

# Chapter 13—Cross-Complaints

## § 13.01 Introduction

If the defendant has claims against the plaintiff or against another defendant, he may file a cross-complaint against the plaintiff or the other defendant. He may also file a cross-complaint against a third person who is not yet a party to the action if his **cause of action** against the third person is related to the subject matter of the lawsuit.<sup>1</sup> A defendant may generally file a cross-complaint against any person from whom he seeks equitable indemnity.<sup>2</sup> One who files a cross-complaint is referred to as a “cross-complainant,” and a defendant to a cross-complaint is referred to as a “cross-defendant.” A cross-defendant may also file a cross-complaint against the plaintiff, against another defendant, or against a third person who is not yet a party to the action.

A complaint and a cross-complaint are two separate actions, and the issues joined on the cross-complaint are completely severable from the issues under the original **complaint** and **answer**.<sup>3</sup> Dismissal of the complaint does not affect the independent existence of the cross-complaint.<sup>4</sup> A defendant’s admission to the plaintiff in the

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<sup>1</sup> CODE CIV. PROC. § 428.10. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:500–:507 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1095, 1097 (4th ed. 1997).

<sup>2</sup> *Platt v. Coldwell Banker Residential Real Estate Servs.*, 217 Cal. App. 3d 1439, 1444, 266 Cal. Rptr. 601, 604 (1990).

defense of the complaint is not binding on the defendant in his cross-action against a cross-defendant.<sup>5</sup>

### § 13.02 Permissive Cross-Complaints

With respect to a cross-defendant who is already asserting a claim against the cross-complainant (either in his capacity as a plaintiff or a cross-complainant), the cross-complaint may assert any cause of action that the cross-complainant has against the cross-defendant, whether or not it is related to the pending claim against the cross-complainant.<sup>6</sup>

**Example:** *P* sues *D* for negligence. *D* may file a cross-complaint against *P* for breach of contract.

With respect to a cross-defendant who is not already asserting a claim against the cross-complainant, the cross-complainant may file a cross-complaint against that

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<sup>3</sup> Security Pac. Nat'l Bank v. Adamo, 142 Cal. App. 3d 492, 496, 191 Cal. Rptr. 134, 137 (1983). See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1089 (4th ed. 1997).

<sup>4</sup> Bertero v. National Gen. Corp., 13 Cal. 3d 43, 52, 529 P.2d 608, 615, 118 Cal. Rptr. 184 (1974).

<sup>5</sup> Shepard & Morgan v. Lee & Daniel, Inc., 31 Cal. 3d 256, 259, 643 P.2d 968, 969, 182 Cal. Rptr. 351, 352 (1982).

<sup>6</sup> CODE CIV. PROC. § 428.10(a). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:508–:510, :524–:529, :538–:543, :559, :564, :579–:580 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1100–1101 (4th ed. 1997).

Because a cause of action for malicious prosecution does not ripen until the underlying action results in a favorable termination, one may not file a cross-complaint for malicious prosecution in the same action alleged to be malicious, *Babb v. Superior Court*, 3 Cal. 3d 841, 846, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971), unless the plaintiff's claims have already been terminated before the filing of the cross-complaint, *Loomis v. Murphy*, 217 Cal. App. 3d 589, 594, 266 Cal. Rptr. 82, 85 (1990).

cross-defendant only if the cross-complaint asserts a related cause of action, *i.e.*, one that arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action pending against the cross-complainant or that asserts a claim, right, or interest in the property or controversy that is the subject of the cause of action pending against the cross-complainant.<sup>7</sup>

**Example:** *P* sues *D*<sub>1</sub> and *D*<sub>2</sub> for negligence. *D*<sub>1</sub> can file a cross-complaint against *D*<sub>2</sub> for breach of contract only if the breach of contract claim is related to *P*'s cause of action against *D*<sub>1</sub> and *D*<sub>2</sub>.

