Study J-110 March 6, 1995

Memorandum 95-15

Code of Civil Procedure Section 351: Tolling the Statute of Limitations When the Defendant is Outside the State

Code of Civil Procedure Section 351 provides for tolling of the statute of limitations when the defendant is out of state:

> 351. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

Recent commentary and judicial decisions criticize Section 351. Last year, at the suggestion of the Commission, the Legislature authorized the Commission to study Section 351. 1994 Cal. Stat. res. ch 81. Also in 1994, the State Bar Conference of Delegates considered but rejected a proposal to repeal the statute. Having read the transcript of the State Bar proceedings and researched Section 351 and similar statutes, the Commission staff now has suggestions on how to proceed.

SUMMARY

Section 351 was enacted prior to the introduction of modern concepts of personal jurisdiction and service of process. Plaintiffs had no means of suing out-of-state defendants (other than suing wherever the defendant chose to be), so Section 351 was necessary to preserve their right to obtain redress.

California's longarm statute and other statutes regulating service of process now afford a means of suing most, if not all, out-of-state defendants. See, e.g., Code Civ. Proc. §§ 410.10, 413.10, 413.30, 415.20, 415.30, 415.40, 415.50. Section 351 is not as necessary as it was in the past, yet it forces out-of-state defendants to either be present in California for the limitations period or forfeit the benefits of the statute of limitations. According to the Ninth Circuit, that burden violates the Commerce Clause in cases involving interstate commerce. Abramson v. Brownstein, 897 F.2d 389 (9th Cir. 1990).

Section 351 is thus inapplicable to cases involving interstate commerce. As explained below, it is also inapplicable to corporations, limited partnerships, certain tax proceedings, nonresident motorists, and, in some circumstances, resident motorists.

Although Section 351 is already narrow in its current application, it should be narrowed further. When a cause of action has no nexus to California, Section 351 should not apply: State courts should not have to adjudicate ancient disputes between foreigners that arose outside California. Additionally, a tardy plaintiff should not reap the benefits of Section 351 when the defendant has been absent from the state for only a very brief period and there has been no interference with plaintiff's ability to bring suit and serve process. On the other hand, in disputes that have a nexus to California or involve a person who was a Californian when the dispute arose, there is still a need to protect plaintiffs from being deprived of redress if a defendant is truly beyond the reach of process. That is true whether the dispute involves interstate commerce or is purely local in character.

The staff's proposed amendment of Section 351 to further these policy considerations and comply with the Commerce Clause is set out at the end of this memorandum. In sum, the proposed amendment would make the tolling of Section 351 inapplicable if any of the following circumstances exist: (1) the defendant can with reasonable diligence be served with process outside the state, (2) the defendant's absence from the state is for a continuous period of less than thirty days, or (3) at the time the cause of action accrued no party was a resident of the state and there is no basis for jurisdiction in California other than subsequent residence of a party in the state.

HISTORY OF SECTION 351

Section 351 was enacted in 1872. In that era, out-of-state service of process was insufficient to confer personal jurisdiction. *See* Pennoyer v. Neff, 95 U.S. 14 (1877). Tolling provisions such as Section 351 were necessary because otherwise defendants could escape accountability for their conduct by simply staying outside the state until the applicable statute of limitations ran. Although concepts of personal jurisdiction have changed drastically since the enactment of Section 351, the statute has never been amended.

Brief Absences

The tolling of Section 351 applies not only to extended periods of absence from California, but also to very brief absences. *See, e.g.*, Mounts v. Uyeda, 227 Cal. App. 3d 111, 114, 277 Cal. Rptr. 730 (1991) (four day absence); Garcia v. Flores, 64 Cal. App. 3d 705, 709, 134 Cal. Rptr. 712 (1976) (eight day absence). In contrast, some states limit out-of-state tolling to absences of a certain minimum length. For example, Michigan's statute provides:

> 27A.5853. If any person is outside of this state at the time any claim accrues against him the period of limitation shall only begin to run when he enters this state unless a means of service of process sufficient to vest the jurisdiction of a Michigan court over him was available to the plaintiff. If after any claim accrues the person against whom the claim accrued is absent from this state, any and all periods of absence ***in excess of 2 months at a time*** shall not be counted as any part of the time limited for the commencement of the action unless while he was outside of this state a means for service of process sufficient to vest the jurisdiction of a Michigan court over him was available to the plaintiff.
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> Mich. Stat. Ann. § 27A.5853 (emph. added).

See also N.Y. Civ. Prac. L. & R. 207 (absence of four months or more); Pa. Stat. Ann. tit. 42, § 5532 (same).

Amenability to Service of Process

In Dew v. Appleberry, 23 Cal. 3d 630, 634, 591 P.2d 509, 153 Cal. Rptr. 219 (1979) (Tobriner, J.), the court considered whether the tolling of Section 351 applies when a defendant is outside the state but nonetheless amenable to service of process. The defendant argued that "the Legislature in enacting [Section 351] in 1872 sought to prevent a claim from being barred simply because the defendant, being outside the state, could not be served with a summons and complaint in an in personam action." The defendant contended that because "a plaintiff has no need for the protection of the tolling provision when the absent party is still amenable to process," Section 351 does not apply under those circumstances. *Id.*

The Court rejected that construction of Section 351. "Although the California statute itself remains unchanged from the date of enactment, the Legislature is clearly aware of the statute's broad ramifications, and has modified the reach of

the rule in appropriate circumstances [e.g., Veh. Code § 17460]." *Id.* at 634-35. "These provisions evidence the Legislature's recognition that the availability of personal jurisdiction *may* remove the necessity for suspending the statute of limitations." *Id.* at 635. "If the Legislature intends that the tolling provision not extend the limitations period *whenever* the defendant is amenable to jurisdiction, it can easily so state. . . . We believe that we should leave to the Legislature the decision whether the policy of expediting litigation that underlies the alternate service statutes should prevail over the policies underlying section 351." *Id.* (emph. in original).

