually takes place *after* the statute of limitations has expired.

The policy behind statutes of limitations, therefore, is to put defendants on notice of the need to gather and preserve evidence in time to prepare a fair defense on the merits.[163] The relation-back doctrine is consistent with this policy.[164] The relation-back doctrine also reflects concern for the competing policy of promoting litigation of cases on their merits by avoiding dismissals based on procedural technicalities, and for the practical needs of plaintiffs who may not know the precise nature of their cases until after formal discovery.[165]

Nor is the relation-back doctrine the only judicially-created mechanism for suspending the statute of limitations. The California Supreme Court also adheres to another policy, embodied in the doctrine of equitable tolling, which favors relieving a plaintiff from the bar of a limitations statute when

---

163. *See* Garrison v. Bd. of Dirs. of the United Water Conservation Dist., 43 Cal. Rptr. 2d 214, 218 (Ct. App. 1995); Pasadena Hosp. Ass'n v. Superior Court, 251 Cal. Rptr. 686, 688 (Ct. App. 1988); Lamont v. Wolfe, 190 Cal. Rptr. 874, 877-78 (Ct. App. 1983).

164. *See, e.g.*, *Garrison*, 43 Cal. Rptr. 2d at 218; Citizens Ass'n for Sensible Dev. of Bishop Area v. County of Inyo, 217 Cal. Rptr. 893, 898 (Ct. App. 1985) (ruling that when recovery is sought on the same basic set of facts, the main policy of the statute of limitations—to put defendants on notice of the need to defend against a claim in time to prepare a fair defense on the merits—is satisfied); *Pasadena Hospital Ass'n*, 251 Cal. Rptr. at 688; *Lamont*, 190 Cal. Rptr. at 877-78 (the relation-back doctrine satisfies the purpose and policy of the statute of limitations where the defendant is put on notice of the need to defend the plaintiff's claim in time to prepare a fair defense on the merits).

165. *See, e.g.*, Davies v. Krasna, 535 P.2d 1161, 1168 (Cal. 1975) (noting that modern adjustments in limitations law have reflected concern for the practical needs of prospective plaintiffs); Austin v. Mass. Bonding & Ins. Co., 364 P.2d 681, 683 (Cal. 1961) (explaining that the modern relation-back doctrine was designed to further the policy of deciding cases on their merits); *see also* cases cited *supra* note 112.

the plaintiff has put the defendant on notice of the need to defend against a claim in time to prepare a fair defense on the merits.[166] *Addison v. State of California*[167] provides the classic example of the equitable tolling doctrine.

In *Addison*, state and county officers raided the plaintiffs' business and seized numerous records in contemplation of criminal proceedings which were never initiated.[168] The plaintiffs filed timely damage claims against the state and county, which were denied by these public entities with the warning that the plaintiffs must file any court action on the claims within six months.[169] Three and one-half months after the denial, the plaintiffs filed a complaint in federal court alleging violations of federal civil rights statutes and, on the basis of pendant jurisdiction, several state causes of action for which the claims had been filed and denied.[170] After concluding that the federal civil rights causes of action could not lie against public entities, the federal court dismissed the federal causes of action.[171] The federal court also declined to assert pendant jurisdiction over the remaining state causes of action and dismissed them as well, without prejudice.[172] The plaintiffs immediately filed the state causes of action in superior court, but the limitation period for bringing these state actions had expired.[173]

Applying the doctrine of equitable tolling, the supreme court in *Addison* held that the filing of the federal court action suspended the running of the limitations period within which a suit could be brought against the public entities.[174] The *Addison* court stated that this doctrine contains three necessary elements: (1) timely notice of the claim to the defendant, (2) lack of prejudice to the defendant, and (3) reasonable and good faith conduct on the part of the plaintiff.[175]

The *Addison* court viewed this pragmatic doctrine as con-

166. *See, e.g.*, Addison v. State, 578 P.2d 941, 943-45 (Cal. 1978); Prudential-LMI Comm. Ins. v. Superior Court, 798 P.2d 1230, 1238-42 (Ct. App. 1990).
167. 578 P.2d 941 (Cal. 1978).
168. *Addison*, 578 P.2d at 942.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 941-42.
174. *See Addison*, 578 P.2d at 943-45.
175. *Id.* at 943-44.

sistent with the primary purpose of statutes of limitations—to prevent the assertion of stale claims.[176] Since "the federal court action was timely filed," the court explained, "defendants were notified of the action and had the opportunity to begin gathering their evidence and preparing their defense."[177] Because the plaintiffs filed their state court action within one week of their federal lawsuit's dismissal, the court found no prejudice to the defendants.[178] Consequently, the *Addison* court reasoned that its application of equitable tolling satisfied the policy underlying the statute of limitations "without ignoring the competing policy of avoiding technical and unjust forfeitures."[179]

Another California Supreme Court decision, *Elkins v. Derby*,[180] is particularly instructive because it expressly links the equitable tolling and relation back doctrines. The plaintiff in *Elkins* sustained a serious injury while working on the defendant's business premises.[181] The plaintiff reasonably and in good faith filed a timely claim for benefits with the Workers Compensation Appeals Board (WCAB).[182] After several months of adjudication, the WCAB decided that the plaintiff had not been an "employee" at the time of his injury and therefore concluded he was not entitled to benefits.[183] The plaintiff then filed a civil action seeking damages for the same injuries which prompted the compensation claim.[184] Because the action was not filed within one year of the injury, the superior court determined that it was barred by the appli-

176. *Id.* at 942-45.
177. *Id.* at 944.
178. *See id.*
179. *Id.* Subsequent to the holding in *Addison*, the California courts applied the equitable tolling doctrine in several other contexts. *See, e.g.*, Garabedian v. Skochko, 283 Cal. Rptr. 802, 808 (Ct. App. 1991) (discussing the doctrine in the context of a tort claim denied by a federal agency and a subsequent lawsuit in state court); Prudential-LMI Comm. Ins. v. Superior Court, 798 P.2d 1230, 1238-42 (Cal. 1990) (holding that a one-year statute of limitations for suits under an insurance policy tolled from the time the insured gave notice of the claim to the insurer, pursuant to the policy notice provisions, until the insurer denied coverage); Elkins v. Derby, 525 P.2d 81, 84-88 (Cal. 1974) (holding that the statute of limitations on a personal injury action is tolled for the period during which the plaintiff pursues his or her worker's compensation remedy).
180. 525 P.2d 81 (Cal. 1974).
181. *Id.* at 82-83.
182. *Id.*
183. *Id.*
184. *Id.*

cable statute of limitations.[185] The supreme court reversed, relying on the doctrine of equitable tolling.[186]

The supreme court in *Elkins* first noted that the plaintiff was not required to seek workers compensation as a prerequisite to filing a civil action, but could have pursued his compensation and tort remedies simultaneously.[187] Nevertheless, the court concluded that the statute of limitations was equitably tolled during the time the plaintiff pursued his claim for benefits.[188] The plaintiff had acted reasonably and in good faith when confronted with several legal remedies.[189] Moreover, the defendant was not prejudiced by the plaintiff's pursuit of the workers compensation remedy.[190]