Once the cross-complainant has asserted a related cause of action, he may join with that related cause of action any other causes of action he has against the cross-defendant.<sup>8</sup>

**Example:** *P* sues *D*<sub>1</sub> and *D*<sub>2</sub> for negligence. *D*<sub>1</sub> files a cross-complaint against *D*<sub>2</sub> on a related cause of action for breach of contract. *D*<sub>1</sub> may join with that related cause of action an unrelated cause of action against *D*<sub>2</sub> for battery.

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint.<sup>9</sup>

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<sup>7</sup> CODE CIV. PROC. § 428.10(b).

<sup>8</sup> CODE CIV. PROC. § 428.30. This does not include the plaintiff in an eminent domain proceeding. *Id.*

<sup>9</sup> CODE CIV. PROC. § 1048(b).

[A] Exceptions

Cross-complaints are not available in eminent domain proceedings,<sup>10</sup> unless the cross-complaint is a [compulsory cross-complaint](#).<sup>11</sup> Cross-complaints are not available in unlawful detainer actions<sup>12</sup> unless the defendant tenant first surrenders possession, transforming the summary procedure to regain possession into an ordinary action for damages.<sup>13</sup> Nor are cross-complaints available in [proceedings for summary restitution](#) following the reversal of a judgment.<sup>14</sup> An attorney sued for malpractice may not file a cross-complaint for equitable indemnity against the successor attorney hired to clean up the mess created by the first attorney.<sup>15</sup>

A defendant who wishes to establish his right to an offset based on the plaintiff's employer's concurrent negligence may only do so by raising the issue as an [affirmative defense](#) in his answer, if the employer does not seek reimbursement for

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<sup>10</sup> CODE CIV. PROC. § 428.10(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:522, :530–:537 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1086–1088, 1096 (4th ed. 1997).

<sup>11</sup> CODE CIV. PROC. § 426.70(b).

<sup>12</sup> *Knowles v. Robinson*, 60 Cal. 2d 620, 625, 387 P.2d 833, 836, 36 Cal. Rptr. 33, 36 (1963); *Cheney v. Trauzettel*, 9 Cal. 2d 158, 160, 69 P.2d 832, 833 (1937) (action to gain possession by purchaser under deed of trust).

<sup>13</sup> *Medford v. Superior Court*, 140 Cal. App. 3d 236, 239, 189 Cal. Rptr. 227, 229 (1983).

<sup>14</sup> *Cf. Buckman v. Tucker*, 9 Cal. 2d 403, 406, 71 P.2d 69, 70 (1937) (dictum).

<sup>15</sup> *Holland v. Thacher*, 199 Cal. App. 3d 924, 930, 245 Cal. Rptr. 247, 250 (1988). *But see Parker v. Morton*, 117 Cal. App. 3d 751, 760, 173 Cal. Rptr. 197, 202 (1981) (allowing cross-complaint against successor attorney when the threat of a cross-complaint does not have the potential to influence the attorney's exercise of his professional judgment).

### § 13.03 Joinder of Cross-Complainants and Cross-Defendants

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benefits provided to the employee. The defendant may not file a cross-complaint against the employer in these circumstances.<sup>16</sup>

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Contractors

➔ Affirmative Defenses:  
Actions by Common  
Interest Development  
Associations Against  
Contractors

In any action by a condominium owners' association for damage to the condominium, the association's damages are reduced by the amount of damages allocated to the association or its managing agents in proportion to their share of responsibility based on principles of comparative fault. The defendant may raise the association's fault by means of an **affirmative defense** but may not file a cross-complaint against the association for contribution or implied indemnity if the association or its members alone suffered damage.<sup>17</sup>

### § 13.03 Joinder of Cross-Complainants and Cross-Defendants

➔ Persons Who May Be  
Joined as Parties

A cross-complainant may join any person as a cross-complainant or cross-defendant, whether or not such person is already a party to the action, if, had the cross-complainant filed the cross-complaint as an independent action, the statutes governing joinder of parties would have permitted the joinder of that party.<sup>18</sup> In determining whether a cross-defendant has been properly joined in the lawsuit by means of a cross-complaint, one first asks whether the cause of action asserted

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<sup>16</sup> *Difko Administration (US) Inc. v. Superior Court*, 24 Cal. App. 4th 126, 134–35, 29 Cal. Rptr. 2d 291, 296–97 (1994); *C.J.L. Constr., Inc. v. Universal Plumbing*, 18 Cal. App. 4th 376, 387, 22 Cal. Rptr. 2d 360, 367 (1993). *Contra*, *Del Monte Corp. v. Superior Court*, 127 Cal. App. 3d 1049, 1055, 179 Cal. Rptr. 855, 859 (1982).

