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FOR WHOM THE STATUTE TOLLS - THE STATUTE OF LIMITATIONS AS APPLIED TO FOREIGN DEFENDANTS IN COUNTRIES WHICH DO NOT PERMIT SERVICE BY MAIL

I. INTRODUCTION

A statute of limitations bars a law suit unless the suit is filed within a prescribed time.1 The fundamental notion underlying a statute of limitations is that individuals must be afforded a fair opportunity to prepare a defense.2 As the United States Supreme Court noted, statutes of limitations "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."3 In time, the right to be free of stale claims prevails over the right to prosecute them.

The policy considerations underlying statutes of limitations are only served if the plaintiff has the ability to prosecute his or her claim. If some disability precludes the injured party from pursuing an action, allowance should be made for the period of that disability.4 To provide that allowance, states have enacted tolling provisions5 which suspend or "toll" the statute of limitations during the period of incapacity.6 For example, to protect a plaintiff while a de-

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1. A statute of limitations is a statute of repose, designed to compel suit within a reasonable time in the interest of society, serving to prevent perjuries, frauds, and mistakes, and its purpose is to force a litigant to pursue every avenue of relief promptly, while evidence is fresh and witnesses available.
4. See Comment, supra note 2, at 587.
5. BLACK'S LAW DICTIONARY 1334 (5th ed. 1979) defines "Toll" as "[t]o suspend or stop temporarily as the statute of limitations is tolled during the defendant's absence from the jurisdiction and during the plaintiff's minority." Id.
6. One of the earliest tolling provisions was 21 James 1, c. 16 (1623). In this provision the limitation period was suspended while the person entitled to the action was under twenty-one years of age, femme covert (a single woman), non compos mentis (mentally incapacitated), imprisoned or beyond the seas. See Comment, supra note 2, at 587 n.10.

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fendant is out of the jurisdiction, tolling provisions suspend the running of the statute of limitations until the defendant returns to the state. In California, section 351 of the Code of Civil Procedure provides for the tolling of the statute of limitations while the defendant is out of the state. Section 351 provides:

If when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein 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.

Although the statute's language is clear, California courts have applied the tolling provision differently with respect to individuals and corporations. If the defendant is an individual, the statute of limitations is tolled during the period he or she is out of the state. However, if the defendant is a corporation, the statute of limitations is not tolled because corporations may be effectively served either directly through the mail or indirectly through the Secretary of State. A problem arises, however, because certain foreign corporations are not susceptible to service through these means. These corporations are located in countries which have objected to service by mail through an international treaty, the Hague Convention on Service Abroad. Because these special foreign corporations may not be effectively served through the mail or the Secretary of State, they should be treated like individual defendants and the section 351 tolling provisions should apply. The effect of tolling the statute for these special foreign corporations is to subject them to suit indefinitely.

This comment addresses the problems posed by these special foreign corporations in the context of California law. First, it examines the distinctions made between individual and corporate defendants in the application of the section 351 tolling provision. Second, this comment suggests that, since foreign corporate defendants located in countries which do not permit service by mail cannot effec-

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7. These saving clauses, as they are often referred to, developed in England to provide a tolling of the statute of limitations while defendant was beyond the seas. See Limitation of Actions—Absence from State as a Basis of Tolling Statute of Limitations Despite Availability of Service Under Nonresident Motorist Statute, 12 Vand. L. Rev. 295, 296 (1958) and H. Bushwell, THE STATUTE OF LIMITATIONS AND ADVERSE POSSESSION § 116 (1889).
9. “Out of the state” includes residence and travel outside California. Thus, if an individual travelled to Nevada for a weekend, this would constitute “out of the state” for tolling purposes.
tively be served through the Secretary of State, this special class of defendants should be treated like individuals for purposes of applying the section 351 tolling provision. This has the unfortunate consequence of subjecting these defendants to suit indefinitely because they are permanently out of the state.

