

Memorandum 95-44**Tolling Statute of Limitations When Defendant Is Out of State: Comments on
Tentative Recommendation**

The Commission received two comments on its tentative recommendation to repeal Code of Civil Procedure Section 351, which tolls the statute of limitations when the defendant is absent from the state.

The Real Property Law Section of the State Bar supports the tentative recommendation for the same reasons as the Commission:

Section 351 is an anachronism which can lead to inconsistent and unfair results, especially given its unconstitutionality in the broad context of cases involving interstate commerce. Given the ease of effecting service out-of-state, the statute is unnecessary.

Exhibit p. 1. The Real Property Law Section also comments that the apparent justification for retaining Section 351 “relates to cases where a defendant is not merely absent from the state, but cannot be found at all.” As the Real Property Law Section observes, that situation can occur regardless of whether the defendant is in California, and can be handled through other existing procedures.

The Civil and Small Claims Standing Advisory Committee of the Judicial Council supports the portion of the tentative recommendation proposing to require courts to extend the delay reduction deadline for service of a complaint “on a showing that service cannot be achieved within the time required with the exercise of due diligence.” Exhibit p. 2. The committee does not, however, fully support repeal of Section 351. Rather, it maintains that tolling during a defendant’s absence from the state continues to be important in small claims cases, because with limited exceptions Code of Civil Procedure Section 116.340(d) precludes out-of-state service in such cases. *Id.*

The Civil and Small Claims Standing Advisory Committee has a point. Section 116.340 governs service in small claims cases and provides in part:

(d) Service shall be made within this state, except as provided in subdivisions (e) and (f).

(e) The owner of record of real property in California who resides in another state and who has no lawfully designated agent in California for service of process may be served by any of the methods described in this section if the claim relates to that property.

(f) Service on the Director of the Department of Motor Vehicles, and notice to the defendant, if made by any of the methods permitted in this section for service of a claim and order, shall satisfy the requirements of Sections 17450 to 17461, inclusive, of the Vehicle Code, on constructive service on a nonresident owner or operator of a motor vehicle involved in an accident in this state.

According to Albert Balingit of the Civil and Small Claims Advisory Committee, the rationale for restricting out-of-state service in small claims cases is to prevent plaintiffs from abusing out-of-state defendants by suing in California where it is cost-prohibitive for an out-of-state defendant to defend against a small claim.

That rationale has merit, but the proposal to retain out-of-state tolling for small claims cases raises a number of issues:

(1) If out-of-state tolling is to continue in small claims cases, how should the tolling provision be drafted to make it constitutional in cases involving interstate commerce?

(2) Is it necessary to preserve out-of-state tolling in small claims cases, when plaintiffs with minor claims against out-of-state defendants could assert their claims in municipal court rather than in small claims court?

(3) If out-of-state tolling was preserved in small claims cases, wouldn't the effect be to preserve such tolling for the first \$5,000 of any claim? Consider a large claim that would be time-barred without such tolling, but timely if out-of-state tolling applied. If such tolling was restricted to small claims cases, couldn't the plaintiff simply waive the excess and assert the claim in small claims court? Is that a problem?

(4) For causes of action involving less than \$5,000, if out-of-state tolling was restricted to small claims cases, wouldn't that mean that the same cause of action could be both timely and time-barred, depending on whether it was asserted in small claims court as opposed to municipal court? Is that a problem?

(5) Suppose a plaintiff sues in small claims court and the defendant has a related claim in excess of the court's jurisdiction. The case is transferred out of small claims court and into municipal or superior court pursuant to Code of Civil Procedure Section 116.390. Then the defendant asserts that plaintiff's claim is time-barred because out-of state tolling applies only in small claims cases. How should that situation be resolved?

The staff posed these questions in a letter to Mr. Balingit, who reported by phone that they are good questions not previously considered by the Civil and Small Claims Advisory Committee. Unfortunately, however, the committee will not meet again until October, so its position on these points is not yet known.

The staff proposes to reconcile the various competing considerations by adding the following statute to the conforming revisions in the tentative recommendation:

§ 116.350 (added). Tolling of limitations periods

116.350. (a) In computing the running of the statute of limitations on a claim, the small claims court shall exclude any time during which subdivision (d) of Section 116.340 precluded service on the defendant.

(b) The tolling of subdivision (a) shall apply even if the claim is transferred to another court pursuant to Section 116.390.

(c) Tolling pursuant to subdivision (a), whether continuous or interrupted, shall not exceed a total of five years for any claim.

Comment. Section 116.350 is added to reflect the repeal of Code of Civil Procedure Section 351 and the continued need for tolling of the statute of limitations in small claims cases when the defendant is outside California and Section 116.340(d) precludes service of process.

Subdivision (b) makes clear that asserting a related claim in another court and successfully seeking transfer of the small claims case to the other court pursuant to Section 116.390 does not affect the availability of tolling under subdivision (a).