Although *Dew* construes Section 351 to apply regardless of amenability to service of process, courts in many states have construed similar tolling statutes to apply only to out-of-state defendants who are not amenable to service of process. *See, e.g.*, Byrne v. Ogle, 488 P.2d 716 (Alaska 1971); Engle Bros., Inc. v. Superior Court, 23 Ariz. App. 406, 533 P.2d 714 (1975; Towns v. Brown, 177 Ga. App. 504, 339 S.E.2d 926 (1986); Blankenship v. Myers, 97 Idaho 356, 544 P.2d 314 (1975). Additionally, some states have out-of-state tolling statutes that expressly limit the tolling to out-of-state defendants who are not amenable to service of process. *See, e.g.*, Colo. Rev. Stat. § 13-80-118; Del. Code Ann. tit. 10, § 8117; Fla. Stat. Ann. § 95.051; 735 ILCS 5/13-208; Kan. Stat. Ann. § 60-517; Mich. Stat. Ann. § 27A.5853; Minn. Stat. Ann. § 541.13; N.D. Cent. Code § 28-01-32; N.J. Stat. Ann. § 2A:14-22; N.Y. Civ. Prac. L. & R. 207; Pa. Stat. Ann. tit. 42, § 5532.

Causes of Action Having No Nexus to California

In Kohan v. Cohan, 204 Cal. App. 3d 915, 251 Cal. Rptr. 570 (1988), the court considered whether Section 351 tolled the statute of limitations with respect to a dispute between three Iranian brothers regarding events that occurred in Iran while all three brothers resided there. The court concluded that "section 351 applie[d] to toll the statute of limitations until defendant's arrival in California." *Id.* at 919. Thus,

> section 351 can be utilized to toll a statute of limitations ***even if, at the time the cause of action accrued, the parties were residing outside the state*** and subsequently moved into the state. This creates situations where a cause of action, ***which has no legal nexus with California,*** other than the parties being residents of the state, may be brought in California ***an indefinite amount of time after it accrued.***

> Comment, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll?*, 23 Pac. L.J. 1639, 1672-73 (1992) (emph. added).

The effect of *Kohan* is limited to some extent by California's borrowing statute, Code of Civil Procedure Section 361, which provides:

> When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued.

The borrowing statute is of no use, however, if the foreign jurisdiction has a very long statute of limitations, such as Venezuela's 20 year period for suing an employer for personal injury to an employee. *See* Acts, Recommendation and Study relating to Application of Foreign Periods of Limitation and Tolling of the Statute of Limitations by Absence of Defendant, N.Y. L. Revision Comm'n Reports 127, 170 (1943). Additionally, the borrowing statute may be "of no practical effect if the jurisdiction whose statute of limitations is borrowed tolls the statute of limitations during the defendant's absence." Case Note, *Limitations of Actions: Absence of the Defendant: Tolling the Statute of Limitations on a Foreign Cause of Action*, 1 UCLA L. Rev. 619, 621 (1954).

CURRENT SCOPE OF SECTION 351: NARROW ASPECTS

Foreign and Domestic Corporations

Section 351 does not apply to California corporations because they "cannot depart from or be absent from this state." Loope v. Greyhound, Inc., 114 Cal. App. 2d 611, 250 P.2d 651 (1952). As for foreign corporations, they are required to designate an agent for service of process and consent to "service of process on the Secretary of State if the agent so designated or the agent's successor is no longer authorized to act or cannot be found at the address given." Corp. Code § 2105; *see also* Corp. Code §§ 2110, 2110.1, 2111. "[U]nder *Loope* and its progeny, the availability of substituted service of process upon a foreign corporation renders the tolling provisions of section 351 inapplicable." Cardoso v. American Medical Systems, Inc., 183 Cal. App. 3d 994, 999, 228 Cal. Rptr. 627 (1986). As explained in *Cardoso*, 183 Cal. App. 3d at 999:

> To rule otherwise would result in the anomalous situation that a statute of limitations would never run in actions filed against foreign corporations. This would be contrary to the avowed purpose of such statutes to prevent stale claims.

Thus, "[n]either a foreign corporation nor a domestic corporation is deemed absent from the state when its officers are absent and the statute of limitations is not tolled pursuant to section 351 of the Code of Civil Procedure as to either of such entities." Epstein v. Frank, 125 Cal. App. 3d 111, 119 n.4, 177 Cal. Rptr. 831 (1981).

Limited Partnerships

Under Section 351, the same analysis applies to limited partnerships as to foreign corporations: The availability of substitute service renders the tolling provision inapplicable. As the court stated in *Epstein,* 125 Cal. App. 3d at 120:

> A limited partnership is regarded as an entity separate and apart from its partners when it is sued, when it is served with process, and when executing upon its assets. We can perceive of no compelling reason why, in determining the applicability of Code of Civil Procedure section 351, it should not be regarded as an entity, which, like a corporation, is considered to be permanently within the state, regardless of the whereabouts of its principals.

Tax Proceedings

By statute, Section 351 is expressly made inapplicable to certain tax proceedings. See Rev. & Tax Code §§ 177(c), 3725, 3809.

