

RESOLUTION 04-03-05

DIGEST

Statute Of Limitations : Repeal of Tolling When Defendant is Out of State

Repeals Code of Civil Procedure section 351 which tolls the statute of limitations in an action while the defendant is outside of California.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution repeals Code of Civil Procedure section 351 which tolls the statute of limitations in an action while the defendant is outside of California. This resolution should be approved in principle because it has been held unconstitutional and its purpose is no longer necessary.

Section 351 was enacted in 1872, when the service of process on a non-resident defendant was extremely difficult. Since then, the means of serving non-resident defendants have been greatly increased. Retained investigative services and the internet make it easier to locate individuals. The initial reasoning behind the enactment of Section 351, i.e. if you cannot find someone out of state, you cannot serve that person, is moot.

In *Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389, the Ninth Circuit held that section 351 is unconstitutional as violating the Commerce Clause by placing burdens on interstate commerce. Section 351 "forces a nonresident individual engaged in interstate commerce to choose between being present in California for several years or forfeiture of the limitations defense, remaining subject to suit in California in perpetuity." (Id at 392.) The Court concluded that California's long-arm statute is sufficiently broad such that service can be effectuated out-of-state.

Statutes of limitation benefit all litigants. Memories fade, witnesses become unavailable, and laws change. All litigants have a vested interest in ensuring that claims are brought timely, and that litigation is resolved while there are witnesses to testify. Repealing section 351 would be a step toward forcing litigants to move expeditiously in prosecuting cases.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to repeal Code of Civil Procedure section 351 as follows:

- 1 § 351
- 2 ~~EXCEPTION, WHERE DEFENDANT IS OUT OF THE STATE. If, when the cause of action~~
- 3 ~~accrues against a person, he is out of the State, the action may be commenced within the term~~
- 4 ~~herein limited, after his return to the State, and if, after the cause of action accrues, he departs from~~
- 5 ~~the State, the time of his absence is not part of the time limited for the commencement of the action.~~

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

Existing Law: Provides that statutes of limitation are tolled while the defendant is outside the State of California.

This Resolution: Would repeal this unconstitutional provision and treat non-resident defendants the same as California residents for statute of limitations purposes.

The Problem: The existing statute is unconstitutional. The Ninth Circuit U.S. Court of Appeals has held that the provision imposes an unconstitutional burden on interstate commerce. *Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389, 391-393. The California Law Revision Commission concurs:

The tolling provision now codified as Section 351 dates from as early as 1850, in an era when out-of-state service of process was insufficient to confer personal jurisdiction. Without tolling, a defendant could escape liability by staying outside the state where a cause of action accrued until the statute of limitations ran. A plaintiff who was unable or unwilling to pursue the defendant in the defendant's place of residence was left without a means of redressing the injury. By tolling the limitations period during a defendant's absence from California, Section 351 preserved the plaintiff's right to redress until the defendant could be served within the state.

Out-of-state service of process is now widely available and recent commentary and judicial decisions criticize Section 351. Additionally, the tolling of Section 351 is riddled with exceptions. It does not apply to corporations, limited partnerships, nonresident motorists, or certain resident motorists, nor in certain tax proceedings or actions *in rem*. Section 351 causes substantial problems and no longer serves a useful purpose. It should be repealed.

(See also, *Tolling Statute of Limitations When Defendant Is Out of State* (1996) 26 Cal. L. Revision Comm'n Reports 83.)

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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