Study J-110 June 6, 1996

Memorandum 96-42

Tolling Statute of Limitations: Legislative Action on SB 1510

In light of recent developments, the Commission needs to revisit its proposal to repeal Code of Civil Procedure Section 351, which tolls the statute of limitations when the defendant is out of the state. This memorandum reports on the status of the proposal, the arguments raised, and the options for future action.

LEGISLATIVE ACTION

Senator Kopp incorporated the Commission's proposal into his omnibus civil practice bill, SB 1510. The Senate Judiciary Committee heard the bill on May 7, 1996, but merely directed Senator Kopp to present it again after making author's amendments. In informal discussions at that hearing, the staff learned that although Consumer Attorneys of California (CAOC) had not put its position in writing, it intended to oppose the Commission's proposal. As a compromise, CAOC suggested limiting the tolling of Section 351 to three years.

At its meeting on May 9, the Commission considered and rejected that proposal (subject to ratification). The Commission decided to counterpropose limiting the tolling of Section 351 to defendants who are out of the country.

The staff raised that idea with CAOC, but CAOC was not interested. It sent a letter to members of the Senate Judiciary Committee opposing the Commission's proposal to repeal Section 351 (Exhibit pp. 1-3).

On May 21, 1996, the Senate Judiciary Committee held a further hearing on SB 1510, considering each of its five subjects separately. CAOC supported part of the bill (the hospital lien reforms), but opposed other parts, including the Commission's proposal. After limited discussion of the Commission's proposal, Chairman Calderon stated that three of the senators present opposed it.

Senator Kopp therefore agreed to delete the proposal from the bill. With CAOC's approval, however, the Commission's proposed amendment of Government Code Section 68616 remains in the bill. That amendment would require courts to extend delay reduction deadlines for service of process "on a

showing that service cannot be achieved within the time required with the exercise of due diligence."

The Senate has since passed SB 1510. It is pending in the Assembly. Although SB 1510 no longer incorporates the Commission's proposal to repeal Section 351, Senator Kopp is open to placing the proposal in another bill next session.

SUBSTANTIVE ANALYSIS

Attached as Exhibit pages 4-7 is the Senate Judiciary Committee consultant's analysis of the Commission's proposal to repeal Section 351. After setting forth the Commission's arguments in favor of repeal, the analysis discusses some new points. These points have surface appeal, but the staff continues to believe that the Commission's proposal is substantively sound.

First, the analysis relates CAOC's contention that repeal would place "another hurdle for injured parties to surmount if they wish to seek redress in the courts." (Exhibit p. 6.) Specifically, instead of being able to rely on the automatic tolling of Section 351, plaintiffs would have to file suit and then justify any failure to meet service deadlines. CAOC regards the Commission's proposed amendment of Government Code Section 68616 as inadequate to compensate for placing "the burden, cost, and the risk" on plaintiffs to justify such failures. *Id.*

The staff considers this a legitimate concern, but believes that the benefits of repeal — elimination of an unfair, misleading, and judicially burdensome statute — would justify the increased burden on plaintiffs. Under the Commission's proposed amendment of Section 68616, that burden is not onerous. A plaintiff would only have to submit an unopposed account of diligent but unsuccessful efforts to achieve service. The court would then *have* to extend the delay reduction deadline. The burden on plaintiffs could be further decreased by requiring the court to grant the extension without oral argument unless it notifies the plaintiff that it is inclined to deny the request.

Second, the analysis raises questions regarding the Commission's proposed Code of Civil Procedure Section 116.350, which would continue out-of-state tolling, with a five-year cap and other limitations, in small claims cases. Specifically, the analysis queries:

- "Should a California plaintiff lose a small claims case against an out-of-state defendant because the defendant cannot be served within the allotted five year period?" (Exhibit p. 7.)

• "Should a uniform rule be established for small claims, municipal, and superior court litigants? Should the level of the court determine the tolling provision?" *Id.*

These questions are answerable. Out-of-state service of process is generally unavailable in small claims cases. *See* Code Civ. Proc. § 116.340. According to the Judicial Council Civil and Small Claims Advisory Committee, that rule is necessary to protect out-of-state defendants from abusive assertion of claims that are too small to defend against from a distance. The difference in availability of out-of-state service justifies application of differing tolling provisions.