In determining that the statute of limitations was equitably tolled, the court in *Elkins* devoted considerable attention to the issue of prejudice to the defendant.[191] "Defendants' interest in being promptly apprised of claims against them in order that they may gather and preserve evidence," the court reasoned, "is fully satisfied when prospective tort plaintiffs file compensation claims within one year of the date of their injuries."[192] Even though "an employer notified of a compensation claim may fail to gather evidence of fault, and such evidence could prove critical in a subsequent tort action," the court found the likelihood that the employer will suffer prejudice to be minimal.[193] "After the filing of the compensation claim, the employer can identify and locate persons with knowledge of the events or circumstances causing the injury," the court reasoned, and "[b]y doing so . . . takes the critical steps necessary to preserve evidence respecting fault."[194] With respect to this finding of minimal prejudice, the *Elkins* court further explained that although an employer may choose not to gather evidence bearing on fault from these persons when faced with only a compensation claim, the employer "will be able in most instances to recontact these peo-

185. *Id.*
186. *See Elkins*, 525 P.2d at 84-88.
187. *Id.* at 82-84.
188. *Id.* at 84-88.
189. *Id.* at 82.
190. *Id.* at 86-87.
191. *Id.*
192. *See Elkins*, 525 P.2d at 86.
193. *Id.*
194. *Id.* at 86-87.

ple . . . for further evidentiary contributions should a controversy as to fault later arise in a tort action."[195]

The *Elkins* court then noted that the courts have applied tolling rules or their functional equivalents liberally to situations in which the plaintiff has satisfied the notification purpose of a limitations statute.[196] As an example, the court specifically referred to the rule "relating back" an amended complaint to the date of the original complaint was filed provided recovery is sought on the same general set of facts that underlay the original complaint.[197] Most importantly, the court noted the relation-back rule does not function only when the amended complaint contains no new theories which might necessitate the adduction of evidence irrelevant to the issues raised by the original complaint.[198] "In the context of amended complaints," the court continued, "it has been felt that a defendant is not prejudiced when a plaintiff changes the theory of his action after the running of the limitations period in a manner requiring the defendant to gather additional evidence."[199]

The common thread between equitable tolling and relation back is that the California courts have applied these doctrines to situations in which the plaintiff has satisfied the basic notification purpose of a statute of limitations.[200] *Elkins* and *Addision* also reveal a pragmatic approach to equitable tolling of statutes of limitations that should likewise apply to the relation-back doctrine. So long as (1) the original complaint notifies the defendant of the general nature of the plaintiff's case, (2) the new allegations in the amended complaint do not unfairly surprise or unduly prejudice the defen-

---

195. *Id.* at 87. The court also observed:

> [A]n employer who suspects that the facts underlying a compensation claim fall near the elusive boundary that separates the claimant's mutually exclusive compensation and tort remedies may well choose to obtain evidence of fault immediately upon the filing of a compensation application even though no court action has yet been initiated.

Id.

196. *See id.*

197. *See id.*

198. *See Elkins*, 525 P.2d at 87 n.7.

199. *See id.*

200. The court noted that tolling rules and their functional equivalents, including the relation-back doctrine, are liberally applied in cases involving amended complaints, particularly to situations in which plaintiffs have satisfied the notification purpose of a limitations statute. *Id.* at 87.

dant, and (3) the plaintiff has not misled the defendant but has acted reasonably in amending the complaint, the amended complaint should relate back to the original complaint for purposes of avoiding the statute of limitations.

Applied under circumstances where the original and amended complaint name the same defendants, the relation-back doctrine focuses mainly on whether the plaintiff has satisfied the notification purpose of the statute of limitations. Ironically, this notification purpose is neither the main focus nor even a relevant consideration when an amended complaint seeks to add a newly-named defendant for a fictitiously-named one. Instead, as discussed below, relation back under California's fictitious defendant practice is concerned with the *plaintiff's* lack of knowledge of the identity of the (subsequently-named) defendant at the time of the filing of the original complaint.[201]

C. The Same Relation-Back Rule Applied in Two Contexts: The Same Defendants and Newly Named Defendants

1. California's Doe Defendant Practice: Relation Back Even Though the Defendant Received No Notice of the Complaint Before the Statute of Limitations Expired

The relation-back doctrine applies in two contexts.[202] The typical context is where the parties named in the amended complaint are the same as those named in the original complaint. A second, more problematic context is where the amended complaint names new defendants who were not named in the original complaint. Most states permit a cause of action alleged against a newly named defendant in the amended complaint to relate back to the date of the original complaint, but only in a very limited set of circumstances. These states follow a relation-back scheme similar to the one

201. The relation back, Doe defendant and equitable tolling doctrines, as well as other modern adjustments in limitations law such as the delayed discovery rule, also reflect a broader concern for the practical needs of plaintiffs. *See, e.g.*, Davies v. Krasna, 535 P.2d 1161, 1168 (Cal. 1975) (noting that modern adjustments in limitations law have reflected concern for the practical needs of prospective plaintiffs); Martinez-Ferrer v. Richardson-Merrell, Inc., 164 Cal. Rptr. 591, 596 (Ct. App. 1980).

202. *See supra* note 97-114 and *infra* notes 204-20 and accompanying text.

in effect in the federal courts, as set forth in Rule 15(c) of the Federal Rules of Civil Procedure.[203]

Federal Rule 15(c)(2) provides that an amendment relates back to the date of the original complaint when the claim asserted in the amended complaint "arose out of the conduct, transaction, or occurrence set forth" in the original complaint.[204] Rule 15(c)(3) adds two additional requirements when the amendment changes the defendant. First, within the period for service of the summons and complaint—generally within 120 days after the filing of the complaint as provided for in Rule 4(m)—the party to be brought in by amendment must have received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits.[205] Second, within this same period for service, the new party must know or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against that party.[206] In other words, an amended complaint adding a new defendant may relate back only if the newly named defendant had timely notice of the original complaint and knows his omission from the original complaint was due to a naming mistake by the plaintiff.

The California courts do not follow the restrictive notion of relation back set forth in Rule 15(c)(3) or its equivalent in other states. Instead, the California courts follow a far more liberal scheme of relation back, commonly referred to as "Doe defendant practice," with respect to amended complaints that add new defendants.[207] Pursuant to section 474 of the California Code of Civil Procedure, a plaintiff ignorant of the identity of a party responsible for damages may name that person in a fictitious capacity, a "Doe" defendant, in the com-

---

203. *See* Joel E. Smith, Annotation, *Relation Back of Amended Pleadings Substituting True Name of Defendant for Fictitious Name Used in Earlier Pleading so as to Avoid Bar of Limitations*, 85 A.L.R.3d 130-57 (1978 & Supp. 1994).

204. FED. R. CIV. P. 15(c)(2).

205. *Id.* at 15(c)(3)(A).

