Study J-110 April 5, 1996

Memorandum 96-28

Tolling Statute of Limitations: Issues on Recommendation

In November 1995, the Commission approved a final recommendation proposing repeal of Code of Civil Procedure Section 351, which tolls the statute of limitations when the defendant is absent from the state. Before the proposal was incorporated in a bill, the Commission received a letter from the State Bar Litigation Section, commenting for the first time on the study. The Litigation Section "strongly recommend[s] that Section 351 not be repealed." Exhibit p. 1. It advances a number of different arguments in support of that position. *Id.* at pp. 1-3.

At its last meeting, the Commission considered the Litigation Section's newly-arrived letter and decided to seek input from the Consumer Attorneys of California. This memorandum reports on that effort and analyzes the Litigation Section's letter more thoroughly than was possible for the last meeting.

POSITION OF THE CONSUMER ATTORNEYS OF CALIFORNIA

Shortly after the Commission's last meeting, the staff sent the recommendation to and solicited comments from the Consumer Attorneys of California. Due to preoccupation with the March primary election, Consumer Attorneys has been slow in responding. The staff still has not received a written response from Consumer Attorneys.

Legislative advocate LeeAnn Tratten reported by phone, however, that it is a close call but Consumer Attorneys opposes the Commission's proposal in its present form. That position seems to rest on general aversion to shortening limitations periods, rather than on arguments more specific to Code of Civil Procedure Section 351. Consumer Attorneys may want to try to work out a middle ground, or may simply oppose the proposal outright. Ms. Tratten said that decision was still up in the air. She promised to either contact the staff with an alternate approach before the Commission's upcoming meeting, or send a letter expressing Consumer Attorneys' opposition. The staff will supplement this memorandum if we receive any further input from Consumer Attorneys.

ANALYSIS OF THE LITIGATION SECTION'S COMMENTS

The Litigation Section's most persuasive arguments focus on expense and difficulty involved in pursuing defendants residing in other states. It seems logical to address those concerns first, and then turn to the Litigation Section's remaining points.

Prohibitive Expense and Difficulty Pursuing Defendants in Other States

The Litigation Section comments that

> 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.
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> [Exhibit pp. 1-2.]

If service by publication is necessary, plaintiffs may encounter additional problems:

> 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.
>
> [Exhibit p. 2.]

These concerns about the prohibitive expense and difficulty of achieving justice are legitimate. In many instances, however, they apply just as well to defendants residing within California as to defendants in other states. For example, a plaintiff may be deterred from suing a resident defendant known to have little money and a penchant for evading service. The Commission did not overlook the problem of prohibitive litigation expenses in crafting its recommendation, but rather determined that Code of Civil Procedure Section 351

is a poorly tailored means of addressing that problem. The Litigation Section's comments on the issue may be grounds for revising the Commission's recommendation to address that point, rather than abandoning the Commission's approach to Section 351.

Defendants in Other Countries

The Litigation Section also points to difficulties pursuing defendants in other countries:

> [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 undercapitalized, 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.
>
> [Exhibit p. 2.]

Although much of what the Litigation Section says is true, the argument is as much an indictment of Section 351 as a justification for it.

That is because *Section 351 does not apply to corporations or limited partnerships.* Cardoso v. American Medical Systems, Inc., 183 Cal. App. 3d 994, 998-99, 228 Cal. Rptr. 627 (1986); Epstein v. Frank, 125 Cal. App. 3d 111, 119 n.4, 177 Cal. Rptr. 831 (1981); Loope v. Greyhound Lines, Inc., 114 Cal. App. 2d 611, 250 P.2d 651 (1952). Those exceptions are easily overlooked, because they are not expressly codified. Rather, courts inferred the exceptions from the rules governing service of process on corporations and limited partnerships. *See* Cardoso, 183 Cal. App. 3d 994; Epstein, 125 Cal. App. 3d at 118-20; Loope, 114 Cal. App. 2d at 614. A foreign corporation is always subject to service of process through substitute service on the Secretary of State (if not through other means). *See* Corp. Code § 2111. That

> renders the tolling provisions of section 351 inapplicable. 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.
>
> [Cardoso, 183 Cal. App. 3d at 999.]