<sup>17</sup> CODE CIV. PROC. § 383(b). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:453–:454 (1996).

<sup>18</sup> CODE CIV. PROC. § 428.20. *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1098–1099 (4th ed. 1997).

against the cross-defendant is a permissible claim. If the claim is proper, then one asks whether the cross-defendant's joinder is proper in light of the cross-defendant's connection to that claim.

### § 13.04 Compulsory Cross-Complaints

If a defendant (or cross-defendant) fails to allege in a cross-complaint any related cause of action that he has against the plaintiff (or cross-complainant) at the time of serving his [answer](#), he may not later, in any other action, assert against the plaintiff (or cross-complainant) the cause of action not pleaded.<sup>19</sup> Nor may he use the barred claim as a [setoff](#) against his adversary's recovery.<sup>20</sup> A "related cause of action" is one that arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action that the plaintiff or cross-complainant alleges in his complaint or cross-complaint.<sup>21</sup> This standard does not require an absolute identity of factual backgrounds for the two claims. All that is required is a logical relationship between them.<sup>22</sup>

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<sup>19</sup> CODE CIV. PROC. § 426.30(a). A cross-complaint based on a related cause of action arising *after* the defendant serves his answer is a permissive cross-complaint. *Crocker Nat'l Bank v. Emerald*, 221 Cal. App. 3d 852, 864, 270 Cal. Rptr. 699, 706 (1990). A cross-complaint based on a related cause of action against a *third party* is a permissive cross-complaint. *Insurance Co. of N. Am. v. Liberty Mut. Ins. Co.*, 128 Cal. App. 3d 297, 303, 180 Cal. Rptr. 244, 248 (1982). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:511–:520, :544, :563, :581–:582.1 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 1103 (4th ed. 1997).

<sup>20</sup> CODE CIV. PROC. § 431.70.

<sup>21</sup> CODE CIV. PROC. § 426.10(c). Compare this definition with the broader definition that applies in the context of [permissive cross-complaints](#).

<sup>22</sup> *Currie Medical Specialties, Inc. v. Bowen*, 136 Cal. App. 3d 774, 777, 186 Cal. Rptr. 543, 544 (1982).

**Example:** *P* sues *D* for trademark infringement and unfair competition based on *D*'s alleged theft of *P*'s customers following termination of their distributorship contract. The parties stipulate to dismissal of the action with prejudice. *D* sues *P* for breach of the distributorship contract, fraud, negligent misrepresentation, intentional interference with prospective business advantage and unfair competition. The nature of the contractual relationship is central to both claims because of *D*'s allegation that *P* usurped his business opportunities during their contractual relationship. The court grants *P* summary judgment on the ground that *D*'s claims were compulsory cross-claims in the original action.

The court ruled correctly. The logical relationship among the claims established that the claims arose from the same transaction or occurrence.<sup>23</sup>

The defendant must plead the compulsory cross-complaint rule as an [affirmative defense](#).

#### [A] Exceptions

This compulsory cross-complaint rule does not apply when

- the court does not have personal jurisdiction over the defendant or cross-defendant<sup>24</sup>

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<sup>23</sup> *Currie Medical Specialties, Inc. v. Bowen*, 136 Cal. App. 3d 774, 777, 186 Cal. Rptr. 543, 544 (1982).

<sup>24</sup> CODE CIV. PROC. § 426.30(b)(1). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:521–:521.7 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1104–1105 (4th ed. 1997).