This can be extremely important with respect to many cases. For example, in products liability cases where the statute of limitations has run against local dealers and distributors, California plaintiffs continue to have a cause of action against foreign manufacturers. To remedy this inconsistency, this comment proposes that the California tolling statute, Civil Procedure Code section 351, be amended with respect to corporations located in countries which do not permit service by mail. The amendment should provide for tolling the statute unless the corporation voluntarily appoints an agent to accept service within California. This proposed legislation would benefit both the California plaintiff and the foreign corporate defendant. The California plaintiff would not be faced with the difficulties that may arise when serving a foreign defendant. The foreign defendant would not be subject to indefinite liability because a statute of limitations would apply upon voluntary compliance with the statute.

II. BACKGROUND

California Code of Civil Procedure section 351\textsuperscript{11} provides for the tolling of the statute of limitations while the defendant is out of the state. Section 351 applies differently to individuals and corporations because the latter are also subject to alternative methods of service pursuant to provisions of the California Corporations Code.\textsuperscript{12}

A. Amenability to Service is the Distinguishing Factor Between Individuals and Corporations

1. Applicability to Individual Defendants

The seminal case interpreting section 351 as it applies to an individual defendant is \textit{Dew v. Appleberry}.\textsuperscript{13} In \textit{Dew}, the defendant was absent from California on vacation for five weeks during the year following the accident in question. The California Supreme

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\textsuperscript{11} CAL. CIV. PROC. CODE § 351 (West 1982). See supra text accompanying note 8.


\textsuperscript{13} 23 Cal. 3d 630, 591 P.2d 509, 153 Cal. Rptr. 219 (1979).
Court held that the statute of limitations tolled during the period of defendant's absence. Thus, an action filed one year and one day after the alleged accident was not barred by the one year statute of limitations. The defendant argued that the tolling provision should not apply when the absent party is nonetheless amenable to service of process. He noted that the original statute had been enacted in 1872 because at that time defendants could not be served by summons. The defendant pointed out that the Legislature subsequently provided for alternative methods of service. Thus, defendant claimed a plaintiff did not need the protection of the tolling provision when the absent party was still amenable to process. The California Supreme Court held, however, that "section 351 does not make its tolling provision depend on the availability of service on a defendant, but on his physical presence in California." Noting that the Legislature was clearly aware of the statute's broad ramifications and had modified the rule in appropriate circumstances, the court held that any changes in the provision should be left to the Legislature. The courts have continued to adhere to the section 351 tolling provision with respect to individual defendants despite the defendant's amenability to service.

14. Id. at 636, 591 P.2d at 513, 153 Cal. Rptr. at 223.
15. Defendant maintained that he was a California resident, and that he owned property within the state. During the times he was out of the state (visiting his mother), his business and residential addresses were the same as they had been at the time of the accident. Thus, he claimed, he was amenable to process. Id. at 634, 591 P.2d at 512, 153 Cal. Rptr. at 221.
16. In lieu of personal delivery, a summons and complaint may now be served by leaving a copy at the office, dwelling house, usual place of abode or usual place of business of the person to be served (§ 415.20); by mailing a copy to the party within or without the state (§§ 415.30, 415.40); or by publication "in a named newspaper, published in this state, that is most likely to give actual notice to the party to be served" (§ 415.50 subd. (b)). Id. (construing CAL. CORP. CODE §§ 2105, 2110, 2111 (West 1977 & Supp. 1987)). See infra note 23 for relevant text.
17. Dew, 23 Cal. 3d at 635, 591 P.2d at 513, 153 Cal. Rptr. at 222 (quoting Garcia v. Flores, 64 Cal. App. 3d 705, 709, 134 Cal. Rptr. 712, 714 (1976)).
18. "When substituted service or constructive service . . . is available in a cause of action arising . . . out of operation of a motor vehicle . . . notwithstanding any provision of section 351 . . . to the contrary . . . the time of [defendant's] absence from this State is part of the time limited for the commencement of the action." Dew, 23 Cal. 3d at 635, 591 P.2d at 512, 153 Cal. Rptr. at 222 (construing CAL. VEH. CODE §§ 17460, 17463 (West 1959)). This provision was extended to actions against nonresident motorists as well in Bigelow v. Smik, 6 Cal. App. 3d 10, 85 Cal. Rptr. 613 (1970).