Similarly, the five year cap is not as harsh as it might seem, because small claims court is not the only available forum. As explained in the Comment to proposed Section 116.350, plaintiffs have the option of suing in municipal court instead. In that forum, plaintiffs are freely able to pursue out-of-state defendants. Thus, the five year cap would not deprive plaintiffs of redress. It would just require some plaintiffs to seek redress in municipal court instead of small claims court.

Finally, the Commission's recommendation points out that Section 351 unfairly penalizes Californians who take brief trips outside the state. At the hearing on May 21, CAOC countered that in practice courts only apply Section 351 to nonresidents. That is incorrect. *See, e.g.*, Mounts v. Uyeda, 227 Cal. App. 3d 111, 114, 277 Cal. Rptr. 730 (1991) (tolling applied to Californian who left state for four days); Garcia v. Flores, 64 Cal. App. 3d 705, 709, 134 Cal. Rptr. 712 (1976) (tolling applied to Californian who left state for eight days). Although politically unacceptable to CAOC, the Commission's analysis of Section 351 still appears intellectually solid.

FUTURE ACTION

The Commission's options at this point include:

(1) *Reintroducing the Commission's proposal to repeal Section 351.* After the hearing on May 21, Senator Kopp expressed willingness and inclination to reintroduce the Commission's proposal next legislative session. A lobbyist for CAOC also informed the staff that CAOC would "work with" the Commission when the proposal is reintroduced. The staff remains pessimistic about prospects for repeal of Section 351, but recommends eliciting Senator Kopp's current view on how the proposal would fare as a separate bill in a nonelection year.

(2) *Crafting a less sweeping but still helpful reform.* Another alternative is to abandon the attempt to repeal Section 351 and instead pursue less controversial but still productive reforms. In particular, it might be helpful to codify the exceptions to Section 351 in a coherent manner, so that the statute is not misleading on its face. The Commission could also address the statute's constitutional infirmity by expressly making Section 351 applicable only to the extent consistent with the Commerce Clause. The staff suggests the following:

> 351. (a) If, when the cause of action accrues against a person, ~~he~~ the person is out of the State, the action may be commenced within the term herein limited, after ~~his~~ the person's return to the State, and if, after the cause of action accrues, ~~he~~ the person departs from the 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) does not apply to any of the following:
>
> (1) A cause of action against a corporation.
>
> (2) A cause of action against a limited partnership.
>
> (3) A cause of action against a nonresident motorist.
>
> (4) A cause of action exempted pursuant to Section 17463 of the Vehicle Code.
>
> (5) A cause of action exempted pursuant to Section 177, 3725, or 3809 of the Revenue and Taxation Code.
>
> (c) Subdivision (a) applies only to the extent consistent with the Commerce Clause of the Constitution of the United States.
>
> **Comment.** Section 351 is amended to clarify that its application is limited.
>
> Subdivision (b)(1) codifies the rule of Loope v. Greyhound Lines, Inc., 114 Cal. App. 2d 611, 250 P.2d 651 (1952), and Cardoso v. American Medical Systems, Inc., 183 Cal. App. 3d 994, 998-99, 228 Cal. Rptr. 627 (1986). *See also* Corp. Code § 2111; Epstein v. Frank, 125 Cal. App. 3d 111, 119 n.4, 177 Cal. Rptr. 831 (1981) ("[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").
>
> Subdivision (b)(2) codifies the rule of Epstein v. Frank, 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831 (1981). Subdivision (b)(3) codifies the rule of Bigelow v. Smik, 6 Cal. App. 3d 10, 15, 85 Cal. Rptr. 613 (1970).
>
> Subdivision (c) draws attention to the constitutional constraints on application of Section 351. *See* Abramson v. Brownstein, 897 F.2d 389, 391-93 (9th Cir. 1990) (Section 351 is unconstitutional as applied to cases involving interstate commerce). *See also* Pratali v.