Nonresident Motorists

Under Vehicle Code Sections 17451 and 17453, by operating a motor vehicle in California, a nonresident appoints the Director of Motor Vehicles as agent for service of process in any action resulting from such activity. See also Veh. Code § 17454. The same rule applies if the nonresident allows another person to operate the nonresident's car in California. Based on these provisions, in Bigelow v. Smik, 6 Cal. App. 3d 10, 15, 85 Cal. Rptr. 613 (1970), the court determined that "since a nonresident motorist is amenable to service of process within the state and to the entry of personal judgment against him, the reason for section 351 is not present, the section does not apply, and the period of limitation for commencing suit against him does not suspend."

Resident Motorists Operating a Motor Vehicle In-State and Later Departing

Along the same lines, Vehicle Code Section 17460 provides that by accepting a California driver's license, a California resident consents to out-of-state service of process in any action arising out of the resident's "operation" of a motor vehicle in California. Vehicle Code Section 17459 is a similar provision pertaining to a resident's acceptance of a certificate of ownership or registration. Under Vehicle Code Section 17463, if service can be made pursuant to Vehicle Code Sections 17459 or 17460, then the tolling of Section 351 does not apply, "except when [the resident] is out of this State and cannot be located through the exercise of reasonable diligence."

This rule applies only to accidents arising from "operation" of a motor vehicle, not to those due to "use" of a motor vehicle, such as pointing a gun while driving a car. Mounts v. Uyeda, 227 Cal. App. 3d 111, 277 Cal. Rptr. 730 (1991). Also, Sections 17459 and 17460 are expressly limited to accidents occurring within California. *See* Garcia v. Flores, 64 Cal. App. 3d 705, 134 Cal. Rptr. 712 (1976).

Actions *in Rem*

There is old authority that Section 351 does not apply to actions *in rem*. "If the action is *in rem* and complete jurisdiction of the *res* is acquired regardless of the absence of the owner thereof, on principle the statute should not be tolled." Ridgway v. Salrin, 41 Cal. App. 2d 50, 54, 105 P.2d 1024 (1940); *see also* 3 B. Witkin, California Procedure *Actions* § 493, at 521-22 (3d ed. 1985); *Developments in the Law--Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1226 (1950); J. McLaughlin, Practice Commentary on N.Y. Civ. Prac. L. & R. 207.

Cases Involving Interstate Commerce

Although Section 351 has withstood equal protection and right to travel challenges, *see, e.g., Dew*, 23 Cal. 3d at 636-37; Pratali v. Gates, 4 Cal. App. 4th 632, 5 Cal. Rptr. 2d 733 (1992); *Kohan*, 204 Cal. App. 3d at 923; *see also* G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982), the Ninth Circuit has determined that it violates the Commerce Clause as applied to cases involving interstate commerce, Abramson v. Brownstein, 897 F.2d 389 (1990). The court reasoned that Section 351 "forces a nonresident individual engaged in interstate commerce to choose between being present in California for several years or forfeiture of the limitations defense, remaining subject to suit in California in perpetuity." *Id.* at

392. That "significant" burden outweighs California's countervailing interest in "'alleviat[ing] any hardship that would result by compelling plaintiff to pursue defendant out of state.'" *Id.* at 393, *quoting Dew*, 23 Cal. 3d at 637.

In reaching that assessment and therefore concluding that Section 351 violates the Commerce Clause, the Ninth Circuit relied heavily on Bendix v. Corp. v. Midwesco Enterprises, 486 U.S. 888 (1988), in which the United States Supreme Court found an Ohio statute similar to Section 351 unconstitutional as applied to foreign corporations. The Ninth Circuit's invalidation of Section 351 in regard to interstate commerce is but one of many decisions that rely on *Bendix* in declaring out-of-state tolling provisions similar to Section 351 unconstitutional under the Commerce Clause. *See, e.g.,* Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064 (8th Cir. 1992) (N. Dakota statute); Juzwin v. Asbestos Corp., Ltd., 900 F.2d 686 (3d Cir. 1990) (N.J. statute); Tesar v. Hallas, 738 F. Supp. 240 (N.D. Ohio, E.D. 1990) (Ohio statute as applied to individuals); Crespo v. Stapf, 128 N.J. 351, 608 A.2d 241 (1992) (N.J. statute); Muller v. Custom Distributors, Inc., 487 N.W.2d 1 (N.D. 1992) (N. Dakota statute).

Given the broad scope of interstate commerce, the Ninth Circuit's decision is far-reaching. However, "*Abramson* d[id] not declare Code of Civil Procedure section 351 facially unconstitutional." *Mounts,* 227 Cal. App. 3d at 121. California courts still apply Section 351 in disputes that do not involve interstate commerce. *See* Pratali, 5 Cal. Rptr. 2d at 740 ("we question whether a single amicable loan between California acquaintances while visiting in Las Vegas can rise to the level of interstate commerce within the meaning of the commerce clause--however the proceeds are used"); *Mounts,* 227 Cal. App. 3d at 122 ("both parties are local residents, and the alleged injury did not involve interstate commerce"); *Kohan*, 204 Cal. App. 3d at 924 ("That acts giving rise to the causes of action herein occurred in Iran while defendants were residents of that country does not affect either interstate commerce or commerce between the United States and Iran, nor does it establish that defendants were engaged in interstate commerce by any definition of that term").

ATTACKS ON SECTION 351

The tolling of Section 351 is thus both very broad and very narrow in scope. On the one hand, it extends to any absence, however brief, regardless of amenability to service of process and notwithstanding whether the cause of

action has any causal nexus to California. On the other hand, Section 351 does not apply to cases involving interstate commerce, nor does it apply to corporations, limited partnerships, certain tax proceedings, nonresident motorists, or, in some circumstances, resident motorists.