206. *Id.* at 15(c)(3)(B).

207. *See, e.g.*, Austin v. Mass. Bonding & Ins. Co., 364 P.2d 681 (Cal. 1961); Smeltzley v. Nicholson Mfg. Co., 559 P.2d 624 (Cal. 1977); Marasco v. Wadsworth, 578 P.2d 90 (Cal. 1978). For an excellent discussion of the evolution and mechanics of California's Doe defendant practice, see James E. Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger Than Truth*, 30 STAN. L. REV. 51 (1977).

plaint.[208] If that complaint states a cause of action against the Doe defendant and is timely filed, the time period prescribed by the applicable statute of limitations is extended as to the unknown defendant.[209] The plaintiff has up to three years after the commencement of the action to discover the true identity of the unknown defendant and effect service of the (amended) complaint.[210]

Under California's Doe defendant practice, an amended complaint substituting an actual defendant for a fictitious one

---

208. CAL. CIV. PROC. CODE § 474 (West 2004). To use California's Doe defendant practice, a plaintiff must be "ignorant" of the defendant's true name at the time the original complaint is filed. *See, e.g.*, Streicher v. Tommy's Elec. Co., 211 Cal. Rptr. 22, 25 (Ct. App. 1985) (finding that plaintiff's ignorance of defendant's true name "must be genuine and not feigned"); Munoz v. Purdy, 154 Cal. Rptr. 472, 475 (Ct. App. 1979) (observing that a plaintiff must actually be ignorant of the facts giving him a cause of action against the fictitiously named defendant). This requisite "ignorance" has been expansively interpreted to encompass situations where (1) a plaintiff knows the identity of the person but is ignorant of the facts giving the plaintiff a cause of action against that person, or (2) knows the name and all the facts but is unaware that the law grants a cause of action against a fictitiously named defendant and discovers that right by reason of decisions rendered after the commencement of the action. *See, e.g.*, *Marasco*, 578 P.2d at 93; Barnes v. Wilson, 114 Cal. Rptr. 839, 843-44 (Ct. App. 1974); Hogan, *supra* note 207, at 58-69.

A plaintiff's actual knowledge at the time the suit is filed is dispositive in triggering the application of section 474. A plaintiff is not required to exercise reasonable diligence to discover the defendant's identity or the facts giving rise to a cause of action prior to, or even after filing a complaint. *See, e.g.*, Irving v. Carpentier, 11 P. 391, 392 (Cal. 1886); *Streicher*, 211 Cal. Rptr. at 22-25; *see also* Fuller v. Tucker, 101 Cal. Rptr. 2d 776, 781-82 (Ct. App. 2000); Gen. Motors Corp. v. Superior Court, 55 Cal. Rptr. 2d 871, 880-81 n.15 (Ct. App. 1996); *Munoz*, 154 Cal. Rptr. at 475-76.

209. *See* authorities cited *supra* note 207-08.

210. California Code of Civil Procedure section 583.210 requires that a complaint and summons be served upon a defendant within three years of filing the complaint. CAL. CIV. PROC. CODE § 583.210(a) (West 2004). With respect to fictitious defendants, this means that a plaintiff must serve the amended complaint on the Doe defendant within three years of the filing of the original complaint. *See* Barrington v. A. H. Robins Co., 702 P. 2d 563, 565 (Cal. 1985); *General Motors*, 55 Cal. Rptr. 2d at 877 n.10. Moreover, as a result of various trial delay reduction programs and their enabling rules, this three-year statutory period has been significantly reduced. *See* CAL. GOVT. CODE § 68616(h) (West 2004) (providing that Doe defendants in fast track cases shall not be dismissed before all evidence has been introduced at trial); CAL. CT. R. 201.7(b) (requiring complaints to be served on all named defendants within sixty days after filing the complaint, and on a newly added defendant within thirty days after filing the amended complaint); *General Motors*, 55 Cal. Rptr. 2d at 877 n.10 (noting that, as a practical result of trial delay reduction rules, the traditional three-year maximum for service has been effectively reduced to approximately one year).

relates back to the date of the original complaint, thereby defeating the bar of the statute of limitations, provided it seeks recovery on the "same general set of facts" as alleged in the original complaint.[211] When the complaint is amended to substitute the true name of the defendant for the fictional name, the defendant is regarded as a party from the commencement of the lawsuit.[212] Unlike federal Rule 15(c)(3), relation back under California's Doe defendant practice does not depend on whether the newly named defendant had *any* notice of the original complaint before the amended complaint is served on that defendant.[213] Therefore, the two prerequisites of the federal rule—notice of the institution of the original action and knowledge that but for a mistake in identity the newly named defendant would have been named in the original complaint—are irrelevant to relation back under the California's practice.

Consequently, under California's Doe defendant practice, the newly named defendant may first learn of the lawsuit when served with the amended complaint and summons. This service may not occur until years after the applicable statute of limitations has expired. In a personal injury action, for example, the original complaint containing proper Doe allegations must be filed within two years after the cause of action accrues.[214] However, the amended complaint substituting an actual defendant for one designated in the original complaint by a fictitious name may be served on the new defendant up to three years later.[215] During these years the actual (and, as yet, unnamed) defendant may have no knowledge of the lawsuit. Despite this lack of earlier notice and therefore any opportunity to investigate possible claims and to preserve facts, if the amended complaint is served on the new defendant within three years after filing of the original complaint and alleges "the same general set of facts" as the original complaint, the amended complaint will relate back to the date of filing of the original complaint.[216]

---

211. *See* authorities cited *supra* notes 207-10.

212. *See* authorities cited *supra* notes 207 & 210.

213. *See* authorities cited *supra* notes 207-10.

214. *See* CAL. CIV. PROC. CODE § 335.1 (West 2004). Prior to 2003, the limitations period for personal injury actions was only one year. *Id.* § 340(3).

215. *See* authorities cited *supra* note 210.

216. *See, e.g.*, Marasco v. Wadsworth, 578 P.2d 90 (Cal. 1978); Smeltzley v. Nicholson Mfg. Co., 559 P.2d 624 (Cal. 1977); Austin v. Mass. Bonding & Ins.

The California Supreme Court has specifically approved the relation back of amended complaints adding a new defendant in situations where the amended complaint alleges a different cause of action or theory of liability than that alleged in the original complaint.[217] Reasoning that the newly named defendant is not prejudiced by the filing of an amendment after the statute of limitations has elapsed, the *Austin* court observed that "a defendant unaware of the suit against him by a fictitious name is in no worse position if, in addition to substituting his true name, the amendment makes other changes in allegations on the basis of the same general set of facts."[218] Conversely, according to the *Austin* court:

> [A] plaintiff who did not know the defendant's true name at the time the original complaint was filed . . . has at least as great a need for the liberality of amendment permitted by the modern rule as a plaintiff who knew the defendant's name throughout, and he should not be penalized merely because he was compelled to resort to his statutory right of using a fictitious name.[219]

Co., 364 P.2d 681 (Cal. 1961).