19. See Maurer v. Individually and as Members of Los Angeles County Sheriff's Dept., 691 F.2d 434 (9th Cir. 1982); Bledstein v. Superior Court (Jezioriski), 162 Cal. App. 3d 152, 208 Cal. Rptr. 428 (1984); Garcia v. Flores, 64 Cal. App. 3d 705, 134 Cal. Rptr. 712 (1976).
2. Applicability to Corporate Defendants

In light of the statutory provisions relative to service of summons on foreign corporations, California courts have held section 351 inapplicable to corporate defendants. In *Loope v. Greyhound Lines, Inc.* the Fourth District Court held that a corporation was never out of the state for tolling purposes because a corporation could always be served through a designated or substituted agent. The code provides that service upon a foreign corporation can be made on a designated agent, and if no agent has been named, service may be made on the Secretary of State. As a result, only non-amenability to service causes the tolling provision to apply to a corporate defendant.

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22. In *Loope*, the one year statute of limitations was tolled to extend the time within which a personal injury action could be brought against the defendant bus driver, but it was not tolled with respect to the corporate defendant, Greyhound. It was not clear whether Greyhound was a domestic or foreign corporation but the court reasoned that if it was a foreign corporation and doing business within the state it was subject to service. Id. at 614, 250 P.2d at 652.
23. The applicable code sections provide:
   2105(a)- A foreign corporation shall not transact intrastate business without having first obtained from the Secretary of State a certificate of qualification. To obtain that certificate it shall file, . . . a statement and designation . . . stating: . . . (4) The name of an agent upon whom process directed to the corporation may be served within this state. (5) Its irrevocable consent to service of process directed to it upon the agent designated and to service of process on the Secretary of State if the agent so designated or the agent's successor is no longer authorized to act or cannot be found at the address given.
   2110- Delivery by hand of a copy of any process against a foreign corporation (a) to any officer of the corporation or its general manager in this state, or if the corporation is a bank to a cashier or an assistant cashier, (b) to any natural person designated by it as agent for the service of process, or (c), if the corporation has designated a corporate agent, to any person named in the latest certificate of such corporate agent filed pursuant to Section 1505 shall constitute valid service on the corporation . .
   2111(a)- If the agent designated for the service of process is a natural person and cannot be found with due diligence at the address stated in the designation or if such agent is a corporation and no person can be found with due diligence to whom the delivery authorized by section 2110 may be made for the purpose of delivery to such corporate agent, or if the agent designated is no longer authorized to act, or if no agent has been designated and if no one of the officers or agents of the corporation specified in Section 2110 can be found after diligent search and it is so shown by affidavit to the satisfaction of the court, then the court may make an order that service be made by personal delivery to the Secretary of State or to an assistant or deputy secretary of state. . . .
24. Nonamenability to service has been the rationale used in subsequent cases. See Ren-
3. Past Use of Amenability to Service as a Defense

Before enactment of the Convention, several cases had allowed foreign corporations to invoke amenability to service as a defense despite the fact that they had not registered to do business within California. In Raynolds v. Volkswagenwerk Aktiengesellschaft, an action had been filed, but the plaintiffs failed to prosecute such action within two years. The foreign corporation moved for dismissal under Civil Procedure Code section 583, which permits a judge to dismiss an action for want of prosecution. The plaintiffs claimed that the defendant, Volkswagenwerk, was "absent" from California because the defendant had failed to designate an agent for service of process and failed to obtain a certificate of qualification to do business within the state. The plaintiffs argued that since the corporation was absent from California, they had a valid excuse for failure to timely prosecute their action. The court used the Dew and Loope analysis and held that a foreign corporation could not be "absent" since it was subject to substituted service, and further, that the corporation's failure to comply with the statutory provisions did not preclude it from defending the action. Citing Taylor v. Navigazione Libera Triestina, the court noted "[I]f a foreign corporation fails to qualify for the transaction of intrastate business under California statutory law, it has been construed, as to corporate defendants, to mean that it is nonamenability to service of process, including substituted service, that causes the tolling provision to apply." See also Dedmon v. Falls Prods. Inc., 299 F.2d 173, 174 (5th Cir. 1962), (identical analysis is applied in the Fifth Circuit).