> Gates, 4 Cal. App. 4th 632, 5 Cal. Rptr. 2d 733, 740 (1992) (Commerce Clause limitation inapplicable); Mounts v. Uyeda, 227 Cal. App. 3d 111, 121-22, 277 Cal. Rptr. 730 (1991) (same); Kohan v. Cohan, 204 Cal. App. 3d 915, 924, 251 Cal. Rptr. 570 (1988) (same).
>
> Section 351 is also amended to make technical changes.

Clarification along these lines may be noncontroversial yet beneficial to courts and litigants.

Other possible approaches — previously considered and rejected by the Commission — include:

• Limiting the tolling of Section 351 to three years (CAOC's compromise proposal)

• Making the tolling of Section 351 inapplicable to brief absences

• Conditioning the tolling of Section 351 on difficulty in achieving service of process

• Overturning the result in Kohan v. Cohan, 204 Cal. App. 3d 915, 251 Cal. Rptr. 570 (1988) (Section 351 tolls limitations period on cause of action that arose in Iran between Iranians who subsequently moved to California)

• Amending Section 351 to specify how it applies to multiple absences, multiple defendants, and entry of nonresidents into California

• Extending the tolling of Section 351 to periods of concealment, as well as absences from the state

(3) *Dropping the effort to reform Section 351.* A third option is to drop the effort to reform Section 351. The downside of this approach would be continuation of the problems Section 351 entails, as detailed in the Commission's recommendation. The existence of five recent appellate decisions construing the statute attests to its ambiguity and the need for reform. *See* Pratali v. Gates, 4 Cal. App. 4th 632, 5 Cal. Rptr. 2d 733, 737-41 (1992); Mounts v. Uyeda, 227 Cal. App. 3d 111, 115-22, 277 Cal. Rptr. 730 (1991); Abramson v. Brownstein, 897 F.2d 389, 391-93 (9th Cir. 1990); O'Laskey v. Sortino, 224 Cal. App. 3d 241, 273 Cal. Rptr. 674 (1990); Kohan v. Cohan, 204 Cal. App. 3d 915, 920-24, 251 Cal. Rptr. 570

(1988). Discontinuing the study would, however, allow the Commission to devote more resources to other matters.

(4) *Deferring decision on how to proceed.* Finally, the Commission could wait until later in the year to decide how to proceed. If the Commission gets involved in major projects such as trial court unification and preparation of an environmental code, then it may not make sense to devote more resources to reform of Section 351. If the Commission's workload is lighter, then further work on Section 351 may prove worthwhile.

RECOMMENDATION

The Commission needs to balance the potential benefits of reforming Section 351 against the resources necessary to achieve such change. The staff recommends soliciting and paying close attention to Senator Kopp's views on reintroducing the Commission's proposal to repeal Section 351. It may also be helpful to learn whether CAOC would oppose a clarifying amendment such as the one discussed above. The Commission's resources are limited and major new projects are on the horizon. The staff recommends continuing efforts to reform Section 351, but only as a low priority project requiring few resources.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

CONSUMER ATTORNEYS OF CALIFORNIA

May 17, 1996

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ANS'D_____

The Honorable Quentin Kopp
State Capitol, Room 2057
Sacramento, CA 95814

Re: SB 1510 (Kopp) As amended May 13, 1996

Dear Senator Kopp:

The Consumer Attorneys of California opposes the portions of SB 1510 that create priority of discovery in civil cases and repeal CCP § 351. CAOC supports the amendments to SB 1510 that clarify hospital lien recovery rights. SB 1510 is set for hearing in the Senate Judiciary Committee on May 21, 1996.

Priority of discovery

SB 1510 creates priority of discovery in civil actions. The bill requires completion of responses before a party can commence discovery. Priority will unduly delay cases and make it difficult to comply with Fast Track requirements. Priority of discovery will also increase gamesmanship in discovery practice.

The amendment at section 7 of the bill, which allow a plaintiff to serve interrogatories at the time of the service of the complaint assist plaintiffs in getting a jump on discovery; however, the problems with priority remain.

