

First Supplement to Memorandum 96-8

1996 Legislative Program: Tolling Statute of Limitations

At its meeting on November 2, 1995, the Commission approved a final recommendation calling for repeal of Code of Civil Procedure Section 351, which tolls the statute of limitations when the defendant is absent from the state. As explained in Memorandum 96-8, the staff has been exploring possibilities for placement of the proposal.

Yesterday afternoon, however, the Commission received a letter from the State Bar Litigation Section, commenting on the proposal for the first time. See Exhibit pp. 1-3. The Litigation Section “strongly recommend[s] that Section 351 not be repealed.”

The Litigation Section makes the following points:

(1) “The only people who will be injured by the repeal of Section 351 are residents of California. The only people who will be aided by the repeal of Section 351 will be either people who commit torts or breach contracts here and then leave the State or nonresidents who have injured California residents without entering the State.”

(2) If Section 351 is repealed, plaintiffs will have to sue out of state defendants, even though the expense of prosecuting the case may be “excessive,” and “the possibility of collecting from the out of state or out of country defendant may be not only difficult and expensive but also unlikely.”

(3) California courts are not overburdened with litigation of claims that arose elsewhere, nor are they a “haven for dilatory nonresidents.”

(4) “There is no policy reason why [foreign] manufacturers of defective products in international commerce should be protected from liability to our residents by our statute of limitations.”

(5) Repeal of Section 351 “would encourage defendants in major cases to go into hiding or conceal themselves.” Because of its expense and difficulty, “service by publication is not an adequate solution.”

(6) The “process of totaling brief absences of a defendant from California to calculate the time of tolling under Section 351 is reasonable,” because it

“ameliorates the arbitrary, and in some cases unreasonably short, periods of limitation that apply in this state.”

There are counterarguments to these points, some of which the Commission considered in preparing its recommendation. For instance, statutes of limitations serve important policy interests, such as sparing courts from adjudicating stale claims. Section 351 has many exceptions and is unconstitutional as applied to interstate commerce. Repealing it may prevent confusion and disputes over whether tolling applies, and may help preserve judicial resources for cases in which witnesses are available and evidence is fresh. These effects may benefit Californians generally. Additionally, Section 351 is not the only means of protecting against difficulties in effecting service, and out of state service is not necessarily more difficult or expensive than service within the state. Litigation expenses may be prohibitive in any small case, regardless of whether the defendant is out of the state. Section 351 is at best a poorly tailored means of addressing that problem. Repeal of Section 351 may prevent inequities, such as allowing a dilatory plaintiff to pursue a claim that would have been barred but for the fortuity that the defendant happened to take a short vacation outside California instead of within the state.

Although counterarguments exist, the concerns of the Litigation Section deserve serious attention and may perhaps warrant rethinking of the Commission’s proposal to repeal Section 351. In considering the issues, the Commission should bear in mind that the State Bar Real Property Section supported the recommendation. The Civil and Small Claims Standing Advisory Committee of the Judicial Council initially opposed the proposal, but reversed its position after the Commission revised the recommendation to preserve out of state tolling in certain small claims cases.

Respectfully submitted,

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Staff Counsel

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Law Revision Commission
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February 5, 1996

California Law Revision Commission
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Ladies and Gentlemen:

This letter will respond on behalf of the Litigation Section of the State Bar of California to your request for comments on the proposed repeal of Code of Civil Procedure section 351, as reflected in the November, 1995, discussion draft. For the reasons hereinafter stated, we strongly recommend that Section 351 not be repealed.

The only people who will be injured by the repeal of Section 351 are residents of California. The only people who will be aided by the repeal of Section 351 will be either people who commit torts or breach contracts here and then leave the State or nonresidents who have injured California residents without entering the State. We see no reason why the Law Revision Commission or the California Legislature should prefer the interests of nonresidents over those of residents of this State. This proposal was disapproved by a very substantial majority of the 1994 Conference of Delegates. We agree with the statements of reasons presented on that occasion.

Repeal would not protect California residents in the situations in which the tolling provisions ought legitimately to apply. For example, a plaintiff with modest means may find it very expensive to serve an out of state defendant. If a California resident holds a relatively small claim and knows in advance that the defendant is out of the state, so service of process may be expensive or difficult, the repeal of Section 351 will harm that person. He or she will have to sue before the statute of limitations expires, even though the chances of recovery may be slim and the expenses of preparing, filing, serving, and

prosecuting the lawsuit are excessive, and even though the possibility of collecting from the out of state or out of country defendant may be not only difficult and expensive but also unlikely.

The argument that California courts are over-burdened by litigation here of claims that arose elsewhere is unfounded. No statistics have been proffered to substantiate such an argument. The staff study presents no evidence which might lead to the inference that claims against nonresidents which fall within Section 351 materially add to the burdens of the California courts. In fact, civil cases are not the reason for California courts being over-burdened. Criminal cases are.

If a California resident has potential claims against a person or entity outside the United States, Section 351 should continue to be available to toll the statutes of limitations. For example, a foreign manufacturer of a product imported to California should not be protected by the one year statute of limitations where that product causes personal injury in California. The company through whom the foreign manufacturer distributes the product in California may not be amenable to service of process here, may not have qualified to do business here, may be under-capitalized, or may be uninsured. The manufacturer may be in a country in which service of process is difficult, expensive, time consuming, or impracticable. A default judgment may be impossible to enforce in the courts of that country. If the manufacturer subsequently moves to California, establishes a presence here, or becomes subject to service of process here, the tolling of our statutes of limitations could then cease. There is no policy reason why manufacturers of defective products in international commerce should be protected from liability to our residents by our statute of limitations.

Outright repeal of Section 351 would encourage defendants in major cases to go into hiding or conceal themselves from service of process.

The availability of possible service by publication is not an adequate solution. A California resident may not timely be able to find out where publication must be made to constitute reasonable notice. Some judges are reluctant to order service by publication, so merely seeking an order permitting such service may cost many thousands of dollars in investigator fees and attorney fees, even if the order is granted.

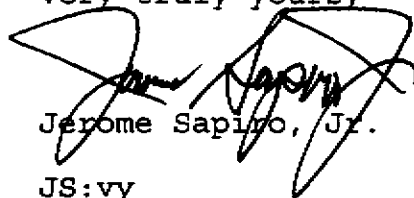
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The Commission's argument that Section 351 makes California a haven for dilatory nonresidents is not correct. Many states have longer periods of limitation than California does, so nonresidents can sue easier elsewhere, particularly in personal injury cases. Precisely because California has substantially shorter periods of limitation than other states, nonresident plaintiffs should not be handicapped by the fact that they moved here after our own statute had run. For example, if a personal injury plaintiff is brought here for medical care and remains in this state, our one year statute of limitations should continue to be tolled if Section 351 applies. Otherwise, that plaintiff potentially becomes a burden on our state by being disabled or impecunious, as a result of the injury suffered, but is left with no remedy.

Instead of being a reason to repeal Section 351, the process of totalling brief absences of a defendant from California to calculate the time of tolling under Section 351 is reasonable. Doing so ameliorates the arbitrary, and in some cases unreasonably short, periods of limitation that apply in this state. Having the tolling provision offsets the otherwise arbitrary effects of short periods of limitation.

Please contact the undersigned if you have any questions regarding the foregoing.

Very truly yours,



Jerome Sapiro, Jr.

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