25. See Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9th Cir. 1956); Taylor v. Navigazione Libera Triestina, 95 F.2d 907 (9th Cir. 1938); Raynolds v. Volkswagenwerk Aktiengesellschaft, 275 Cal. App. 2d 997, 80 Cal. Rptr. 610 (1969).


27. In Raynolds, the action was filed October 31, 1963. Thus, the Hague Convention on Service of Process would not apply here because the Convention did not become effective until 1967. See infra text accompanying notes 36-39.

28. CAL. CIV. PROC. CODE § 583 (repealed in 1984 but replaced by section 583.410) provided in relevant part: "The Court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial." Raynolds, 275 Cal. App. 2d at 1000 n.5, 80 Cal. Rptr. at 612 n.5 (construing CAL. CIV. PROC. CODE § 583 (West 1929)).

29. Raynolds, 275 Cal. App. 2d at 1000-02, 80 Cal. Rptr. at 613.

30. The Dew court held that section 351 applied to individual defendants. Loope held that section 351 did not apply to corporate defendants because they were subject to substituted service.


32. 95 F.2d 907, 910 (9th Cir. 1938).
law, such failure does not impose a forfeiture of the right to plead the statute of limitations." By analogy, the court reasoned that failure to comply with the statutory provisions did not preclude defendant from availing itself of the benefits of section 583.

_Loope, Raynolds and Taylor_ present an assumption that substituted service is valid service upon foreign corporations. Since these decisions, however, the Hague Convention on Service Abroad was changed to provide that, in cases where a signatory country objects to substituted service, it is invalid.

**B. Amenability of Service as Applied to Foreign Corporations Which Do Not Accept Service By Mail**

1. _Rejection of Service by Mail Through the Convention_

The Hague Convention on Service Abroad permits countries to object to service of process by mail. When a country ratifies the Convention and objects to service by mail, foreign corporations located in that country indirectly objects to service by mail as well. The objectives of this Convention were: a) to bring actual notice of the document to be served to the recipient in sufficient time to enable preparation of a proper defense; b) to simplify the method of transmission of these documents; and c) to facilitate proof that service had been affected abroad by means of a uniform model. In order to achieve these objectives, the Convention established a system whereby a "Central Authority" accepts documents. To comply with the Convention, effective service is to be directed to the signatory country's designated authority. The important provisions for purposes of this comment are Article 10, which provides for service by postal channels, and Article 21, which permits a signatory to object to Article 10. Several states, most notably Germany, have objected to the use

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33. Raynolds, 275 Cal. App. 2d at 1003-04, 80 Cal. Rptr. at 615.
34. See Dedmon, 299 F.2d at 173, for a similar holding in another jurisdiction.
35. See infra note 36 and accompanying text.
37. MAARTEN KLUWER'S _INTERNATIONALE UITGEVERSONDERNEMING, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW CONVENTION SERVICE OF PROCESS ABROAD_ (1983).
38. A "Central authority" is merely one designated to accept service of process.
39. Article 10 states in relevant part: "Provided the State of destination does not object, the present Convention shall not interfere with — (a) the freedom to send judicial documents,
of the mail for transmission of judicial documents.  

2. Effect of the Convention on California Law

California cannot effectively serve a foreign defendant, such as a German corporation, through its foreign corporation code provisions because the United States is a party to the Convention. The Convention, as a treaty, is the supreme law of the land. If no agent of the foreign corporation has been designated, service may not be substituted upon the Secretary of State. California Corporations Code section 2111(b) requires the Secretary of State to send notice of service to the corporation by registered mail. Because the crucial aspect of service is notification, service upon the Secretary of State is invalid when intended for the special foreign corporations which do

by postal channels, directly to persons abroad.” Id. Article 21 states that: “Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following. . . . Each contracting State shall similarly inform the Ministry, where appropriate, of opposition to the use of methods of transmission pursuant to articles 8 and 10.” HAGUE CONVENTION ON SERVICE OF PROCESS ABROAD, Nov. 15, 1965, United States-Netherlands arts. 10, 21, 20 U.S.T. 361, 363, 365 T.I.A.S. No. 6638 (1969).