The text of Section 351 does not reflect these bounds, and there have been a number of attacks on the statute, including the following:

Implied Repeal Argument

In *Dew,* the defendant contended that the statutes authorizing substitute service impliedly repealed Section 351. The Court rejected that argument, stating:

> ***We find no irreconcilable conflict between section 351 and the statutes governing substituted service.*** The Legislature may justifiably have concluded that a defendant's physical absence impedes his availability for suit, and that it would be inequitable to force a claimant to pursue the defendant out of state in order effectively to commence an action within the limitations period. At the same time, by providing alternate forms of service the Legislature simply encourages a plaintiff to adjudicate his claim expeditiously if possibly [sic]; by using substituted service a plaintiff may now obtain a binding judgment even in the defendant's absence. ***While the alternate service provisions may lessen the need for section 351, we do not believe they repeal section 351 pro tanto.***
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> 23 Cal. 3d at 636 (emph. added).

In sum, the Court concluded that Section 351 "rationally alleviates any hardship that would result by compelling plaintiff to pursue defendant out of state." *Id.* at 637. "If it is advisable that the statute be changed to accommodate more modern concepts of service of process, ***the Legislature has it within its power to effect such amendment.***" *Id.* (emph. added).

Judicial Criticism in *O'Laskey*

While Justice Tobriner did not criticize Section 351 in *Dew*, the panel in *O'Laskey v. Sortino,* 224 Cal. App. 3d 241, 273 Cal. Rptr. 674 (1990), had harsh words for it. Section 351 "'adopted in 1872, may have made sense when there was no long-arm statute and no ability to serve an absent defendant by substituted service or by publication. ***It makes no sense today and should be repealed.***'" *Id.* at 252 n.8, *quoting* a superseded concurring opinion of Justice King (emphasis added). The court explained:

> "A defendant's absence from the state in no way limits or interferes with a plaintiff's filing of an action. Indeed, we see here that a defendant is penalized for having taken a legitimate four-day vacation out of state long before the statute ran. Such an absence should not reward a tardy plaintiff who has filed to file an action within the statutory period. There is no reason why another plaintiff with the same claim should have a shorter period within which to file an action because the defendant in that action did not leave California during the statutory period."
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> *Id.*

Scholarly Criticism

A recent Comment in *Pacific Law Journal* analyzes Section 351 at length and concludes that the statute should either be (1) repealed, "allow[ing] the legislature a clean slate on which to formulate a more narrowly tailored statute," such as "a statute that tolls the statute of limitations when a defendant is not amenable to service of process," or (2) amended "to read that no person shall be considered to be out of the state when that person is subject to the jurisdiction of the California courts." Comment, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll?*, 23 Pac. L.J. 1639, 1675 (1992) (reproduced at Exhibit pp. 1-38). The Comment ends with the following summary:

> Section 351 of the California Code of Civil Procedure was enacted over one hundred years ago, and since that time, changes in the law and society have rendered it an unnecessary, if not unjust, statute. The primary purpose behind the enactment of section 351 has long since been eliminated by changes in jurisdictional doctrine, and any legitimate purpose left would be better served by a more narrowly tailored statute. Moreover, plaintiffs utilizing the tolling provision are often times not doing so because they were unable to serve process on the defendant during the prescribed statutory period, but instead because the plaintiffs themselves were negligent in not complying with the applicable statute of limitations. The continued use of section 351 unduly burdens defendants who travel outside of California during the running of a statute of limitations, while not serving a legitimate purpose. This fact alone should encourage the California Legislature to take action to correct the abuse of Section 351.

Id. at 1676 (fns. omitted).

State Bar Conference of Delegates Resolution 4-27-94

In 1994, the Orange County Bar Association (with James A. McQueen taking the lead) proposed State Bar Conference of Delegates Resolution 4-27-94, which called for outright repeal of Section 351. The resolution was debated and defeated, apparently because "many 'fast-track' local court rules require service of the defendant within a short time after filing," "[t]here are many instances where personal service is difficult," and "[s]ervice by publication is prohibitively expensive in some cases." Exhibit pp. 39-44. To the staff's knowledge, neither the Orange County Bar Association nor anyone else has proposed a State Bar resolution calling for amendment of Section 351, rather than repeal.

OPTIONS: PROS AND CONS

Options regarding Section 351 include at a minimum the following, many of which are not mutually exclusive:

(1) Repeal Section 351 Outright

The Commission could recommend that the legislature repeal Section 351 outright. Given the State Bar's opposition to repealing the statute, however, such a recommendation may prove futile. Additionally, even the Comment in *Pacific Law Journal* acknowledges that "[o]ne legitimate interest that may be left unprotected without section 351 would be situations in which the defendant goes into hiding or somehow disappears, and is no longer amenable to service of process." Comment, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll?,* 23 Pac. L.J. 1639, 1675 (1992).

(2) Leave Section 351 on the Books Unchanged

In light of the State Bar's opposition to repeal of Section 351, as well as likely opposition from the California Trial Lawyers, the Commission could determine that Section 351 is not ripe for reform. The Commission could implement such a determination by either:

(1) submitting a recommendation to the legislature, which would set forth the Commission's reasons for leaving Section 351 as is;

(2) requesting that the legislature remove the topic from the Commission's agenda; or

(3) doing nothing and revisiting the topic at a later date.

(3) Amend Section 351 to Toll the Statute of Limitations Only When the Defendant is Not Subject to Service of Process

A further possibility would be to recommend that the legislature amend Section 351 such that there is no tolling when a out-of-state defendant is subject to service of process. Narrowing Section 351 along these lines would further the important policies underlying statutes of limitation: "to further justice by preventing defendants from being surprised by the restoration of claims that have laid dormant until evidence has been misplaced, witnesses have disappeared, and facts have been forgotten." Comment, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll?*, 23 Pac. L.J. 1639, 1642 (1992) (fn. omitted). On the other side of the equation, such statutory narrowing would not have much of a downside: When an out-of-state defendant is subject to service of process, the plaintiff may obtain prompt redress despite the defendant's absence, perhaps with no more difficulty in achieving service than if the defendant was in California.