## § 13.04 Compulsory Cross-Complaints

- the defendant or cross-defendant did not file an answer to the complaint or cross-complaint<sup>25</sup>
- the cause of action not pleaded requires for its adjudication the presence of additional parties over whom the court cannot acquire jurisdiction<sup>26</sup>
- the court in which the action is pending (and any other court to which the action is transferrable) is prohibited from entertaining the cause of action not pleaded<sup>27</sup>
- the cause of action not pleaded was the subject of another pending action when the action was commenced<sup>28</sup>
- the original action was a special proceeding and not an ordinary civil action<sup>29</sup>
- the original action was filed in small claims court<sup>30</sup>
- the original action sought only a declaration of the rights and duties of the respective parties.<sup>31</sup>

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<sup>25</sup> CODE CIV. PROC. § 426.30(b)(2).

<sup>26</sup> CODE CIV. PROC. § 426.40(a).

<sup>27</sup> CODE CIV. PROC. § 426.40(b).

<sup>28</sup> CODE CIV. PROC. § 426.40(c).

<sup>29</sup> CODE CIV. PROC. § 426.60(a).

<sup>30</sup> CODE CIV. PROC. § 426.60(b).

<sup>31</sup> CODE CIV. PROC. § 426.60(c). Though a party is not obligated to assert related causes of action in a cross-complaint to a suit for declaratory relief, there is no statutory prohibition against the filing of such a pleading. *California State Auto. Ass'n, Inter-Ins. Bureau v. Superior Court*, 184 Cal. App. 3d 1428, 1434 n.6, 229 Cal. Rptr. 409, 414 n.6 (1986).



**[B] Leave to File a Compulsory Cross-Complaint**

A party who fails to plead a related cause of action, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his pleading or to file a cross-complaint in order to assert the related cause of action at any time during the course of the action. The court must grant leave to amend the pleading or to file the cross-complaint, upon such terms as may be just to the parties, if the party who failed to plead the cause of action acted in good faith.<sup>32</sup> The court does not have the discretion to deny leave to amend or to file a cross-complaint if the omitted claim is a compulsory claim, unless the moving party acted in bad faith. This is true even if the motion is made on the eve of trial.<sup>33</sup> Factors such as oversight, inadvertence, neglect, mistake or other cause, are insufficient grounds to deny the motion unless accompanied by bad faith.<sup>34</sup> Bad faith connotes actual or constructive fraud, a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or contractual obligation, not prompted by an honest mistake, bad judgment, or negligence but by some interested or sinister motive, the conscious doing of a wrong because of dishonest purpose or moral obliquity. It contemplates a state of mind affirmatively operating with furtive design or ill will.<sup>35</sup>

<sup>32</sup> CODE CIV. PROC. § 426.50. *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 1106 (4th ed. 1997).

<sup>33</sup> *Silver Organizations Ltd. v. Frank*, 217 Cal. App. 3d 94, 98–99, 265 Cal. Rptr. 681, 683 (1990). *But see* *Gherman v. Colburn*, 72 Cal. App. 3d 544, 559, 140 Cal. Rptr. 330, 340 (1977) (holding that “the statutory terminology allows the court some modicum of discretion in determining whether or not a defendant has acted in good faith”).

<sup>34</sup> *Silver Organizations Ltd. v. Frank*, 217 Cal. App. 3d 94, 98–99, 265 Cal. Rptr. 681, 683 (1990).

<sup>35</sup> *Silver Organizations Ltd. v. Frank*, 217 Cal. App. 3d 94, 100, 265 Cal. Rptr. 681, 683 (1990).

**Example:** *P* sues *D* on a promissory note. *D* answers the complaint in pro per, in the hope of settling the case and avoiding the expense of hiring counsel. When settlement negotiations prove futile, *D* hires an attorney, who obtains a continuance and undertakes discovery. The attorney learns that *D* has grounds to assert a compulsory cross-claim against *P*. *D* files a motion for leave to file a compulsory cross-complaint. The court denies the motion the day before trial.