40. Germany is noted and used as an example because: 1) German products are prevalent in California, so German corporations are likely defendants; 2) there are many reported German cases; and 3) for simplification. However, Botswana, Czechoslovakia, Denmark, Egypt, Germany, Norway, and Turkey have all objected to service through postal channels. See MAARTEN KLUWER'S INTERNATIONALE UITGEVERSONDERNEMING, HAGUE CONVENTION—SERVICE OF PROCESS ABROAD, supra note 37 at 92-131; The Netherlands Law Digest, supra note 36.


42. The United States ratified the Convention, supra note 36, on August 24, 1967 and the provisions came into force on February 10, 1969. MAARTEN KLUWER'S INTERNATIONALE UITGEVERSONDERNEMING, HAGUE CONVENTION—SERVICE OF PROCESS ABROAD, supra note 37, at 22.

43. See infra note 48 and accompanying text.

44. This often occurs when a foreign manufacturer “shields” itself through a distributor or subsidiary. The foreign manufacturer is not doing business within California and is not required to register or appoint an agent. See Coons v. Honda Motor Co. of Japan, 176 N.J. 575, 424 A.2d 446 (1980).

45. California Corporations Code section 2111(b) provides in part:

Upon receipt of the process and order and the fee therefor [sic] the Secretary of State forthwith shall give notice to the corporation of the service of the process by forwarding by registered mail, with request for return receipt, a copy of the process and order to the address specified in the order. . . .

CAL. CORP. CODE § 2111(b) (West 1977).
not accept service by mail.

This issue was discussed in *Porsche A.G. v. Superior Court*. In *Porsche*, the plaintiff attempted to serve the German defendant directly through registered mail addressed to the German defendant and indirectly through the Secretary of State. The court found that, despite plaintiff's numerous and diligent attempts to serve the German defendant, plaintiffs had not complied with the Convention. The *Porsche* court held that California courts are bound by the Convention and may not exercise jurisdiction in violation of the Convention.

The Convention required service of process on the "Central Authority" and required that it be translated into German. The court stated that, even if the German defendant had actual notice, this would be insufficient to avoid the effect of noncompliance with the Convention. Service of process through the Secretary of State was therefore invalid.

In order to comply with the Convention, it follows that foreign corporations in a country which, under the Convention does not permit service by mail, cannot be served through any of the statutory

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47. See also Richardson v. Volkswagenwerk, A.G., 552 F. Supp. 73 (W.D. Mo. 1982) (a Missouri district court held that Convention service was not proper and thus excused defendant); Shoel Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973);
48. U.S. Const. art. VI, cl. 2 (also quoted in *Porsche*, 123 Cal. App. 3d at 760, 177 Cal. Rptr. at 158).
49. For the German "Central Authority" address list, see German Law Digest, 7 MARTINDALE-HUBBELL LAW DIRECTORY, pt. VII, 4 (1985). See supra note 38 and accompanying text.
50. The plaintiffs in *Porsche* argued that they had been misled into not serving defendant's designated agent in the United States under the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1399(e)). The court held, however, that "the scope of such agency is limited to actions which pertain to that act and not to common law actions commenced in California courts." 123 Cal. App. 3d at 762, 177 Cal. Rptr. at 159.

In so holding the court rejected the contrary analysis of Bollard v. Volkswagenwerk, A.G., 313 F. Supp. 126 (W.D. Mo. 1970). The *Bollard* court held that a tort action may be served upon the agent designated to receive service of process pursuant to the National Traffic Motor Vehicle Safety Act. Similarly, in *Richardson*, a Missouri district court held that the National Traffic Motor Vehicle Safety Act cannot be construed to allow service by mail.
provisions. It should follow, then, that these defendants are absent from the state for the purposes of the section 351 tolling provision. Because they are not easily amenable to service, these foreign corporations should be treated like individuals out of the state. These special corporations should not be treated like other foreign corporations because they cannot be served through the normal procedures. In other states, courts have recognized that the statute of limitations tolls when the foreign corporate defendant is not amenable to service.