Additionally, if the tolling of Section 351 was limited to defendants beyond the reach of process, the statute would impose less of a burden on interstate commerce than it now does, and probably would comport with the Commerce Clause. *See generally* Juzwin v. Asbestos Corp., Ltd., 900 F.2d 686 (3d Cir. 1990) ("We think New Jersey's legitimate interest could adequately be protected by a statute that permits a court to order the statute of limitations to be tolled when it is satisfied that, in spite of diligent efforts, long-arm service cannot be effectuated"). Accordingly, courts could apply Section 351 without distinguishing between local and interstate disputes. That would not only be more rational than the current situation, but would also expand the effective reach of Section 351, an effect that might cause CTLA and others to view the proposal more favorably than an attempt to repeal of Section 351.

The concept of limiting the tolling of Section 351 to defendants beyond the reach of process seems simple, but attempting to draft such a limitation reveals complexities:

-- Should the statute state that the limitations period is tolled "when the defendant is outside the state and beyond the reach of process"? Should the statute provide instead that the limitations period is tolled "when the defendant is outside the state," but make an exception "when the defendant is subject to service"? What if Section 351 simply recites that the limitations period is tolled when the defendant is beyond the reach of process? Would it be better if Section

351 tolled the limitations period as to "out-of-state" defendants, but defined "out-of-state" to mean beyond the reach of process? A formulation preserving existing language in Section 351 may fare better politically than one that essentially repeals existing Section 351 and replaces it with a new Section 351.

-- What does it mean to be "beyond the reach of process" or "amenable to process" or "subject to service of process" or the like? In New York, there is no tolling so long as "jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state." That phrase has been interpreted such that "[p]laintiff must make every attempt to acquire jurisdiction within the statutory period and this includes what is generally regarded as grasping at the last straw: obtaining an order under CPLR 308(5)" to serve the defendant in some manner the court found practicable. J. McLaughlin, Practice Commentary on N.Y. Civ. Prac. L. & R. 207. Should Section 351 require plaintiffs to go to such lengths to serve defendants?

Under Code of Civil Procedure Sections 583.210 and 583.240, service must be accomplished within three years of filing suit, but that limit is tolled when the defendant is "not amenable to the process of the court." As in New York, if the defendant can only be served through extreme means, such as service by publication, the defendant is nonetheless regarded as "amenable to the process of the court" and there is no tolling. *See* Perez v. Smith, 19 Cal. App. 4th 1600, 24 Cal. Rptr. 2d 186 (1993); *but see* Quaranta v. Merlini, 192 Cal. App. 3d 22, 237 Cal. Rptr. 179 (1987); *and see* Watts v. Crawford (issue is pending before the California Supreme Court in SO No. 35808). Should Section 351 parallel Section 583.240? In light of the State Bar's concerns about the expense of service by publication, as well as the demands of fast-track litigation, perhaps not, at least if Section 583.240 continues to be interpreted as in *Perez*. The State Bar and other groups may more readily support a less stringent standard, under which it is easier to show that the defendant is not susceptible to process. Additionally, it makes some sense to demand greater effort to achieve service with regard to an actual suit than with regard to one that is merely contemplated.

-- Should the statute say anything about the burden of proof? In Bywaters v. Bywaters, 721 F. Supp. 84, 88 (E.D. Pa. 1989), *aff'd*, 902 F.2d 1559 (3d Cir. 1990), the court considered the burden of proof under Pennsylvania's out-of-state tolling statute, which was silent on that point. The court concluded:

> [F]or tolling to apply, plaintiff must establish, by a preponderance of the evidence, that defendant has become a non-

> resident of the Commonwealth within the meaning of § 5532(a). . . . However, once plaintiff has shown that the defendant is no longer a Pennsylvania resident, the burden shifts to the defendant to show that plaintiff could have located the defendant's whereabouts through reasonable diligence and served him there by certified mail. In other words, plaintiff bears the burden of establishing that she is entitled to tolling under the general rule of § 5532(a), and once that burden is met defendant bears the burden of showing that he falls within the exception to the general tolling rule found in § 5532(b).

The *Bywaters* court advanced no policy reason for its allocation of the burden of proof, and the approach appears questionable: Requiring plaintiffs to demonstrate what they actually did to attempt service seems more straightforward than forcing defendants to show what plaintiff could have done to effect service had plaintiff been diligent. Use of the latter approach in *Bywaters* may be explainable simply as rationalization for upholding the large jury award that the *Bywaters* plaintiff recovered against her father for molestation.

(4) Amend Section 351 to State that There is No Tolling When the Cause of Action Lacks a Nexus to California and None of the Parties Was a California Resident When it Arose

Section 351 could be amended to provide that there is no tolling when the cause of action lacks any nexus to California and none of the parties was a California resident at the time it arose. As a commentator explained some time ago:

> [A] tolling statute of the forum should not apply unless the forum has some contact with the factual situation . . . . Otherwise, the application of the tolling statute exposes the defendant to unending liability on claims that arose in a foreign jurisdiction. Such an interpretation of the tolling statute ignores the basic policy of the statute of limitations--the prevention of stale claims.
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> Case Note, *Limitations of Actions: Absence of the Defendant: Tolling the Statute of Limitations on a Foreign Cause of Action,* 1 UCLA L. Rev. 619, 621 (1954).