The court erred. In the absence of a “strong showing”<sup>36</sup> of bad faith, the court was required to grant *D* leave to file her compulsory cross-complaint. The appropriate remedy to protect *P* from surprise was another continuance.<sup>37</sup>

### [C] Tolling of the Statute of Limitations

The plaintiff’s commencement of an action tolls the statute of limitations as to a defendant’s then unbarred cause of action against the plaintiff, provided that the action is a compulsory cross-complaint and not a permissive cross-complaint or independent action.<sup>38</sup>

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<sup>36</sup> Foot’s Transfer & Storage Co. v. Superior Court, 114 Cal. App. 3d 897, 902, 171 Cal. Rptr. 1, 3 (1980).

<sup>37</sup> Silver Organizations Ltd. v. Frank, 217 Cal. App. 3d 94, 98–99, 265 Cal. Rptr. 681, 683 (1990).

<sup>38</sup> Luna Records Corp. v. Alvarado, 232 Cal. App. 3d 1023, 283 Cal. Rptr. 865 (1991) (independent action barred); Trindade v. Superior Court, 29 Cal. App. 3d 857, 860, 106 Cal. Rptr. 48, 49–50 (1973). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:592–:600 (1996).

**Example:** *P* sues *D* for personal injuries *P* suffered in a traffic collision with *D*. After the expiration of the one-year statute of limitations, *D* files a cross-complaint against *P* for injuries *D* suffered in the same accident. The court sustains *P*'s demurrer to *D*'s cross-complaint.

The court erred. Because *D*'s cross-complaint was a compulsory cross-complaint, *P*'s filing of his action against *D* tolled the running of the one-year limitations period, and *D*'s cross-complaint was not barred by the statute of limitations.<sup>39</sup>

The same suspension of the statute of limitations standard applies for an amended cross-complaint as for an initial cross-complaint.<sup>40</sup> The statute of limitations is not suspended as to co-defendants or third parties.<sup>41</sup>

A construction professional sued for a latent defect in a construction project within the ten-year limitations provision specified in Code of Civil Procedure section 337.15(a), the defendant may file a cross-complaint for indemnity against others involved in the construction project, even after the expiration of the ten-year limitations period.<sup>42</sup> This exception does not apply to the filing of a cross-complaint for indemnity by a defendant against whom a timely claim has been filed *after* the expiration of the ten-year limitations period.<sup>43</sup>

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<sup>39</sup> *Trindade v. Superior Court*, 29 Cal. App. 3d 857, 860, 106 Cal. Rptr. 48, 49–50 (1973).

<sup>40</sup> *Sidney v. Superior Court*, 198 Cal. App. 3d 710, 715, 244 Cal. Rptr. 31, 34 (1988).

<sup>41</sup> *Sidney v. Superior Court*, 198 Cal. App. 3d 710, 717 n.4, 244 Cal. Rptr. 31, 36 n.4 (1988).

<sup>42</sup> CODE CIV. PROC. § 337.15(c); *Valley Circle Estates v. VTN Consolidated, Inc.*, 33 Cal. 3d 604, 609, 659 P.2d 1160, 1163, 189 Cal. Rptr. 871, 874 (1983).

## § 13.05 Form

➔ Form: Cross-Complaint  
Caption

A cross-complaint is contained in a separate pleading.<sup>44</sup> It is in the same format as a complaint. Local rules often require that the caption on a cross-complaint must set forth a second designation of the parties indicating the capacity in which they appear and must identify any new parties.<sup>45</sup>

The Judicial Council form [Complaint—Contract](#) can be used for cross-complaints as well. One may attach to it the associated Judicial Council cause of action forms:

- [Cause of Action—Breach of Contract](#)
- [Cause of Action—Common Counts](#)
- [Cause of Action—Fraud](#).<sup>46</sup>

The Judicial Council provides a separate [Cross-Complaint—Personal Injury, Property Damage, Wrongful Death](#). One may attach to it the associated Judicial Council cause of action forms:

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<sup>43</sup> Grange Debris Box & Wrecking Co.. v. Superior Court, 16 Cal. App. 4th 1349, 1355, 20 Cal. Rptr. 2d 515, 519 (1993).