Repeal of Section 351 would thus remove a trap for the unwary. None of its many exceptions are codified in or near Section 351. See *Recommendation,* at pp. 1-2 & nn. 4-9 & cases cited therein. A plaintiff could easily rely on the presumed tolling of Section 351, only to discover too late that the claim falls within one of its exceptions. Repeal of Section 351 would eliminate misplaced reliance on it.

As for claims against individuals living in foreign countries, means of service exist. *See* I. Brown & R. Weil, Civil Procedure Before Trial, 4-32.10 to 4-32.14 (Rutter Group 1995). The problem boils down to potentially prohibitive expense and difficulties obtaining recovery, just as with defendants in other states.

Repeal Will Hurt Californians and Benefit Only Nonresidents

The Litigation Section asserts that the "only people who will be injured by the repeal of Section 351 are residents of California." (Exhibit p. 1.) Further, according to the Litigation Section, 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." *Id.*

The staff disagrees. All people, residents and nonresidents alike, are served by clarifying a confusing area of law. At present, plaintiffs may make mistakes about when Section 351 applies, as by failing to consider that the statute is unconstitutional as applied to interstate commerce, or incorrectly concluding that their claims do not involve interstate commerce. Litigants and courts may become bogged down in disputes over whether Section 351 applies, delaying justice for all citizens and costing taxpayers money. Repeal would alleviate these effects.

Californians are also benefited when their courts do not have to adjudicate stale claims. Statutes of limitation are not empty procedural requirements. They serve the important purpose of ensuring that disputes are litigated when courts can most effectively determine the truth and achieve justice: when memories are fresh, witnesses are available, and evidence is still at hand. By eliminating a

means of delaying adjudication, repeal of Section 351 would help California courts focus on disputes that are ripe for adjudication, not overripe. That positive effect on court operations would benefit Californians generally.

In short, the staff believes the issue is not whether Californians would derive *any* benefit from repeal of Section 351. Rather, the question is whether the benefits to be gained outweigh any potential downsides of repeal.

There is No Big Influx of People Who Invoke Section 351

The Litigation Section attacks what it apparently views as an important premise of the Commission's recommendation: the notion that Section 351 makes California a haven for dilatory nonresidents and overburdens California courts with claims that arose elsewhere.

The Litigation Section overstates and overemphasizes the Commission's point. Rather than contending that nonresidents flock to California to take advantage of Section 351, the recommendation states:

> Section 351 tolls a limitations period even if, at the time the cause of action accrued, the parties resided outside the state and did not move into the state until much later. This means that a cause of action having no other connection to California may be asserted in the state long after it accrued, simply because the defendant moved to California after the fact. *Although this situation may be infrequent,* the state should not have to devote judicial resources to such stale claims lacking any significant nexus to the state.
>
> [p. 3 (emph. added).]

The staff continues to believe that the point is valid, although it certainly is not the most pressing of the reasons the Commission gives for repealing Section 351. The situation described may be infrequent, but it is not purely hypothetical, as is evident from Kohan v. Cohan, 204 Cal. App. 3d 915, 251 Cal. Rptr. 570 (1988). Nevertheless, if the Commission revises its recommendation, it may want to further de-emphasize the point.

Repeal of Section 351 Would Encourage Defendants to Hide from Process

The Litigation Section maintains that "[o]utright repeal of Section 351 would encourage defendants in major cases to go into hiding or conceal themselves from service of process." (Exhibit p. 2.) It seems unlikely, however, that there

would be any significantly greater incidence of concealment than at present. Section 351 does not protect a defendant from being sued outside California, but merely prolongs the period during which the defendant remains subject to suit. A plaintiff may pursue an out-of-state defendant even though the limitations period is tolled. How often will a defendant forego concealment on the assumption that the plaintiff will rely on an obscure tolling provision? If anything, repeal of Section 351 would just remove a disincentive to concealing oneself outside California, as opposed to within the state. Because few defendants are likely to be aware of the existence of that disincentive, the effect on concealment may well prove minimal.

Repeal of Section 351 Would Hurt Nonresidents Who Move to the State

The Litigation Section points out that if Section 351 is repealed, nonresidents who move to California may find their claims barred here by limitations periods that are shorter than in their previous places of residence:

> 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.
>
> [Exhibit p. 3.]

Is it really accurate to say, however, that a plaintiff in such circumstances is left with no remedy? The plaintiff is still able to bring suit in the prior jurisdiction, just at greater expense and with more inconvenience than suing in the new home state, where there may not even be a basis for jurisdiction. Based on the information it has thus far, the staff is unconvinced that any revision of the Commission's recommendation is necessary to account for this situation.