Indeed, the New York Law Revision Commission recognized this problem over a half century ago. *See* Acts, Recommendation and Study relating to Application of Foreign Periods of Limitation and Tolling of the Statute of Limitations by Absence of Defendant, N.Y. L. Revision Comm'n Reports 127, 168-71 (1943).

California's overburdened courts should not have to adjudicate ancient disputes lacking any connection to the state. *See* Comment, California Code of Civil Procedure Section 351: Who's Really Paying the Toll, 23 Pac. L.J. 1639, 1658-61, 1672-73 (1992).

(5) Amend Section 351 to Exclude Brief Absences

Because Section 351 now applies even to very brief absences, defendants may be "penalized for taking a legitimate vacation out of state, often times long before the statute of limitations has run." Comment, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll?,* 23 Pac. L.J. 1639, 1674-75 (1992). "Such an absence rewards a tardy plaintiff who has failed to file an action within the statutory period." *Id.* at 1675; *see also* Acts, Recommendation and Study relating to Application of Foreign Periods of Limitation and Tolling of the Statute of Limitations by Absence of Defendant, N.Y. L. Revision Comm'n Reports 127, 168 (1943). One means of alleviating this unfairness would be to limit the tolling of Section 351 to periods of absence exceeding a certain minimum length.

(6) Amend Section 351 to Specify How it Applies to Multiple Absences, Multiple Defendants, and Entry of Nonresidents into California

Existing caselaw provides:

(a) Courts are to aggregate multiple absences in applying the tolling of Section 351. *See, e.g.,* Dew v. Appleberry, 23 Cal. 3d 630, 633, 591 P.2d 509, 153 Cal. Rptr. 219 (1979) (Tobriner, J.) and cases cited therein.

(b) The tolling applies only to the absent defendant, not to other defendants. *See* 3 B. Witkin, California Procedure *Actions* § 491, at 520 (3d ed. 1985) and cases cited therein.

(c) The tolling applies regardless of whether the defendant was in California and left, or was never in California in the first place. *See, e.g.,* Green v. Zissis, 5 Cal. App. 4th 1219, 7 Cal. Rptr. 2d 406 (1992); Cvecich v. Giardino, 37 Cal. App. 2d 394, 99 P.2d 573 (1940).

Each of these points could be codified, so that they would be clear merely from reading the statute, without having to refer to case law. That may, however, unduly complicate efforts to make more significant changes in Section 351.

(7) Amend Section 351 to Provide Tolling for Periods of Concealment, As Well As Absence From the State

Many states toll the limitations period when the defendant is "concealed," as well as when the defendant is absent from the state. *See, e.g.,* Colo. Rev. Stat. § 13-80-118; Fla. Stat. Ann. § 95.051; Kan. Stat. Ann. § 60-517. Obviously, such an approach would require either a statutory or a judicial definition of "concealment," which may raise difficult issues. If a defendant marries, changes her name, and moves to a new address, is that "concealment?" Does proof of "concealment" require a showing of intent to hide from the plaintiff? Extending Section 351 to "concealment" may raise more problems than it solves. Moreover, some means already exist for dealing with concealed defendants. *See, e.g.,* Code Civ. Proc. §§ 415.20 (in lieu of personal delivery, defendant may be served by leaving the papers at defendant's home or office, followed by mailing them to the same address); 415.50 (service by publication when defendant cannot "with reasonable diligence" be served in another manner).

(8) Amend Section 351 to Set An Upper Limit on the Length of the Tolling

Another option would be to set an upper limit on the length of the tolling under Section 351. For example, Connecticut's out-of-state tolling statute provides:

> In computing the time limited in the period of limitation prescribed under any provision of chapter 925 or this chapter, the time during which the party, against whom there may be any such cause of action, is without this state shall be excluded from the computation, ***except that the time so excluded shall not exceed seven years***.
>
> Conn. Gen. Stat. Ann. § 52-590 (emph. added.)

Such a limit would necessarily be arbitrary and may not fairly balance the interests in each case. It might, however, add a degree of certainty and generally achieve just results.

RECOMMENDATION

The staff recommends simultaneously pursuing the following options:

-- Amend Section 351 to apply only when the defendant is not subject to service of process (#3 above).

-- Amend Section 351 to make the toll inapplicable when the cause of action lacks a nexus to California and none of the parties was a California resident when it arose (#4 above).

-- Amend Section 351 to exclude brief absences (#5 above).

The staff suggests drafting the amendment as follows:

§ 351. Tolling of statute of limitations when defendant is out of state

351. *(a)* If, when the cause of action accrues against a person, ~~he~~ *the person* is out of the ~~State~~ *state*, the action may be commenced within the term ~~herein~~ limited *for commencement of the action*~~,~~ after ~~his~~ *the person's* return to the ~~State~~ *state*, and if, after the cause of action accrues, ~~he~~ *the person* departs from the ~~State~~ *state*, the time of ~~his~~ *the person's* absence is not part of the time limited for the commencement of the action.

(b) Subdivision (a) applies only to periods of time after the cause of action accrues during which all of the following conditions are satisfied:

(1) The person cannot with reasonable diligence be served with process.

(2) The person's absence from the state is for a continuous period of more than thirty full days.

(c) Subdivision (a) does not apply if, when the cause of action accrues, there is no basis for jurisdiction in the state.

Comment. Section 351 is amended to reflect modern concepts of personal jurisdiction and limits on service of process. *See, e.g.,* International Shoe Co. v. Washington, 326 U.S. 310 (1945); Cal. Code Civ. Proc. §§ 410.10, 413.10, 413.30, 415.20, 415.30, 415.40, 415.50.

The text now in subdivision (a) is amended to make technical changes.