217. *See, e.g.*, *Austin*, 364 P.2d at 683-84. Similarly, the court in *Smeltzley* found that an amendment substituting a named individual previously sued in a fictitious name related back to the filing of the original complaint. The recovery was for the same accident and injury, even though the amended complaint set out a different legal theory and stated a different cause of action. 559 P.2d at 629; *see also Marasco*, 578 P.2d at 791.

218. *Austin*, 364 P.2d at 684, *quoted with approval in* Barrington v. A. H. Robins Co., 702 P.2d 563, 565 (Cal. 1985). The reasoning in *Austin* would seem to justify relation back even where an amended complaint naming a new defendant alleges a wholly different set of facts than the original complaint. However, the courts have not suggested that a different, *more* liberal relation-back standard should apply to amended complaints substituting actual defendants for fictitious defendants. Indeed, such a relaxed standard in the context of Doe defendant practice could permit a wholesale circumvention of a statute of limitations as to newly added defendants where a cause of action alleged in the original complaint has no relationship to one alleged in an amended complaint adding new defendants. However, limitations on party joinder would preclude adding new defendants unless the claims against them arise out of the same transaction or occurrence as alleged against existing named defendants. *See* CAL. CIV. PROC. CODE § 379 (West 2004).

The courts have used this reasoning to permit a plaintiff to file after the statute of limitations has expired an amended complaint that not only substitutes an actual defendant for a fictitious one but also cures a failure to properly plead Doe allegations in the original complaint. *See, e.g.*, Diekmann v. Superior Court, 220 Cal. Rptr. 602 (Ct. App. 1986); *see also* Woo v. Superior Court, 89 Cal. Rptr. 2d 20, 24-25 (Ct. App. 1999); Streicher v. Tommy's Elec. Co., 211 Cal. Rptr. 22, 27 (Ct. App. 1985).

219. *Austin*, 364 P.2d at 684.

Therefore, the California courts apply the "same general set of facts" standard for relation back regardless of whether the amended complaint names the same or a new defendant.[220]

2. The Real Concern When the Original and Amended Complaints Name the Same Defendant: Whether that Defendant Has Been Misled and Prejudiced

California's Doe defendant practice is highly instructive on the real concern of the relation-back doctrine when the original and amended complaints name the *same* defendants. As discussed above, this Doe defendant practice permits relation back even though the newly named defendant never has any notice of the plaintiff's claim before the limitations period has expired.[221] The newly named defendant first receives notice of the plaintiff's claim after the limitations period has expired, and only then can that defendant begin to marshal evidence to defend against the plaintiff's claim. California's Doe defendant practice is therefore totally unconcerned with whether the actual defendant is notified of the need to investigate facts, before the expiration of the relevant statute of limitations.

As to amended complaints against the *same* defendants—defendants who have been put on notice of the plaintiff's claim by the original complaint and through subsequent discovery—the primary concern should therefore be whether the allegations in the original complaint have misled, and thereby prejudiced, such defendants with respect to their preparation to meet the issues raised in the amended complaint.[222] If the allegations in the original complaint have caused the defendant to investigate only facts that later turn out to be totally irrelevant to the new allegations in the proposed amended complaint, then the original complaint will have misled the

220. *Id.* at 683-84; *see also* Smeltzley v. Nicholson Mfg. Co., 559 P.2d 624 (Cal. 1977); Marasco v. Wadsworth, 578 P.2d 90, 92-93 (Cal. 1978).

221. *See supra* notes 207-17 and accompanying text.

222. *See, e.g.*, Goldman v. Wilsey Foods, Inc., 265 Cal. Rptr. 294, 298-99 (Ct. App. 1989) (holding that an amended complaint alleging three new causes of action related back where defendants were aware of and not misled as to the nature of the plaintiff's case); Idding v. North Bay Const. Co., 46 Cal. Rptr. 2d 149, 150-51 (Ct. App. 1995) (holding that an amended complaint related back where the timing of the amendment did not mislead or prejudice defendants).

defendant as to the true nature of the plaintiff's case. Conversely, if the allegations in the original complaint have caused the defendant to gather and preserve facts through discovery which *also* respond to the new allegations in the amended complaint, then the defendant will suffer no prejudice if the amended complaint relates back.

IV. THE CALIFORNIA COURTS SHOULD ADOPT A PRAGMATIC APPROACH WHEN APPLYING THE RELATION-BACK DOCTRINE

A. California's Relation-Back Rule Needs Clarification

The issue of the proper application of California's relation-back doctrine is more than an academic concern. As a comparison of two fairly recent appellate decisions illustrate, relation back has significant practical consequences. In *Honig v. Financial Corp. of America*,[223] the court of appeal held that the trial court abused its discretion in denying the plaintiff's motion to file an amended complaint approximately two months before the action was scheduled for trial, and held further that the amended complaint related back to the original complaint.[224]

The plaintiff in *Honig* filed a complaint against his employer while still employed by the defendant institution.[225] His original complaint alleged a campaign of harassment, humiliation, and intimidation.[226] This complaint asserted several causes of action, including attempted constructive termination, fraud, breach of contract, and intentional infliction of emotional distress.[227] After his initial complaint was filed, the plaintiff Honig was fired for insubordination.[228] The plaintiff's lawsuit was assigned to a fast track court, and the parties conducted extensive discovery. The defendant thoroughly deposed Honig regarding the events which occurred subsequent to the filing of his original complaint.[229]

Approximately two years after his filing of the original

223. 7 Cal. Rptr. 2d 922 (Ct. App. 1992).

224. *Id.* at 925-26. For a more detailed discussion of the facts in *Honig*, *see supra* text accompanying notes 41-52.

225. *Id.* at 923.

226. *Id.* at 923-24.

227. *Id.*

228. *Id.* at 924.

229. *See Honig*, 7 Cal. Rptr. 2d at 923-24.

complaint, the plaintiff moved to amend his complaint to add facts that occurred after the initial complaint.[230] The proposed amended complaint asserted a cause of action for wrongful discharge, and contended the charge of insubordination was created as a pretext for the termination.[231] The amended complaint also alleged that the defendant defamed Honig after his termination by repeating this pretextual reason to others.[232] The trial court denied the plaintiff's motion to amend, and the plaintiff appealed.