CAOC does not believe there should be any connection between one party's breach of discovery rules and the other party's obligation to comply. There are already sufficient remedies for failure to comply with discovery obligations. Courts are required to sanction a party who fails to respond to discovery requests. See CCP § 2016 et. seq. For these reasons, CAOC opposes section 2 of SB 1510.

Code of Civil Procedure Section 351

CAOC opposes the repeal of CCP § 351 for the following reasons:

Legislative Department
980 9th Street, Suite 200, Sacramento, CA 95814-2721 • (916) 442-6902 • FAX (916) 442-7734
caoc@aol.com • http://seamless.com/consumer

1. Repeal of CCP § 351 will unfairly prejudice California residents with claims against nonresident defendants. It is difficult and expensive to effect service of process on nonresident defendants. California has extremely short statutes of limitations, one year in tort cases. Without the benefit of CCP § 351's tolling provisions, legitimate claims by California residents against nonresident defendants will be lost.

2. Repeal of CCP § 351 rewards out-of-state defendants who evade service of process.

CAOC understands that the Commission is concerned about perceived unfairness to a defendant who leaves the state, for even a brief period, who then faces tolling under CCP § 351. CAOC believes that rather than repeal the section, the answer is to directly address the perceived problem. CAOC suggests setting an outside limit on the tolling provision, i.e., add "In no event shall the statute be tolled longer than three years."

Hospital Lien Recovery Abuse

The California Hospital Lien Law (Civil Code §§ 3045.1 - 3045.4) is in urgent need of clarification. As originally enacted, the statute granted a lien (upon perfection) to hospitals on tort settlements/judgments for hospital treatment rendered to plaintiffs only during the first 72 hours of emergency care.

The 1992 amendments to the statute (AB 2733 Bronzan) deleted the 72-hour limitation and granted hospitals a lien on tort settlements/judgments for all medical care given to plaintiffs. Left intact was section 3045.4, the so-called 50% rule. It provides that any insurance company making any payment to a plaintiff without first paying the hospital lien (or so much as can be satisfied out of 50% of the monies due under any settlement/judgment) shall be liable to the hospital for the entire amount of the lien.

Letters written by the Association of Hospital Districts in support of the 1992 amendments said the amendments "would maintain the current restrictions on the hospital's lien rights which limit its recovery to 50% of the total amount recovered, after the payment of all prior liens . . . Further, the plaintiffs themselves will be guaranteed at least half of the remaining recovery, regardless of the amount of the hospital bill."

Now, in direct conflict with the stated legislative intent of the 1992 amendments, some hospitals are refusing to limit their billing lien rights to 50% of the settlement/judgment proceeds after payment of all prior liens. Hospitals are demanding entire policy limits in cases where their bills are equal to or more than policy limits. The proposed amendments to SB 1510 reflect the true intent of the 1992 amendments and protect a plaintiff's right to at least half of the tort recovery.

Additional abuse of lien recovery rights is occurring in the context of uninsured/underinsured motorist claims (U/M and UIM). An increasing number of insurance companies are forwarding insurance drafts in uninsured/underinsured motorist claims directly to the hospitals or their lawyers. The insured only discovers the payment if the insurance company sends a copy of the draft to the attorney, otherwise, not until the time of settlement, judgment or award. This arguably bad faith conduct against an insurance company's own insured was never contemplated nor condoned by the 1992 amendments. The amendments to AB 2733 show that U/M and UIM were first included in amendments to §3045.4 and then *deleted*. Those amendments show that the legislature intended to exclude U/M and UIM benefits from the reach of hospital liens. Proposed amendments to SB 1510 clarify that intent.

CAOC supports the proposed amendments to correct abuses in the area of hospital lien rights, and objects to the priority of discovery and statute of limitations provisions. If you or a member of your staff would like to discuss this issue further, please contact me or one of our legislative representatives in Sacramento.