<sup>44</sup> CODE CIV. PROC. § 428.40. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:545–:550 (1996).

<sup>45</sup> *See, e.g.*, L.A. SUPER. CT. R. 9.2(c) (after the initial pleading, the parties may refer to the subsequent pleading as “And Related Action[s]” under the plaintiff and defendant designations, except that a [demurrer](#) to a cross-complaint must set forth the full caption including all cross-complaints); ORANGE SUPER. CT. R. 506(E); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 1(f).

<sup>46</sup> RULES OF CT. 982.1(b).

- [Cause of Action—Motor Vehicle](#)
- [Cause of Action—General Negligence](#)
- [Cause of Action—Intentional Tort](#)
- [Cause of Action—Premises Liability](#)
- [Cause of Action—Products Liability](#)
- [Exemplary Damages Attachment](#).<sup>47</sup>

A cause of action for which no form has been approved may be prepared in the same [page format](#) as other court documents and attached to either approved form of cross-complaint.<sup>48</sup>

### § 13.06 Timing

A party must file his cross-complaint against any of the parties who filed a complaint or cross-complaint against him before or at the same time as the [answer](#) to the complaint or cross-complaint.<sup>49</sup> One may file any other cross-complaint any time before the court first sets a date for trial.<sup>50</sup> At any time during the course of the action one may file a [motion](#) for leave to file a cross-complaint outside these time

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<sup>47</sup> RULES OF CT. 982.1(b).

<sup>48</sup> RULES OF CT. 982.1(c).

<sup>49</sup> CODE CIV. PROC. § 428.50(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:551–:558, :560–:569 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 1094 (4th ed. 1997).

<sup>50</sup> CODE CIV. PROC. § 428.50(b). A cross-complainant's right to file a cross-complaint against a third party without leave of court lapses upon the first trial setting, even if the court has vacated the original trial date and none is set when the cross-complainant wishes to file his cross-complaint. *Looney v. Superior Court*, 160 Cal. App. 3d 719, 722, 206 Cal. Rptr. 769, 770 (1984).

limits on the ground that the filing of the cross-complaint is in the interest of justice.<sup>51</sup> The court must grant [leave to file a compulsory cross-complaint](#) in the absence of bad faith by the cross-complainant. The court's power to grant leave to file a cross-complaint lapses once judgment has been entered on the underlying complaint, even if a pending appeal has not been decided and the judgment is not yet final.<sup>52</sup>

### § 13.07 Service

The cross-complainant must serve the cross-complaint on each of the parties in an action.<sup>53</sup> If a party has [appeared](#) in the action, the cross-complainant may serve the cross-complaint either on the party's attorney or on the party if he has appeared without an attorney, in the manner provided for [service of a summons](#) or in the manner provided for [service of a motion](#).<sup>54</sup> If a party has not already appeared in the action, the cross-complainant must obtain the issuance of a summons and serve the summons and cross-complaint on the party in the same manner that a plaintiff serves a summons and complaint on a defendant.<sup>55</sup> The cross-complainant must also serve a copy of the most recently amended complaint and any answers on cross-defendants who have not previously appeared.<sup>56</sup>

► Chapter—The  
Summons and Service  
of Process

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<sup>51</sup> CODE CIV. PROC. § 428.50(c). The court, however, may deny leave to file a cross-complaint to a cross-defendant whose claims as a plaintiff have been dismissed for his failure to prosecute. *Flynn v. Page*, 218 Cal. App. 3d 342, 347, 266 Cal. Rptr. 830, 832 (1990).

<sup>52</sup> *City of Hanford v. Superior Court*, 208 Cal. App. 3d 580, 587, 256 Cal. Rptr. 274, 278 (1989).

<sup>53</sup> CODE CIV. PROC. § 428.60. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:570--:573 (1996).

<sup>54</sup> CODE CIV. PROC. § 428.60(2).