The court of appeal first ruled that the trial court abused its discretion when it denied Honig leave to file an amended complaint. The *Honig* court reasoned that the parties were fully aware of the events which occurred subsequent to the original complaint and which preceded the actual discharge, including the plaintiff's claim that he had been blackballed and therefore was unable to find new employment.[233] Because the plaintiff was fully deposed by the defendant on these new issues, the court concluded that no prejudice to the defendant would have resulted had the proposed amendments been permitted.[234]

The *Honig* court then concluded that the statute of limitations did not bar the amended complaint because it related back to the original complaint.[235] The facts alleged in the original and amended complaints all related to the plaintiff's discharge, and all injuries alleged were those which were expected from a wrongful discharge, including those asserted in the defamation cause of action.[236] The facts alleged in the amended complaint "were in the chain of events which were originally pled," the court reasoned, and therefore referred to the "same general set of facts."[237] Apparently influenced by the defendant's knowledge of the facts, gained through extensive pretrial discovery, the *Honig* court observed that the proposed amendment did not significantly add new dimensions to the suit.[238]

---

230. *Id.* at 924.
231. *Id.*
232. *Id.*
233. *Id.* at 925-26.
234. *Id.* at 926.
235. *Honig*, 7 Cal. Rptr. 2d at 926-27.
236. *Id.*
237. *Id.* at 926-27.
238. *Id.*

However, in *Lee v. Bank of America*,[239] a case with facts almost identical to those in *Honig*, another court of appeal expressly disagreed with the relation-back conclusion reached in *Honig*.[240] The plaintiff in *Lee* was a branch manager for the defendant bank.[241] After complaining to her superior about various safety hazards at the branch, she was demoted in 1998.[242] While still employed by the defendant, the plaintiff Lee filed a timely complaint in 1989 alleging wrongful demotion.[243] The defendant bank then fired Lee in April 1989, more than a month after she filed her lawsuit.[244] Lee amended her complaint in 1991 to allege wrongful termination.[245] All causes of action in her amended complaint were based on the April 1989 termination. The defendant bank then moved for summary judgment, which the trial court granted on statute of limitations grounds.[246] The plaintiff appealed, and contended that her amended complaint related back to her original 1989 complaint.[247]

The court of appeal in *Lee* first found the *Honig* facts indistinguishable.[248] However, the court then declined to follow *Honig's* relation-back reasoning and conclusion.[249] The *Lee* court considered *Honig* unfaithful to the way the California Supreme Court had construed the "same general set of facts" test in *Barrington v. A. H. Robins Co.*,[250] where the court denied relation back because the amended complaint alleged a different set of operative facts and involved a different "offending instrumentality."[251] The *Lee* court also reviewed nu-

239. 32 Cal. Rptr. 2d 388 (Ct. App. 1994).
240. *Id.* at 392-97.
241. *Id.* at 389.
242. *Id.* at 389-90.
243. *Id.* at 390.
244. *Id.*
245. *See Lee*, 32 Cal. Rptr. 2d at 390.
246. *Id.*
247. *Id.*
248. *Id.* at 390-92.
249. *Id.* at 392-97.
250. Barrington v. A. H. Robins Co., 702 P.2d 563 (Cal. 1985).
251. *See Lee*, 32 Cal. Rptr. 2d at 393-94 n.7. The *Lee* court contrasted *Barrington* with *Honig* as follows:

> *Barrington* shows that different acts allegedly leading to the same injuries are not part of the same general set of facts even though the two different acts may, in context, have been part of the same "story.". . . *Honig*, by contrast, held that different acts (termination of employment as distinct from defaming one's reputation) leading to dis-

merous other appellate decisions applying the "same general set of facts" test in analogous circumstances, and observed that "*Honig* did not grapple with the facts in any previous decision, nor attempt to address the problem of distinct wrongful acts."[252] The *Lee* court then concluded that Lee's amended complaint was not based on substantially the same general facts as her original complaint because the two pleadings were based on different wrongful conduct—wrongful demotion versus subsequent wrongful termination.[253] Therefore, the court held her amended complaint did not relate back, and was barred by the statute of limitations.[254]

At no time did the *Lee* court consider whether the defendant had notice of, and sufficient opportunity to prepare for, the new matter alleged in the proposed amended complaint. Nor did it inquire to determine whether the defendant was unfairly surprised and therefore prejudiced by the new allegations of wrongful termination. Instead, by analogical reasoning, the *Lee* court concluded that the relationship between the allegations of the plaintiff Lee's original and amended complaint was more like that of the cases finding no relation back than those finding otherwise.[255] Unlike the pragmatic analysis of *Honig*, the *Lee* court's approach is best described as a formalistic application of the "same general set of facts" standard.[256]

B. The Relation-Back Doctrine Should Be Applied in a Pragmatic Manner

This Article has already discussed how the current restrictions on California's relation-back doctrine—the "same

---

tinct injuries (loss of job as distinct from loss of reputation) were part of the same general set of facts *just because* they were part of the same "story."

Id. at 394.

252. *Id.* at 396.

253. *Id.* at 397-98.

254. *See id.* at 398-400. Adding insult to injury, the court ruled that any causes of action for wrongful demotion would also be barred because plaintiff Lee's amended complaint superceded her original complaint. *Id.*

255. *Id.* at 396-98.

256. A recent case characterized *Lee* as standing for the proposition that "different acts leading to distinct injuries are *not* part of the 'same general set of facts' even though they may be part of the same 'story.'" *See* McCauley v. Howard Jarvis Taxpayers Ass'n, 80 Cal. Rptr. 2d 900, 904 (Ct. App. 1998) (emphasis added).

accident," "same injury," and "same instrumentality" requirements—are inconsistent with the liberal view of relation back endorsed by the California Supreme Court in *Austin*.[257] The formalistic application of these requirements as rules of exclusion ignores the fundamental question of whether relation back, in the context of the specific case before the court, will actually be contrary to the policy of the statute of limitations. This formalistic approach, exemplified by cases such as *Lee*, determines the relation back question without any practical assessment of the real concerns that are relevant when the original and amended complaints name the same defendants.

As discussed in Part II, when compared to California's Doe defendant practice, the primary concern in the relation-back determination should be whether the allegations of the original complaint have actually misled and thereby prejudiced the defendants with respect to their ability to collect and preserve facts necessary to respond to the new allegations in the amended complaint.[258] The relation-back doctrine also reflects a broader concern for the practical needs of plaintiffs who may not know the precise nature of their cases until after formal discovery, as well as for the competing policy of promoting litigation of cases on their merits by avoiding dismissals based on pleading technicalities.[259]

The doctrine of equitable tolling demonstrates how all these concerns can be addressed in a pragmatic manner. As discussed in Part II, the equitable tolling and relation-back doctrines are functional equivalents in that they apply to situations in which the plaintiff has satisfied the basic notification purpose of a statute of limitations.[260] When applying the equitable tolling doctrine, a court must practically assess the facts of the individual case before it to determine whether

257. *See supra* notes 108-60 and accompanying text.

258. *See supra* notes 221-22 and accompanying text.

259. *See, e.g.*, Davies v. Krasna, 535 P.2d 1161, 1168 (Cal. 1975) (noting that modern adjustments in limitations law have reflected concern for the practical needs of prospective plaintiffs); Martinez-Ferrer v. Richardson-Merrell, Inc., 164 Cal. Rptr. 591, 596 (Ct. App. 1980) (arguing that the *Davies* rational should serve as an authoritative justification); Austin v. Mass. Bonding & Ins. Co., 364 P.2d 681, 683 (Cal. 1961) (explaining the modern relation-back doctrine is designed to further the policy of deciding cases on their merits); *see also* cases cited *supra* note 112.