Sincerely,

Mary E. Alexander

Mary E. Alexander
President

cc: Senate Judiciary Committee

SENATE JUDICIARY COMMITTEE
Charles M. Calderon, Chairman
1995-96 Regular Session

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SB 1510
Senator Kopp
As amended on May 13, 1996
Hearing Date: May 21, 1996
Civil, Civil Procedure, Government Codes
GWW:md

CIVIL PROCEDURE
1. HOSPITAL LIEN RIGHTS
2. DISCOVERY - FIRST IN LINE, FIRST IN TIME
3. CLEAN-UP OF SB 1324 - SEC. 998 AWARDS IN CONTRACT ACTIONS
4. REPEAL OF TOLLING PROVISION FOR OUT OF STATE DEFENDANTS
5. ACTIONS FOR CHARITABLE TRUSTEE'S BREACH OF TRUST

HISTORY

Source: Secs. 1 and 2 (Hospital Liens): Consumer Attorneys of California
Secs. 3 and 7 (Tolling): California Law Revision Commission
Sec. 4 (SB 1324 Clean-up): Author
Sec. 5 (Discovery): Author
Sec. 6 (Charitable Trusts): State Attorney General

Related Pending Legislation: SB 1324(1994) - Sec. 4.

KEY ISSUES

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4. SHOULD THE LAW TOLLING THE STATUTE OF LIMITATIONS FOR FILING AN ACTION WHEN THE DEFENDANT IS OUT OF THE STATE, BE REPEALED?

A.. WOULD THIS PROVISION PROTECT OUT-OF-STATE DEFENDANTS AT THE EXPENSE OF IN-STATE PLAINTIFFS?

B. SHOULD THE FIVE YEAR TOLLING PROVISION FOR SMALL CLAIMS ACTIONS AGAINST AN OUT-OF-STATE DEFENDANT BE SO LIMITED, OR SHOULD IT BE APPLIED UNIFORMLY TO ALL COURTS?

....

PURPOSE

The purpose of this bill is to make a multitude of changes in the law.

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4. Existing law provides for the tolling of the statute of limitations when a cause of action accrues against a person and the person leaves or is out of the state.

   This bill would repeal that provision and specify the effect of that repeal upon accrued causes of action. Under the proposal, the statute of limitations to file an action against an out-of-state defendant would be the same as the statute for filing an action against a defendant in the state. An exception is made for small claims court actions where the statute would be tolled for a maximum of five years to bring a small claims court action against a defendant who is out of the state. The bill would also make conforming amendments to implement the repeal.

....

COMMENT

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4. Should the provision tolling the statute of limitations for filing an action when the defendant is out of the state, be repealed?

   According to the California Law Revision Commission, Section 351 (the out -of-state defendant tolling statute) is no longer necessary to protect a plaintiff's right to sue an out-of-state defendant. When enacted 1872, out-of-state service of process was insufficient to confer personal jurisdiction over the defendant. (See *Pennoyer v. Neff* 95 U.S. 714 (1877). Without tolling, a defendant could escape liability by staying outside the state where the cause of action accrued until the statute of limitations ran. By tolling the limitations period during the defendant's absence from the state, Section 351 preserved the plaintiff's right to redress until the defendant could be served within the state.

   Since 1872, however, the United States Supreme Court has overturned the jurisdictional doctrine requiring service within the forum state. A state may now exercise personal jurisdiction over any person having minimum contacts with the state. (See *International Shoe v. Washington*, 326 U.S. 310 (1945).) Under California's long arm statute and other service of process statutes, "any defendant anywhere can be served with summons -- one way or another." R. Weil & I. Brown, Jr. , *California Practice Guide: Civil Procedure Before Trial* , Sec. 4.3 (Rutter Group, rev. #1, 1994). Methods include personal delivery, substitute service, service by mail coupled with acknowledgment of receipt, by publication upon a court order, or certified or registered mail with return-receipt requested, assuming the defendant's whereabouts are known.

In addition to no longer being necessary for jurisdiction, Section 351 has been found unconstitutional by the Ninth Circuit Court of Appeals because it burdens interstate commerce by forcing non-residents to either stay in California for the length of the limitations period or be subject to suit in California in perpetuity. (*Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990).

