

## RESOLUTION 03-06-2014

### DIGEST

Civil Procedure: No Tolling of Statutes of Limitations for Out of State Parties

Repeals Code of Civil Procedure section 351 thereby eliminating the tolling of statutes of limitations for out of state parties.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

Identical to 04-03-2005 and 07-05-2011, which were approved in principle.

#### Reasons:

This resolution repeals Code of Civil Procedure section 351 thereby eliminating the tolling of statutes of limitations for out of state parties. This resolution should be approved in principle because it eliminates an antiquated, unenforceable, and arguably unconstitutional statute.

Code of Civil Procedure section 351 currently provides for unlimited tolling of any civil statutes of limitations while a defendant is out of state. This statute, originally enacted in 1872, served a purpose at the time given that traveling out of state to effectuate service of process on a non-resident defendant was obviously more difficult than it is today, with airplanes, cars, investigative services and process servers available in every state. California law already provides a plaintiff with up to three years to locate a defendant and serve the summons and complaint after their case has been filed. (Code Civ. Proc., § 583.210, subd. (a).) Thus, even if a litigant is having difficulty locating the out of state defendant, because the litigant has three years to find the defendant once the case is filed, there is no reason to delay the deadline by which the lawsuit itself needs to be filed.

Repeal is also appropriate as the statute inherently penalizes in-state defendants over their out-of-state counterparts. As noted in *Dan Clark Family Partnership v. Miramontes* (2011) 193 Cal.App.4th 219, a nonresident defendant “is potentially subject to liability in California indefinitely,” while a resident defendant is not. (*Id.* at p. 234.)

Finally, numerous courts have questioned the constitutionality of the statute. Specifically, the *Dan Clark* Court recently found the statute to be unconstitutional as applied to an out of state resident, and the Northern District of California reached the same conclusion. (*Galvani v. Galvani* (N.D. Cal. Sept. 12, 2011) 2011 WL 4080338, \*5). Further, the Ninth Circuit previously found section 351 to be an unconstitutional violation of the Commerce Clause as applied to an out of state defendant. (*Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389, 392-393.) Because the ease of both locating and serving out of state defendants has dramatically increased since 1872, the statute is no longer necessary, and in light of recent constitutional concerns, repeal is appropriate.

If there is any tolling allowed for absence of a defendant from the state, it should be a tolling of the time to serve, not the time to file the action.

### TEXT OF RESOLUTION

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

§ 351

1           ~~If, when the cause of action accrues against a person, he is out of the State, the action~~  
2 ~~may be commenced within the term herein limited, after his return to the State, and if, after the~~  
3 ~~cause of action accrues, he departs from the State, the time of his absence is not part of the time~~  
4 ~~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**

The Problem: The existing statute is unconstitutional and unenforceable. Several courts have held that the provision imposes an unconstitutional burden on interstate commerce. (Compare *Dan Clark Family Partnership v. Miramontes* (2011) 193 Cal.App.4th 219, 234 [unconstitutional as applied to out-of-state resident]; *Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389, 392-393 [unconstitutional in violation of Commerce Clause as applied to out-of-state defendant]; and *Filet Menu, Inc. v. Cheng* (1999) 71 Cal.App.4th 1276, 1280-1284 [unconstitutional with respect to defendants who travel in the course of interstate commerce]; with *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 121-122 [distinguishing *Abramson* as limited to out-of-state defendant engaged in interstate commerce; both parties were local residents, and alleged injury did not involve interstate commerce].) Leaving this on the books thus creates a trap for the unwary injured plaintiff, who could be left without a remedy if he or she naively relied on it. Code of Civil Procedure section 351 currently provides for unlimited tolling of the statutes of limitation while the defendant is out of the state. When the 1872 Legislature enacted section 351, service of process on a non-resident defendant was extremely difficult. Since then, the ease and ability in serving non-resident defendants have greatly increased. Retained investigative services and the internet make it much 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 an antiquated concept. Besides, California law already gives a plaintiff up to three years to locate a defendant and serve the summons and complaint after their case has been filed. (Code Civ. Proc. § 583.210, subd. (a).)

The Solution: This resolution solves the problem by repealing Code of Civil Procedure section 351. The California Law Revision Commission concurs with the substance of this resolution – “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.” It concluded, “Section 351 causes substantial problems and no longer serves a useful purpose. It should be repealed.”

**LEGISLATIVE HISTORY**

Not known.

**IMPACT STATEMENT**

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

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