

Memorandum 98-15

Code of Civil Procedure Section 351: Followup Issues

In the 1995-96 legislative session, the Commission unsuccessfully sought to repeal Code of Civil Procedure Section 351, which tolls the statute of limitations when the defendant is out of state. The Commission later decided to rework its proposal on a low priority basis. This memorandum discusses how to proceed.

BACKGROUND

Code of Civil Procedure Section 351 provides:

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

The statute dates from the 19th century, when out-of-state service of process was insufficient to confer personal jurisdiction. In 1995, recognizing that out-of-state service had become widely available, the Commission recommended repeal of the provision. The Commission determined that Section 351 was unnecessary, riddled with exceptions, inconsistent with the purposes underlying statutes of limitation, unclear and unfair in its application, unreasonably burdensome on judicial resources, and unconstitutional as applied to cases involving interstate commerce. *Tolling Statute of Limitations When Defendant Is Out of State*, 26 Cal. L. Revision Comm'n Reports 83, 95 (1996).

Senator Kopp incorporated the Commission's proposal to repeal Section 351 into his 1996 omnibus civil practice bill. The Consumer Attorneys of California (CAOC) objected to the proposal, stating:

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.”

[Memorandum 96-42, Exhibit p. 2.]

In light of CAOC’s opposition, Senator Kopp removed the Commission’s proposal from his bill (the concept of the omnibus bill being that only unobjectionable matters would be included in it). The Commission considered reintroducing the proposal as a free-standing bill in 1997. Once it became clear that prospects for enactment were dim, however, the Commission decided to restudy the area and consider amending Section 351, rather than repealing it. Minutes (Feb. 1997), p. 5.

OPTIONS

In studying Section 351, the Commission explored various alternatives short of repeal. Some of these involve narrowing the scope of the provision, while others would only codify existing law to improve clarity.

Options for Narrowing Section 351

Options for narrowing Section 351 include:

(1) *Conditioning the tolling on difficulty in achieving service of process.* One possibility would be to amend Section 351 to apply only when the defendant is not subject to service of process. Several states have taken this approach to bring their out-of-state tolling provisions in compliance with the Commerce Clause. (This is discussed in detail in Memorandum 95-15, pp. 4, 7-8.) As the Commission previously observed in considering this approach, however, it would make Section 351 a practical nullity, because a defendant is virtually always amenable to service of process by one means or another. For the same reason, CAOC undoubtedly would oppose such an amendment.

(2) *Making the tolling of Section 351 inapplicable to brief absences.* Section 351 now applies not only to extended periods of absence, but also to very brief absences. *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). Consequently, 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. Some states have addressed this problem by limiting out-of-state tolling to absences of a certain minimum length. (This is discussed in detail in Memorandum 95-15, p. 3.) Although this approach has some appeal, any statutory minimum absence would be arbitrary.

(3) *Limiting Section 351 to disputes having a nexus to California.* Section 351 has been construed to apply even to a dispute between three Iranian brothers regarding events that occurred in Iran while all three brothers resided there. *Kohan v. Cohan*, 204 Cal. App. 3d 915, 251 Cal. Rptr. 570 (1988). The Commission could explore the possibility of limiting the provision to disputes having a nexus to California. This is more easily said than done. (This is discussed in detail in Memorandum 95-15, pp. 14-15, 17-18.) A reform along these lines would address only a relatively minor problem.

(4) *Amending Section 351 to set an upper limit on the length of tolling.* A further possibility would be to set an upper limit on the length of tolling under Section 351, as CAOC suggested in its letter of opposition. Without such a limit, a nonresident potentially subject to suit in California must either stay in the state for the duration of the limitations period, or remain subject to suit in California in perpetuity. Connecticut already has an upper limit in its out-of-state tolling provision. (This is discussed in detail in Memorandum 95-15, p. 16.) The approach may be worth pursuing, particularly since CAOC proposed it.

Options for codifying existing law to improve clarity

The Commission should also consider the following options for codifying existing law to improve clarity:

(1) *Codifying the exceptions to Section 351.* The many exceptions to Section 351 are not apparent on the face of the statute, but rather buried in case law and other codes. The Commission could attempt to codify these exceptions in a coherent

manner, so that the statute is not misleading on its face. This could prevent confusion and misplaced reliance on the statutory tolling. The Commission could also alert parties to the constitutional issue by expressly making Section 351 applicable only to the extent consistent with the Commerce Clause. These ideas could be implemented by amending Section 351 along the following lines:

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 make clear 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.

(2) *Amending Section 351 to specify how it applies to multiple absences, multiple defendants, and entry of nonresidents into California.* Existing case law 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. This could save courts and litigants time and expense.

(3) *Providing rules for counting time.* If a person leaves the state for a business meeting at 3:00 pm and returns the next day at 1:00 pm (less than 24 hours), is the statute tolled for one day, two days, or no days? There is no case law indicating whether the same time counting rules applicable to statutes of limitation apply to tolling under this section. Some clarification may be helpful here.

Option of Discontinuing the Study

Finally, the Commission could drop this study altogether and ask the Legislature to remove the topic from the Commission's calendar of topics for study. This would allow the Commission to devote more time to other matters. Because we have already done a fair amount work in the area, however, it may be possible to achieve significant reform without investing a lot more Commission resources.

STAFF RECOMMENDATION

The staff believes that some of the options for reform are worth pursuing, at least for purposes of a tentative recommendation. In particular, it may be worthwhile to (1) set an upper limit on the length of tolling, (2) codify the exceptions to Section 351, and (3) amend Section 351 to specify how it applies to multiple absences, multiple defendants, and entry of nonresidents into California, and how time is counted under it. If the Commission is interested, the staff could prepare a draft along these lines for the next meeting. Regardless of whether the Commission proceeds in this or some other direction, we need to actively solicit input from CAOC on the proposals.

Respectfully submitted,

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