There is little tactical advantage that a defendant can obtain by delaying service of a cross-complaint, for a case may be considered at issue, and ready to be set for trial, notwithstanding any cross-complaint that is not at issue.<sup>57</sup> Local fast track rules sometimes set time limits on the service of cross-complaints.<sup>58</sup>

**§ 13.08 Cross-Complaints Exceeding the Court's Subject Matter Jurisdiction**

If the plaintiff brings an action within the municipal court's jurisdiction and the defendant files a cross-complaint, the municipal court may not award the defendant damages exceeding the court's jurisdictional limit. If the defendant asserts a cross-claim exceeding the municipal court's jurisdictional limit, the court must transfer the case to the superior court.<sup>59</sup>

➔ Jurisdiction: Multiple Claims and Multiple Parties  
➔ (Motions to Transfer)

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<sup>55</sup> CODE CIV. PROC. § 428.60(1). Section 428.60(1) literally requires service of the summons and cross-complaint on all parties who have not already appeared, even those who are not named as cross-defendants in the cross-complaint. The legislature must have intended "party" in subsection (1) to mean "party named as a cross-defendant in the cross-complaint." A literal interpretation of subsection (1) is absurd.

<sup>56</sup> RULES OF CT. 202, 502.

<sup>57</sup> RULES OF CT. 209(b), 507(d).

<sup>58</sup> See, e.g., L.A. SUPER. CT. R. 7.7(a)(2) (within 30 days of the cross-complaint's filing date, with a proof of service filed within 60 days of the filing date unless an appearance is made within those 60 days); ORANGE SUPER. CT. R. 440 (within ten days of filing unless a Certificate of Progress is filed indicating why service has not been effected and what is being done to effect service); SAN DIEGO SUPER. CT. R. 1.5.4(c) (cross-complaints filed after the case is placed on the civil active list must be served within 30 days of filing).

<sup>59</sup> CODE CIV. PROC. § 396. See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:583 (1996)

§ 13.09 Third-Party Defendant's Special Answer

If a defendant (or cross-defendant) files a cross-complaint against a third party in which the defendant (or cross-defendant) claims the right to recover all or part of any amounts for which he may be held liable on the cause of action asserted against him, the cross-complainant becomes what is known as a “third-party plaintiff,” and the cross-defendant becomes a “third-party defendant.”<sup>60</sup> When he answers the cross-complaint, a third-party defendant may file as a separate document a special answer alleging against the person who asserted the cause of action against the third-party plaintiff any defenses which the third-party plaintiff has to such cause of action.<sup>61</sup> To protect himself from the third-party plaintiff's failure or neglect to assert a proper defense to the cause of action alleged against him, through collusion or otherwise, the third-party defendant is allowed to assert any defenses available to the third-party plaintiff. action.

**Example:** *P* sues *D*<sub>1</sub>, who fails to plead the statute of limitations as an affirmative defense but files a cross-complaint seeking indemnity from *D*<sub>2</sub>. *D*<sub>2</sub> files a special answer in which he raises *D*<sub>1</sub>'s statute of limitations defense. The court strikes *D*<sub>2</sub>'s special answer on the ground that *D*<sub>1</sub> forfeited his statute of limitations defense by failing to plead it.

The court erred. *D*<sub>2</sub> had a right to assert against *P*'s cause of action any defenses *D*<sub>1</sub> could have asserted against that cause of action.<sup>62</sup>

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<sup>60</sup> CODE CIV. PROC. § 428.70(a). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:575--:578 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 1102 (4th ed. 1997).

<sup>61</sup> CODE CIV. PROC. § 428.70(b).



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The third-party defendant must serve the special answer on the third-party plaintiff and on the person who asserted the cause of action against the third-party plaintiff.<sup>63</sup>

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<sup>62</sup> *Administrative Management Servs., Inc. v. Fidelity & Deposit Co.*, 129 Cal. App. 3d 484, 489, 181 Cal.Rptr. 141, 144 (1982).

<sup>63</sup> CODE CIV. PROC. § 428.70(b).