Subdivision (b)(1) makes the tolling of subdivision (a) inapplicable when the defendant is subject to service of process through reasonable diligence in a manner sufficient to confer jurisdiction to grant the relief sought. Formerly, the defendant's amenability to process was "irrelevant under the tolling provision." Dew v. Appleberry, 23 Cal. 3d 630, 632, 591 P.2d 509, 153 Cal. Rptr. 219 (1979). The Ninth Circuit found that broad tolling unconstitutional as applied to cases involving interstate commerce. *See* Abramson v. Brownstein, 897 F.2d 389 (9th Cir. 1990). To demonstrate that defendant "cannot with reasonable diligence be served with process," plaintiffs must show that they have "actively exercised reasonable diligence" to serve defendant. See Hirsch v. Blish, 76 Cal. App. 3d 163, 142 Cal. Rptr. 646 (1977). It is not necessary to seek court approval of unusual methods of effectuating service. *Cf.* Perez v. Smith, 19 Cal. App. 4th 1595, 24 Cal. Rptr. 2d 186 (1993) (no tolling of service requirement under Section 583.240 even though service could only be achieved through publication).

Subdivision (b)(2) restricts the tolling of Section 351 to periods of more than thirty continuous full days of absence. The amendment overturns existing caselaw applying the tolling to brief periods of absence. *See, e.g.,* Mounts v. Uyeda, 227 Cal. App. 3d 111, 114, 277 Cal. Rptr. 730 (1991) (four day absence); Garcia v. Flores, 64 Cal. App. 3d 705, 709, 134 Cal. Rptr. 712 (1976) (eight day absence). It is modeled on statutes such as: N.Y. Civ. Prac. L. & R. 207 (absence of four months or more); Pa. Stat. Ann. tit. 42, § 5532 (same); Mich. Comp. Laws Ann. § 27A.5853 (absence in excess of two months). Only full days of absence count in applying subdivision (b)(2).

Subdivision (c) overturns the result of Kohan v. Cohan, 204 Cal. App. 3d 915, 251 Cal. Rptr. 570 (1988). See Comment, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll,* 23 Pac. L.J. 1639, 1658-61, 1672-73 (1992); Case Note, *Limitations of Actions: Absence of the Defendant: Tolling the Statute of Limitations on a Foreign Cause of Action,* 1 UCLA L.

Rev. 619 (1954); Acts, Recommendation and Study relating to Application of Foreign Periods of Limitation and Tolling of the Statute of Limitations by Absence of Defendant, N.Y. L. Revision Comm'n Reports 127, 168-71 (1943). See also Section 361 (if cause of action arose outside California and would be time-barred in the foreign jurisdiction where it arose, the cause of action may not be maintained in California by a nonresident).

The amendment does not extend to actions already commenced, nor to cases where the statute of limitations has fully run. Section 362.

At the Commission's direction, the staff would be able to prepare a draft of a tentative recommendation along these or other lines for the next meeting.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

RESOLUTION 4-27-94

DIGEST
Statute of Limitations: Eliminate Tolling for Out-of-State Defendants
Repeals Code of Civil Procedure section 351 which presently tolls the statute of limitations while a defendant either resides or travels outside of California.

RESOLUTIONS COMMITTEE REPORT
Recommend DISAPPROVE

Reasons:
This resolution repeals Code of Civil Procedure section 351 to preclude tolling of the statute of limitations while a defendant is absent from the state. This resolution should be disapproved because a plaintiff should not be penalized when a defendant is traveling or residing outside of the state.

A plaintiff may file a case against a defendant regardless of whether the defendant is present in the state. However, many "fast-track" local court rules require service of the defendant within a short time after filing. There are many instances where personal service is difficult, and sometimes made intentionally so by the defendant. Service by publication is prohibitively expensive in some cases. Moreover, in all of the years that the statute has been on the books, no state court has found the statute unconstitutional. One federal case (Abraham v. Browning (9th Cir., 1990) 897 Fed. 389) has held the statute unconstitutional in cases of interstate commerce. California Courts of Appeal have criticized the statute, but none have found it unconstitutional.

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SECTION/COMMITTEE REPORTS

COMMITTEE ON THE ADMINISTRATION OF JUSTICE
Recommend DISAPPROVE
Reasons:
This resolution eliminates the tolling of the statute of limitations for the period of time a defendant resides or travels out of state. The author maintains that existing law serves no useful purpose because of California's long-arm statute and the ability to serve by publication.

Unfortunately there are many instances where personal service is difficult (sometimes made intentionally so by the defendant) and the fact is that service by publication is expensive. For these reasons the Committee recommends disapproval of this resolution.

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TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to repeal Code of Civil Procedure section 351 to read as follows:

~~§ 351 Absence of defendant~~

~~If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.~~

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: Tolls the statute of limitations during the time a defendant either resides or travels outside of California.

This Resolution: Eliminates tolling of the statute of limitations when a defendant resides or travels out of state.

The Problem: Anachronistic section 351 serves no purpose today and should be repealed. Adopted in 1872, this section long predates California's long-arm statute and the ability to serve an absent defendant by substituted service or by publication. Further, a plaintiff's ability to file an action is not limited or prejudiced by a defendant's absence from the state.

In addition to being unnecessary, this section creates inequitable advantages to those plaintiffs fortunate enough to face a defendant who resides or travels out of California. In some cases, the statute of limitations is tolled for many years, defeating the purpose of the statute altogether. In other cases, the statute is tolled briefly, while a California resident is away for pleasure or business, for example, rewarding a tardy plaintiff who has otherwise failed to file an action within the statutory period. In either case, plaintiff has obtained an unfair advantage based on the irrelevant circumstance of a defendant who resides or travels out of state.