260. *See supra* notes 162-200 and accompanying text.

the defendant has received timely notice of the plaintiff's claim and has suffered prejudice, and whether the plaintiff has acted reasonably and in good faith.[261] A similar case-by-case, pragmatic approach is also appropriate for relation-back determinations.

What, more precisely, is the nature of this pragmatic approach to relation back? This pragmatic approach would focus on many of the same factors that are relevant to the determination of whether to permit an amended complaint generally, regardless of any relation back issue. As discussed extensively in Part I of this Article, these factors include whether the plaintiff has unreasonably delayed presentation of the motion to amend and whether this delay has resulted in substantial prejudice to the defendant.[262] These factors should be applied in a pragmatic manner designed to permit relation back unless the new allegations in the amended complaint will unfairly surprise, and thereby unduly prejudice, the defendant in preparation for trial.

As with amendments generally, a defendant will not suffer any prejudice in the relation-back context where, as a result of pretrial discovery, the defendant is already prepared to respond to the new factual and legal theories alleged in the proposed amendment.[263] Nor will a defendant suffer undue prejudice merely because the amended complaint may necessitate some additional investigation to respond to these new theories. Even under the formalistic approach to relation back, a defendant is not prejudiced when the amended complaint requires the defendant to gather additional, available evidence.[264]

With respect to an amended complaint that names the same defendants as the original complaint, the only significant factor is whether the defendant will suffer undue prejudice as a result of the relation back of the amended complaint.[265] Delay in presenting the amendment, even inexcusable delay, is not, in and of itself, a significant factor when relation back is sought in this context.[266] In light of

261. *See supra* notes 168-200 and accompanying text.
262. *See supra* notes 19-76 and accompanying text.
263. *See supra* notes 38-76 and accompanying text.
264. *See supra* notes 114 & 198-99 and accompanying text.
265. *See supra* notes 107-43 and accompanying text.
266. *See supra* notes 107-43 and accompanying text.

California's Doe defendant practice, where the California Supreme Court recognizes no prejudice to a newly added defendant who first learns of a lawsuit several years after the original complaint was filed, it is difficult to understand how a defendant already named and served as a defendant before the amendment was proposed can be prejudiced *solely* by delay in presenting an amendment.[267] As with the determination of whether to permit an amendment generally, delay in the relation-back context should only be a relevant factor in a limited set of circumstances. One is where the delay has caused the defendant substantial prejudice because important information has been irretrievably lost because of destroyed evidence or missing witnesses.[268] Another is where the delay requires a continuance because the proposed amendment is presented on the eve of trial and, if permitted, will necessitate more discovery.[269]

This approach is a pragmatic one because the trial court must assess whether, as a result of pretrial discovery, the defendant is already prepared to contest to the new factual and legal theories alleged in the amended complaint. If the original complaint caused the defendant to gather and preserve facts through discovery which respond to the new allegations in the plaintiff's proposed amended complaint, then relation back of the amended complaint will not result in prejudice to the defendant. Likewise, where the original complaint caused

---

267. *Hirsa v. Superior Court* illustrates this point. 173 Cal. Rptr. 418 (Ct. App. 1981). The plaintiff in *Hirsa* was injured when his car was rear-ended by a van driven by one defendant and owned by another defendant, a corporation, who was also the driver's employer. *Id.* at 419. Plaintiff subsequently filed a timely complaint against the driver and the corporation alleging the accident was caused by the negligence of the defendant driver, and seeking personal injury damages from both defendants. *Id.* Four days after the defendant's deposition, the plaintiff sought to amend his complaint to add a cause of action against the defendant employer for negligent entrustment of the van to the defendant driver. *Id.* The *Hirsa* court rejected the defendant's argument that the plaintiff engaged in "unwarranted delay" in presenting the amendment. *Id.* at 420. The court reasoned:

> Particularly is this true in light of the Supreme Court holdings in both *Austin* and *Smeltzley* . . . that amending a complaint to substitute a named defendant for a fictitiously named defendant after the statute of limitations has run does not establish that the plaintiff was dilatory or that the newly substituted defendant was prejudiced.

Id.

268. *See supra* notes 33-34 and accompanying text.

269. *See supra* notes 31-32 & 77-85 and accompanying text.

the defendant to conduct discovery sufficient to respond to the new allegations in the amended complaint, that the two pleadings differ substantially in their factual allegations is of little consequence. The fact that an amended complaint refers to a different accident, injury, or instrumentality should not preclude relation back in such circumstances.

How does this pragmatic approach apply to actual cases? Facts such as those in the *Lee* and *Honig* cases provide a good vehicle to demonstrate how this approach would apply. In each of those cases, the plaintiff filed a complaint before the plaintiff's employment was actually terminated by the defendant employer.[270] The plaintiff sought to amend the complaint to allege new allegations of wrongful discharge after the relevant statute of limitations had expired.[271] Under the pragmatic approach set forth above, the trial court in such cases would not rely solely on the formal relation-back doctrine—i.e., the "same general set of facts" and "same accident, injury, and instrumentality" tests—to answer the relation-back question. Instead, the court would determine whether, as a result of investigation and discovery, the defendant employer is already prepared to defend against the wrongful discharge cause of action.

Obviously, in the actual *Honig* case, the defendant was fully aware of, and prepared to defend against, the "new" allegations of wrongful discharge in the amended complaint. The *Honig* defendant was directly involved in the events surrounding the plaintiff's discharge, and had conducted extensive discovery of the facts relevant to the plaintiff's new cause of action.[272] One might suspect the same was true in the *Lee* case, but the *Lee* court never undertook this pragmatic inquiry because it deemed such a practical analysis was irrelevant to the relation back determination.

One of the consequences of this proposed pragmatic approach is that the courts may no longer simply apply a formalistic rule in all cases to determine whether an amended complaint relates back to the original. Instead, in some cases the court must make a practical assessment of the extent of prejudice to the defendant based on the facts in the record of

270. *See supra* notes 39-44, 225-28 & 241-44 and accompanying text.
271. *See supra* notes 47-52, 230-32 & 245-46 and accompanying text.
272. *See supra* notes 42-58, 239 & 233-34 and accompanying text.

that case. One objection might be that such an ad hoc inquiry as to every amended complaint would be time consuming and unnecessary. Such an inquiry would indeed seem to be unnecessary in those cases where the likelihood of prejudice or unfair surprise to the defendant is remote. In other words, there may be a category of amendments where the court can properly presume that the defendant will suffer no prejudice or surprise, and therefore may rely solely on the application of a formal rule to justify relation back.