Subdivision (c) furthers the goal of finality and prevents stale claims by setting a five-year time limit on tolling pursuant to subdivision (a). Although the combined effect of subdivision (c) and Section 116.340(d) may sometimes be to totally preclude a plaintiff from suing in small claims court, the plaintiff has the alternative of suing in municipal court. *Compare* Section 116.220 (jurisdiction of small claims courts) *with* Section 86 (jurisdiction of municipal courts).

Proposed Section 116.350 would, with limitations, preserve out-of-state tolling in small claims cases. Even though plaintiffs theoretically could assert such claims in municipal court rather than small claims court when the defendant is absent from California, in reality suing in municipal court may be cost-prohibitive, making continued availability of out-of-state tolling important where Section 116.340(d) precludes out-of-state service. Because proposed Section 116.350 is narrowly tailored such that out-of-state tolling applies only to periods during which Section 116.320(d) precludes service, it should be constitutional under the Commerce Clause. Subdivision (b) would clarify that out-of-state tolling continues to apply even if the defendant asserts a related claim exceeding the jurisdictional limit of small claims court and the case is transferred to another court. That rule should discourage defendants from asserting inflated counterclaims as a means of defeating claims that are timely only if out-of-state tolling applies.

Subdivision (c) would address the theoretical situation in which a plaintiff with a large claim that would be time-barred without out-of-state tolling, but timely if such tolling applied, waives the excess to attain small claims jurisdiction. The staff considered but rejected the possibility of directly stating that out-of-state tolling does not apply in such a situation. Although such a provision would specifically address the problem, courts may have great difficulty determining when small claims jurisdiction is based on waiver of an excess in the amount of the demand. The five-year time limit of subdivision (c) would further the goal of finality yet be easy to apply. Additionally, it would account for changes in the jurisdictional limit of small claims courts: Without a time limit on out-of-state tolling, a plaintiff with a large, otherwise time-barred claim against an out-of-state defendant might unfairly surprise the defendant by waiting until the jurisdictional limit of small claims courts increases to the amount of the claim, and then asserting the stale claim in small claims court and invoking the tolling of Section 116.350. Subdivision (c) would preclude such a tactic and ensure finality.

For these reasons, the staff recommends that proposed Section 116.350 be incorporated into the Commission's recommendation, as well as any necessary corrections, and the Commission approve the recommendation as so revised for printing and submission to the Legislature. If the Judicial Council or others have

further input due to the addition of proposed Section 116.350, the Commission could still consider such input and revise its bill if necessary.

Respectfully submitted,

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June 15, 1995

Law Revision Commission
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California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Memorandum 95-20; Proposed Repeal of CCP Section 351

Ladies and Gentlemen:

I am writing on behalf of the Executive Committee of the State Bar Real Property Law Section in response to your request for comment on the Commission's tentative recommendation to repeal Section 351 of the Code of Civil Procedure. Our Section supports this recommendation for the reasons stated therein: Section 351 is an anachronism which can lead to inconsistent and unfair results, especially given its unconstitutionality in the broad context of cases involving interstate commerce. Given the ease of effecting service out-of-state, the statute is unnecessary.

The apparent justification for keeping the statute relates to cases where a defendant is not merely absent from the state, but cannot be found at all. Of course, that can occur whether or not the defendant has left California. Other existing procedures (together with the Commission's proposed amendment to Government Code Section 68616) adequately address these situations.

Please feel free to contact the undersigned should you require further comment on this matter.

Sincerely,



Randall I. Barkan

cc: Executive Committee
David Long



Law Revision Commission
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Judicial Council of California

Administrative Office of the Courts

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July 24, 1995

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Comment on Tolling Statute of Limitations When Defendant is Out of State

Dear Commission:

Thank you for giving us the opportunity to comment on the above-referenced tentative Commission recommendation.

The Judicial Council Civil and Small Claims Standing Advisory Committee reviews and makes recommendations to the Judicial Council on case management, trial court delay reduction, and small claims among other matters. The committee was, therefore, especially interested in the proposal to amend section 68616 of the Government Code under the Trial Court Delay Reduction Act.

After discussion at its meeting on June 9, 1995, the committee supports the Commission's proposal to amend subdivision (a) of section 68616 of the Government Code.

However, the committee believes that the statute of limitations should be tolled for small claims cases under section 351 of the Code of Civil Procedure because small claims cases cannot be served out of state with limited exceptions. (See Code Civ. Proc., sec. 116.340 (d)). If you wish to discuss this matter further, please contact our committee member Mr. Albert Balingit, an attorney with the Department of Consumer Affairs, at (916) 322-5254.

Very truly yours,

Cara M. Vonk
Counsel to the Civil and Small Claims
Standing Advisory Committee

cc: Hon. Janet Kintner, Chair
Mr. Albert Balingit
Mr. Michael Bergeisen, General Counsel