Section 351 is under attack from numerous directions. It has been sharply criticized by the California Court of Appeals (see, e.g., O'Laskey v. Sortino (1990) 224 Cal.App.3d 241, 252, fn. 8). In other states, similar provisions have been modified to eliminate inequitable tolling (see, e.g., Ill. Rev. Stat. 1973, ch. 83, par. 19). Finally, in cases involving interstate commerce, section 351 has been held violative of the Commerce Clause of the Constitution. (Abramson v. Brownstein (9th Cir. 1990) 897 F.2d 389, 393.) Still, section 351 survives to wield its unfair effect on additional defendants each year. This outdated provision should be repealed.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: James A. McQueen, 4675 MacArthur Court, Suite 800, Newport Beach, California 92660; (714) 752-0550

RESPONSIBLE FLOOR DELEGATE: James A. McQueen

CHAIRMAN GOLDIN: First of all, I see that we have a quorum.

The next resolution we're going to consider is Resolution 4-27. It repeals the Code of Civil Procedure section 351, which presently tolls the statute of limitations while a defendant either resides or travels outside of California. The Resolutions Committee recommends disapproval. It's been called up for limited debate.

Recognize the proponent at Microphone 6.

MR. JAMES McQUEEN: Thank you, Mr. Chairman. My name is Jim McQueen, and I'm speaking on behalf of the Orange County Bar Association in support of eliminating Code of Civil Procedure section 351.

This section and sections like this has been ruled unconstitutional regarding businesses. It has been criticized by the Court of Appeals as being obsolete. Other states like the State of Illinois have eliminated it from their books, and there are a lot of reasons why it has received so much criticism.

In California individuals are still being subjected to the tolling of the statute of limitations or in some cases effectively no statute of limitations at all simply because, as is very common in many situations, they reside or travel out of state, and this can result in very inequitable situations. In the extremely common situation of a defendant individual traveling out of state the statute of limitations under 351 is tolled during the time that he's traveling out of state, and what that essentially rewards are tardy plaintiffs because that's the main application that you see in the case law of where 351 is cited, and that's not a very good reason to have an inequitable and

changing statute of limitations, just because somebody traveled out of state briefly on business or pleasure.

Even more egregious are those significant number of cases where the statute of limitations is tolled indefinitely because an individual defendant lives out of state, and in some cases it can be five, six, seven, eight years for a one-year statute of limitations in California before those individuals are sued, and there's just no reason for that given the importance of the statute of limitations, which you've heard argued many times. Service of process in California is very easy, and California's long-arm statutes make it so, and for that reason this statute should be repealed. Thank you.

CHAIRMAN GOLDIN: Thank you. Your time is expired. The Chair recognizes a red card at Microphone 5.

MR. DONN PICKETT: Thank you. Donn Pickett, Bar Association of San Francisco, on behalf of the delegation.

We oppose Resolution 4-27. All of us are aware of instances in which service is made more difficult by parties going out of state, and this legislation has been in place for many, many years to deal with that situation. We really don't have any solution to the problem of that. Service by publication is an expensive procedure. It's often subject to challenge later on after default is taken, and the only problem that's really been suggested that this solves is the problem of an out-of-state defendant who is away for many, many years. The statute tolls were tolled for five, six, seven, eight years. In this age of fast track, that cannot be so. The issues

with respect to service will be resolved, and the current system is a fair means to do so. Therefore we oppose this resolution, and we yield the rest of our time to anyone else in opposition.

CHAIRMAN GOLDIN: Thank you. Are there any other reds? There don't seem to be any in opposition. Therefore, I'm going to go to the proponent to close.

MR. JAMES McQUEEN: Thank you. I don't think anybody in writing or orally can contend that the statute of limitations doesn't have value and shouldn't be applied where it makes sense to apply it. The only concern is whether one can effect service, and in that regard, notwithstanding fast track, there's three years under the statute of the State of California to effect service. That's ample time in 99.99 percent of occasions. There are so many different ways to do it, from mailing a letter, to in those rare cases publication. So service is relatively, in fact extremely easy in California. The legislature has gone out of its way to create ingenious, simple ways to effect service. As for fast track, fast track you can file a declaration of diligence and certainly that does not overrule the three-year statute. So service can be effected, and ultimately one has to balance abdicating the statute of limitations, and the balance doesn't --

CHAIRMAN GOLDIN: Your time has expired. The question before the house is whether to approve in principle Resolution 4-27.

Everyone in favor, raise your cards. Thank you. You may put down your hands.

Everyone opposed?

The resolution clearly fails.

Next we're going to go to Mr. Seff.

MR. SEFF: Ladies and gentlemen, I need the consent of the house again for another Consent Calendar item. This is Resolution 6-3. It was not disapproved by the Resolutions Committee, but those Bar Associations who found difficulties with it have worked them out. The new proposed change has been distributed to the house and, unless I hear some dissent, we will assume we have your consent to put it on the Consent Calendar. Thank you very much.

CHAIRMAN GOLDIN: Thank you. The next resolution in order is 4-29. 4-29 amends the Code of Civil Procedure section 657 to allow a party's attorney to prepare an order for a new trial and specifications of reasons upon the court's request. The Resolutions Committee recommends that this matter be approved in principle, and it's been called up for limited debate.

The proponent is at Microphone 6. You may begin.

MS. LEE EDMON: Thank you, Mr. Chairman. Lee Edmon for the Los Angeles County Bar Association.

Resolution 4-29 would allow the court the discretion to call on one of the parties to the case to prepare a new trial order. That's all it does. Under the present law if the court asks one of the parties to do that, or even if the court adopts some of the arguments of the moving party's memorandum of points and authorities into its own order, that's grounds for reversal on appeal.