What types of amendments fall into this category? Those addressed by the current relation-back doctrine, that is, amended complaints that rest on the "same general set of facts" and refer to the "same accident," "same injuries," and "same offending instrumentality" as the original complaint.[273] In other words, the "same accident, injury, and instrumentality" test should be used (only) as a rule of inclusion and not one of exclusion.[274] If the two pleadings refer to the same accident, injuries, and instrumentality, then the amended complaint must relate back to the original complaint. But if the amended complaint does not refer to the same accident, injuries, and instrumentality, then the trial court must undertake a practical analysis of the facts of the case before it to deter-

273. *See, e.g.*, Citizens Ass'n for Sensible Dev. of Bishop Area v. County of Inyo, 217 Cal. Rptr. 893, 898 (Ct. App. 1985) (ruling that when recovery is sought on the same basic set of facts, the main policy of the statute of limitations—to put defendants on notice of the need to defend against a claim and allow them time to prepare a fair defense—is satisfied); Lamont v. Wolfe, 190 Cal. Rptr. 874, 877-78 (Ct. App. 1983) (holding that the relation-back doctrine is unlikely to prejudice defendants and will not thwart the purpose of the statute of limitations where the amended complaint is based on the same alleged acts of medical negligence as the original complaint); Willard v. Hagenmeister, 175 Cal. Rptr. 365, 373 (Ct. App. 1981) (ruling that defendants could claim neither prejudice nor surprise where an amended complaint alleging lack of informed consent related to the "same general set of facts" as a prior complaint alleging fraud); Smeltzley v. Nicholson Mfg. Co., 559 P.2d 624, 629 (Cal. 1977) (holding that an amended complaint that stated a different legal theory and different cause of action than the original complaint rested on the same general set of facts because both were seeking recovery for the same accident and injuries).

274. This is somewhat like Justice Holmes' test for determining whether a federal question exists for purposes of subject matter jurisdiction in the federal courts. *See* Merrell Dow Pharms., Inc., v. Thompson, 478 U.S. 804, 809 n.5 (1986) (noting that Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended). The "same accident and injury" test is more useful for describing those instances in which an amended complaint will clearly relate back than it is for describing those circumstances in which an amended complaint will not relate back.

mine whether the proposed amendment, if permitted, will actually cause the defendant to suffer undue prejudice.

This pragmatic approach to relation back is similar to that utilized by the federal courts when determining whether an amended complaint refers to the "conduct, transaction, or occurrence" set forth in the original complaint, within the meaning of Federal Rule 15(c)(2).[275] The federal courts often consider whether relation back will cause the defendants undue prejudice, even where the two pleadings name the same defendants.[276] Where the amended complaint adds a new defendant, Federal Rule 15(c)(3) expressly requires the trial court to determine whether the new defendant received such notice of the action that the new defendant "will not be prejudiced in maintaining a defense on the merits."[277]

This pragmatic approach is also consistent with that undertaken by the California Supreme Court when applying the new "same general set of facts" test in cases decided shortly after the modern relation-back doctrine was adopted in *Austin*.[278] In *Wilson v. Bittock*,[279] for example, a case decided four years after *Austin*, the California Supreme Court found the absence of prejudice to the defendants relevant to the determination of whether an amendment related back because it

275. FED. R. CIV. P. 15(c)(2).

276. *See, e.g.*, Grattan v. Burnett, 710 F.2d 160 (4th Cir. 1983) (finding relation back proper where a factual nexus existed between the amendment and the original complaint, the defendant had notice of the claim and was not prejudiced, and evidence relevant to the amendment had been preserved); Harthman v. Texaco, Inc. (*In re* Tutu Wells Contamination Litigation), 846 F. Supp. 1243, 1260-61 (D.V.I. 1993) (observing that because the chief consideration in determining the applicability of relation back is prejudice to the opposing party); Spillman v. Carter, 918 F. Supp. 336 (D. Kan. 1996) (holding that an amended complaint alleging employment discrimination related back to the original complaint for constructive discharge where the defendant would not be prejudiced); Davis v. Univ. of Chic. Hosp., 158 F.R.D. 129, 131-32 (N.D. Ill. 1994) (holding that an amended complaint alleging retaliation related back to the original complaint alleging employment discrimination where the defendant was not unfairly surprised or prejudiced by the amendment); Fed. Leasing v. Amperif Corp., 840 F. Supp. 1068 (D. Md. 1993); Barcume v. City of Flint, 819 F. Supp. 631, 636-37 (E.D. Mich. 1993) (holding that an amended complaint alleging sexual harassment which occurred after the original complaint was filed did not relate back because the defendant was not made aware of the new claims through discovery).

277. FED. R. CIV. P. 15(c)(3)(B).

278. *See, e.g.*, Grudt v. City of Los Angeles, 468 P.2d 825, 828-29 (Cal. 1970); Wilson v. Bittick, 403 P.2d 159, 162-65 (Cal. 1965); *see also supra* notes 108-14 and accompanying text.

279. 403 P.2d 159 (Cal. 1965).

was based on the "same general set of facts" as originally pleaded. *Wilson* was but one of a series of lawsuits over the title to and rents from a half section of unimproved farmland.[280] The plaintiff Wilson and one Browne claimed sole ownership of the half section, and were parties to prior quiet title actions involving this disputed parcel.[281] In the instant action, the plaintiff Wilson sought damages from the defendants, lessees of Browne who had been farming the land.[282]

The original complaint in *Wilson* alleged that during the previous three years, defendants had been trespassing on the "eastern quarter" only of the half section of land in dispute.[283] In the amended complaint, filed several years later and long after the relevant statute of limitations had expired, the plaintiff sought damages for trespass committed during the same period but upon the *entire* half section.[284] The question for the supreme court was whether the amended complaint may be deemed to relate back to the date of the original complaint so as to avoid the bar of statute of limitations.[285] The court concluded that it did.[286]

The *Wilson* court first observed that under the "same general set of facts" standard recently formulated in *Austin*, whether or not a new cause of action is alleged in the amended complaint is no longer the proper test.[287] The court then found the "general set of facts" underlying the pleadings was not merely the alleged trespass on the eastern quarter section mentioned in the original complaint, but rather was "the lengthy dispute between all these parties over the title to and rents or profits from the entire half section of land."[288] In light of the prior ejectment litigation over the entire half section, the court viewed it totally unrealistic to hold now that the omission of the western quarter from the original complaint somehow restricted the "general set of facts" underlying the instant litigation to the eastern quarter alone.[289]

---

280. *Id.* at 160.
281. *See id.* at 160-61.
282. *See id.* at 161.
283. *Id.* at 160.
284. *Id.* at 161.
285. *Wilson*, 403 P.2d at 162-63.
286. *See id.* at 162-65.
287. *Id.* at 163-64.
288. *See id.* at 164.
289. *See id.*

The *Wilson* court also found the absence of prejudice to the defendants relevant to the relation-back determination.[290] Because the defendants in this trespass action were aware of the plaintiff Wilson's claim to the entire half section in the ejectment lawsuits, treated the half section as a single unit, and intended to defend the amended complaint in a manner identical to the original complaint, the court concluded the defendants could claim no surprise at the plaintiff's renewed assertion of rights in the entire half section of land.[291] Consequently, the court concluded that both pleadings arose out of the "same general set of facts."[292] In other words, because the defendants had knowledge of the allegations of the amended complaint and were fully prepared to contest those allegations, they would suffer no prejudice if the amended complaint were allowed to relate back.[293] The *Wilson* court's inquiry into notice, surprise, and prejudice is an excellent example of a pragmatic, as opposed to formalistic, approach to the relation-back doctrine.[294]

C. The Same Pragmatic Approach Should Apply to Relation Back of Supplemental Complaints

Although this Article focuses on amended complaints, much of the discussion also applies to supplemental complaints. A supplemental complaint alleges facts material to the case but which occur after the filing of the original complaint.[295] Some courts view the relation-back doctrine as simply inapplicable to supplemental complaints because supple-

290. *Id.* at 164-65.

