



BEWARE CALIFORNIA'S "FICTITIOUS DEFENDANT" STATUTE

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In 1872, the California Legislature enacted Section 474 of the Code of Civil Procedure, also known as the "fictitious defendant" statute. Section 474 is California's codification of the common law "relation back" doctrine, a procedural device that permits a plaintiff to bring a new defendant into a lawsuit even if the statute of limitations has run, provided certain procedural requirements are satisfied.

In addition to procedural requirements, the plaintiff, as of the time of filing the complaint, must have been either ignorant of the name of the defendant or ignorant of the facts that would have caused a reasonable person to believe that liability was probable.¹ If either of these conditions is satisfied, then the plaintiff will be permitted to substitute the new defendant for a doe defendant, even if the statute of limitations has run. This ostensibly unfair exception to the statute of limitations has been articulated by one Court as being "a satisfactory compromise between the harsh effect on a plaintiff of the statute of limitations and the unfairness to a defendant of attempting to litigate a stale claim."²

Over the years, it has not proven to be difficult for a plaintiff to fall within the parameters of Section 474. Unlike the burden placed on a plaintiff to conduct a reasonable investigation when determining whether a cause of action is barred by the statute of limitations,³ no such burden is placed on the plaintiff for purposes of Section 474. Whether a plaintiff is permitted to substitute a named defendant for a fictitious defendant depends only on the plaintiff's actual knowledge at the time of filing the original complaint, i.e. Section 474 does not impose upon the plaintiff the duty to search for facts that she does not have at the time of filing.⁴ The Supreme Court has explained that "whether (the plaintiff's) ignorance is from misfortune or negligence, he is alike ignorant, and this is all the statute requires."⁵

Section 474 is yet another manifestation of California's liberal legislative approach to amended pleadings.

In furtherance of this public policy, the *Code of Civil Procedure* provides trial courts with nearly unbridled discretion to allow a party to amend its pleadings. This discretion is curbed only by the illusory restriction that the trial court's decision to permit an amendment be "in furtherance of justice."⁶ In fact, it is not uncommon for motions to amend to be granted after trial has commenced where the plaintiff has become apprised of new facts warranting, at least in the trial court's opinion, an amendment.

¹ *Code of Civil Procedure* Section 474; *Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 363; *General Motors v. Superior Court* (1996) 48 Cal.App.4th 580, 588.

² *Sobeck & Assocs., Inc. v. B & R Investments No. 24* (1989) 215 Cal.App.3d 861, 870.

³ See *Code of Civil Procedure* Section 340.5.

⁴ *Grinnel Fire Protection System Co. v. American Sav. & Loan Ass'n* (1986) 183 Cal.App.3d 352, 359; *Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1170.

⁵ *Irving v. Carpentier* (1886) 70 Cal. 23, 26.

⁶ *Code of Civil Procedure* Section 473.

The judiciary has taken it upon itself to restrict the discretion granted to it by the legislature by implementing additional restrictions based on unreasonable delay and prejudice to the party opposing the amendment. However, even where the plaintiff has delayed unreasonably in moving to make a doe amendment, it is an abuse of discretion to deny leave unless the defendant demonstrates that she will be prejudiced by the amendment.⁷ Although it is honorable that courts would restrict the authority granted to it by the legislature to any degree, it is clear that courts have not restricted their discretion with regard to amending pleadings in a way that has any practical effect.

From a defense standpoint, Section 474 can appear to be simply a ploy or tactic used by plaintiff's attorneys to extend the statute of limitations as to certain defendants. Perhaps, a better rule would require a plaintiff, prior to the running of the statute of limitations, to exercise reasonable diligence in identifying all defendants and in ascertaining facts which would cause them to believe liability is probable. With this alternative approach, a plaintiff may still substitute a new defendant for a doe defendant provided that they acted as a reasonably prudent person would have acted with regard to ascertaining the facts prior to the running of the statute of limitations. This would prevent a plaintiff, who unreasonably failed to name the proper defendants during the statutory period, from unfairly benefitting from an extension to the statute of limitations.

In summary, under California's approach to the relation back doctrine, a plaintiff is permitted to bring a new defendant into a lawsuit via a substitution for a doe defendant long after the original statute of limitations has expired. Essentially, the defendant is considered to have been in the lawsuit since the filing of the original complaint. This statutory right continues to be applied liberally by the courts and has not been deemed unfair to defendants, despite its precarious practical effect of extending the statute of limitations.

CAVEAT: THE FOREGOING DOES NOT CONSTITUTE LEGAL ADVICE. PLEASE CONSULT AN ATTORNEY FOR INDIVIDUAL ADVICE REGARDING INDIVIDUAL SITUATIONS.

⁷ *Barrows v. American Motors Corporation* (1983) 144 Cal.App.3d 1, 9.