Finally, the Law Revision Commission contends that Section 351 is now misleading because it fails to reflect numerous exceptions and limitations that are not readily apparent, that litigation over its application adversely affects court operations and waste scarce resources, and that it can result in arbitrary and unfair results. For example, an attorney who misses the one year tort statute by one week could save his license if he learns that the defendant left the state for a two week vacation during the year the statute was running. Even if no attempt was made to serve the defendant prior to the lapsing of the statute, Section 351 extends the limitations period for that two week period and allows the delayed filing.

a) Would this provision protect out-of-state defendants at the expense of in-state plaintiffs?

The Consumer Attorneys of California oppose the repeal of Section 351, asserting that there are legitimate situations where the statute should be tolled because the defendant is out of state and service is impossible. The net effect of the repeal is that it penalizes plaintiffs when an out-of-state defendant cannot be found before the statute runs on the plaintiff.

Although a complaint can be filed to beat the statute and protect the claim, CAOC points out that under the fast-track delay reduction rules, a complaint must be served within 60 days of its filing. (See Government Code Section 68616.) While a "conforming amendment" is being proposed to that provision to require extension of any delay reduction deadline for service of process where the plaintiff shows that service cannot be achieved within the time required with the exercise of due diligence (see page 18, lines 27 to 29), CAOC contends that the bill places the burden, cost, and the risk of the change upon plaintiffs. In order to save his or her cause of action from being dismissed, the plaintiff must show good cause why the complaint has not been served on an out-of-state defendant and must show that failure despite the exercise of due diligence. CAOC contends that the provision places another hurdle for injured parties to surmount if they wish to seek redress in the courts.

As a compromise, CAOC has suggested limiting the tolling of Section 351 to three years. The Law Revision Commission (LRC) has rejected the offer, stating that it would not satisfactorily resolve the concerns that led the Commission to recommend repeal. The LRC also asserts that tolling is not needed to address difficulties in service of process where the defendant is out the state "because there are other means of relief."

WOULD THOSE OTHER MEANS OF RELIEF PLACE ANY ADDITIONAL BURDENS ON A PLAINTIFF TO PROTECT HIS OR HER CAUSE OF ACTION?

b) Conforming amendments to avoid untoward results: Small claims actions against out-of-state defendant tolled for five years

SB 1510 would also adopt several conforming amendments to the Code of Civil Procedure recommended by the LRC to avoid untoward results from the repeal of the statute. Most important is the amendment which recognizes that the small claims court provisions generally prohibit out-of-service of defendants and therefore continues the tolling of the statute for a maximum of five years for any small claims court claim against an out-of-state defendant. (See CCP Section 116.350.) Two mutually exclusive questions are raised regarding this provision.

SHOULD A CALIFORNIA PLAINTIFF LOSE A SMALL CLAIMS CASE AGAINST AN OUT-OF-STATE DEFENDANT BECAUSE THE DEFENDANT CANNOT BE SERVED WITHIN THE ALLOTTED FIVE YEAR PERIOD?

SHOULD A UNIFORM RULE BE ESTABLISHED FOR SMALL CLAIMS, MUNICIPAL, AND SUPERIOR COURT LITIGANTS? SHOULD THE LEVEL OF THE COURT DETERMINE THE TOLLING PROVISION?

Another significant amendment is the amendment to the Trial Court Delay Reduction Act to ensure that delay reduction rules for service of process are extended when plaintiffs are unable to achieve service within the prescribed period despite diligent efforts to do so. (But see discussion above.)

These and other amendments were included in SB 1510 by the May 13 amendments.

c) Transition provisions

Section 7 of the bill would enact transition provisions. According to the comment to the provision: "For causes of action accruing before the effective date of the act, the transition provision would afford a one-year grace period so that a plaintiff relying on the tolling of a repealed statute as a basis for delay suit has adequate opportunity to commence an action."

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Support:	None Known (except the various sponsors)
Opposition:	Judicial Council; Consumer Attorneys of California; Personal Insurance Federation; State Farm Insurance Company.
Prior Legislation:	SB 1324 (1994) - Section 4

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