291. *See Wilson*, 403 P.2d at 164-65.

292. *See id.*

293. *See id.* at 164.

294. Other cases have considered lack of prejudice to the defendant relevant to the determination of whether an amended complaint should relate back. *See, e.g.*, Goldman v. Wilsey Foods, Inc., 265 Cal. Rptr. 294, 298-99 (Ct. App. 1989) (holding that an amended complaint adding new cause of action for employment discrimination related back to the original complaint for emotional distress where defendants were not unaware of or misled by the nature of plaintiff's case); Olsen v. Volkswagen of Am., 247 Cal. Rptr. 719, 722-23 (Ct. App. 1988) (finding that a defendant would suffer no prejudice from relation back of amended complaint); Pasadena Hosp. Ass'n v. Superior Court, 251 Cal. Rptr. 686, 689-90 (Ct. App. 1988) (finding relation back of amended complaint proper where no prejudice to the defendant would result); Hirsa v. Superior Court, 173 Cal. Rptr. 418, 420-21 (Ct. App. 1981); Smeltzley v. Nicholson Mfg. Co., 559 P.2d 624, 628 n.1 (Cal. 1977).

295. *See* CAL. CIV. PROC. CODE § 464(a) (West 2004).

mental complaints, by definition, are based on new matter.[296] Others consider relation back applicable only where the original complaint gave notice that the alleged wrongful conduct was of a continuing nature and the supplemental complaint alleged new events that are a continuation of that same wrongful conduct.[297] However, under the pragmatic approach set forth in this Article, there would seem to be little reason to treat a supplemental complaint any differently than an amended complaint.

A supplemental complaint should relate back to the date of the original complaint in those cases where the defendant had timely notice of the subject matter alleged in the supplemental complaint and was not prejudiced in preparing his defense.[298] Where, for example, a plaintiff employee only alleges wrongful demotion in her original complaint, subsequently is fired by her employer, and after the statue of limitations has run files a supplemental complaint alleging wrongful discharge, relation back should be permitted if the defendant has already gathered and preserved the facts necessary to defend against the wrongful discharge cause of action.

V. CONCLUSION

The pragmatic approach set forth in this Article comports with the modern view of civil litigation where pleadings serve as a general blueprint for discovery and their modification is expected through subsequent pretrial proceedings. California

---

296. *See* ITT Gilfillan, Inc. v. City of Los Angeles, 185 Cal. Rptr. 848, 850-51 (Ct. App. 1982); *cf.* McCauley v. Howard Jarvis Taxpayers Ass'n, 80 Cal. Rptr. 2d 900, 904-05 (Ct. App. 1998) (holding that an amended complaint alleging discrete events that occurred after the original complaint was filed did not relate back); Foxborough v. Van Atta, 31 Cal. Rptr. 2d 525, 532-33 (Ct. App. 1994) (holding that an amended complaint did not relate back, even though it involved the same injury, because it referred to a different incident that occurred after the original complaint was filed).

297. *See, e.g.*, Bendix Corp. v. City of Los Angeles, 198 Cal. Rptr. 370, 372-73 (Ct. App. 1984); William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1057-58 (9th Cir. 1981), *reh'g en banc denied*, 668 F.2d 1059 (9th Cir. 1982); *see also* Lamont v. Wolfe, 190 Cal. Rptr. 874 (Ct. App. 1983); Lee v. Bank of Am., 32 Cal. Rptr. 2d 388 (Ct. App. 1994).

298. *See, e.g.*, *William Inglis*, 668 F.2d at 1057-58 (ruling that relation back of a supplemental complaint will not prejudice the defendant because the original complaint gave notice of a continuing dispute and the supplemental complaint, even though based on new events, alleged events that were a continuation of the old cause of action); *Bendix Corp.*, 198 Cal. Rptr. at 373 (quoting and following the rationale of *William Inglis*).

remains nominally a code or fact pleading jurisdiction.[299] Under modern California litigation practice, however, the allegations of a complaint are intended to put the defendant on notice of the facts and issues as they appear at the beginning of the lawsuit.[300] Only through discovery do the parties determine what factual and legal issues actually constitute the litigation, and which of these are really in dispute. These issues are then made explicit through summary judgment motions, case management statements, and pretrial orders.[301] So long as discovery and pretrial orders notify the parties of the real issues in time to adequately prepare for trial, there is little justification for strict reliance on the specific allegations of the original complaint, until amended, to frame these issues as the litigation progresses toward trial.

In many circumstances, an amended complaint may allege issues that are "new" to the pleadings but, as a result of discovery and other pretrial proceedings, are already known to the parties to be the real issues in dispute for resolution at trial. A doctrine that prevents such an amended complaint from relating back because it refers to a different accident, injury, or offending instrumentality than the original complaint is a relic left over from an era before discovery and pretrial orders defined the issues for trial.

---

299. *See* CAL. CIV. PROC. CODE § 425.10(a) (West 2004) (requiring a complaint to contain "a statement of the facts constituting the cause of action").

300. *See, e.g.*, Holmes v. Cal. Nat'l Guard, 109 Cal. Rptr. 2d 154, 169 (Ct. App. 2001) (finding a complaint adequate because it put defendants on notice of the nature of the plaintiff's claims); Estate of Archer, 239 Cal. Rptr. 137, 141 (Ct. App. 1987) (ruling that a useful test for determining adequacy is whether the complaint as a whole apprises the defendant of the factual basis of the claim); Semole v. Sansouche, 104 Cal. Rptr. 897, 900-01 (Ct. App. 1972) (noting that modern discovery procedures necessarily affect the amount of detail that should be required in a pleading, and ruling that allegations of a complaint should fairly apprise a defendant of the factual nature of the claim against him); Leet v. Union Pac. R.R. Co., 155 P.2d 42, 50-51 (Cal. 1944) (observing that fairness in pleading is to give the defendant such notice by the complaint that he may prepare his case).

301. State and local rules of court set forth the requirements for case management conferences, statements, and orders. *See, e.g.*, CAL. CT. R. 212; CAL. JUD. COUNCIL FORM CM-110 (requiring parties to set forth a brief statement of their case on the Case Management Statement in preparation for the case management conference); SAN DIEGO SUP. CT. R. 2.15 (requiring parties to state the legal issues in dispute in the Joint Trial Readiness Conference Report). One such requirement is that parties must meet and confer before the case management conference to identify the facts and issues that are in dispute. *See* CAL. CT. R. 212(f).

***