Section 351 Helps Compensate for Unduly Short Limitations Periods

Lastly, the Litigation Section challenges the Commission's conclusion that application of Section 351 to brief absences may be "arbitrary and unfair, particularly with regard to a plaintiff who lacked contemporaneous knowledge

of the defendant's absence and cannot claim that the absence interfered with serving the defendant." *Recommendation*, p. 3. According to the Litigation Section, "[i]nstead of being a reason to repeal Section 351, the process of totaling brief absences of a defendant from California to calculate the time of tolling under Section 351 is reasonable." (Exhibit p. 3.) The Litigation Section reasons that "[h]aving the tolling provision offsets the otherwise arbitrary effects of short periods of limitation." *Id.*

There is, however, a much fairer solution to unduly short limitations periods than Section 351, which applies only in a smattering of cases rather than across the board. If a statute of limitations is too short, it should be lengthened. Section 351 is not the answer and it cannot be justified on that basis.

OPTIONS

The Commission's options for dealing with the concerns raised about the recommendation include the following:

(1) Proceed with the recommendation as is. The Commission could simply proceed with the recommendation as is, and see how it fares in the Legislature. The prospects for the recommendation are uncertain. The arguments in favor of protecting California plaintiffs have appeal and may prevail over the arguments in favor of a coherent legal system.

(2) Proceed with repeal but revise recommendation. A second alternative would be to proceed with efforts to repeal Section 351, but augment the recommendation to do one or more of the following:

(a) incorporate some of the discussion from this memo.

(b) add other points that help explain why Section 351 should be repealed.

Revising the recommendation to address these matters may help the proposal somewhat, but would fail to address the core of the opposition.

(3) Amend rather than repeal Section 351. Another possibility would be to drop the attempt to repeal Section 351 and instead consider other approaches to reform of the section (e.g., amending the statute along the lines originally recommended by staff). For convenience, staff's original recommendation and list of options (excerpted from Memorandum 95-15) are attached as Exhibit pages

4-11. The challenge of this approach would be to develop a proposal that is both analytically sound and politically palatable.

(4) Drop the study of Section 351. Lastly, the Commission could decide that further work on Section 351 may not pay off and is not a good use of the Commission's resources. After all, there is no hue and cry for reform of the provision, despite one recent law review critique of it and a 1990 case urging repeal. The staff is inclined against that pessimistic approach. Section 351, with its less than obvious exceptions and constitutional infirmity in cases involving interstate commerce, seems a good candidate for reform, if only for purposes of clarification.

STAFF RECOMMENDATION

The Commission needs to reflect on the political prospects of the recommendation. The views of Consumer Attorneys and the Litigation Section are not the only input received by the Commission. There is support expressed by the State Bar Real Property Section. The Judicial Council's Civil and Small Claims Standing Advisory Committee also supports the proposal, or at least does not oppose it (the staff is not sure which label is more accurate).

The Commission should revisit its substantive analysis of Section 351. The staff believes that analysis is basically sound but should perhaps be more thoroughly explained in the recommendation.

The decision on how to proceed is now heavily dependent on political factors. Although the Commission may prefer not to have the staff speculate on such points, the staff believes that the protectionist sentiment expressed by the opposition may well prevail in the legislative committees, but that Section 351 is in need of reform nonetheless. Therefore the staff leans toward appropriate corrective amendment of Section 351, rather than outright repeal, as the most likely way to achieve reform of the provision.

Respectfully submitted,

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February 5, 1996

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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.

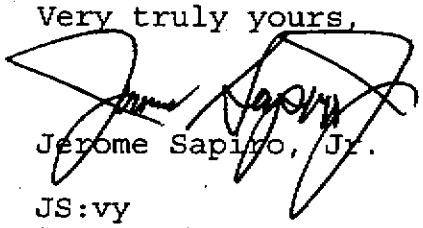
The availability of possible service by publication is not an adequate solution. A California resident may not timely be able to find out where publication must be made to constitute reasonable notice. Some judges are reluctant to order service by publication, so merely seeking an order permitting such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

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.

JS:vy
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cc: Kimberly Reiley Clement
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David C. Long, Esq.

Exhibit

EXCERPT FROM MEMORANDUM 95-15

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***.
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> 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.