3. Tolling the Statute Against Foreign Corporations - The Approach of Other States.

In Coons v. American Honda Motor Co. of Japan, the New Jersey Supreme Court held that the statute of limitations was properly tolled against a foreign manufacturer when the foreign corporation had neither any place of business in the state nor had any agents for service of process located within the state. In Coons, the plaintiffs filed suit against American Honda and Honda Motor Co. of Japan. The defendant, American Honda, was dismissed due to the statute of limitations but the suit against the Japanese defendant survived due to the New Jersey tolling provision.

Like the Japanese defendant in Coons, a foreign corporation which does not accept service by mail and has no agents within the state is forever subject to suit. Because this class of defendants cannot

52. To date there is no California case on point, perhaps because plaintiffs do not realize they continue to have a cause of action against these defendants.
53. For example, to effectively serve a German defendant, the service of process must be translated into German and delivered to the “Central Authority.” German Law Digest, 7 MARTINDALE-HUBBELL LAW DIRECTORY, pt VII, 4 (1985). To note the problems a California plaintiff encounters while attempting to serve a German defendant, see Porsche, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (1981).
54. See e.g., Dew, 23 Cal. 3d 630, 591 P.2d 509, 153 Cal. Rptr. 219 (1979).
57. Denied the statute of limitations defense, Honda of Japan argued that they were being denied equal protection of the laws. The court held that the distinction in the tolling provision was not irrational and thus equal protection was not violated. On appeal, the Supreme Court affirmed the equal protection decision but remanded the case in light of Searle & Co. v. Cohn, 455 U.S. 404 (1981), because there might have been a commerce clause violation. Honda Motor Co. of Japan was eventually dismissed because the tolling statute violated the commerce clause. 455 U.S. at 996. For discussion of the commerce clause, see infra text accompanying notes 66-71.
be served through the Secretary of State, the section 351 tolling provision applies during the entire period they are out of the state. Therefore, a California plaintiff has no time limitation in which to bring his suit. Although as the law stands, there are significant advantages for a California plaintiff, both the plaintiff and foreign corporation would benefit by a change which would allow the defendant to be served in California.

III. HOLDING A FOREIGN CORPORATION INDEFINITELY SUBJECT TO SUIT - A CLOSER LOOK AT THE CONSTITUTIONAL PROBLEMS PRESENTED BY Coons v. Honda Motor Co. of Japan

The United States Supreme Court has commented on the constitutionality of state tolling provisions which operate to hold foreign defendants subject to suit indefinitely. In Coons v. Honda Motor Co. of Japan, the New Jersey Supreme Court held that the statute of limitations properly tolled indefinitely in a products liability action brought against a foreign manufacturer. The distributor, American Honda Motor Co., was granted summary judgment because the statute of limitations barred plaintiff's suit. The designer-manufacturer, Honda Motor Co. of Japan, argued that it should be treated likewise. The Japanese defendants argued that, like the treatment of foreign corporations which had representatives within the state to accept service of process, the Legislature intended that corporations amenable to long-arm service were to be exempt from the tolling provision. The New Jersey Supreme Court, relying on Velmohos

60. Honda Motor Company was subject to long-arm service through its agent, a Washington, D.C. law firm. “Long-arm service” refers to a state legislative act which provides for personal jurisdiction, via substituted service of process, over nonresident persons or corporations which voluntarily enter a state for a limited purpose.
61. The applicable New Jersey tolling provisions are N.J. STAT. ANN. § 2A: 14-22 (West 1987). They provide in relevant part:
   
[I]f any corporation or corporate surety not organized under the laws of this State against whom there is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before expiration of the times so limited, the time . . . during which . . . such corporation or corporate surety is not so represented within this State shall not be computed as part of the periods of time within which such an action is required to be commenced. . . .

Id.

narrowly defined the statute's requirement that a foreign corporation be represented within the state. The definition did not include corporations amenable to long-arm service. Because the defendants had neither a place of business nor agents to accept service of process within New Jersey, the tolling provision applied and Honda Motor Co. of Japan was forever subject to suit.

A. Commerce Clause Violations

The decision in Coons was appealed to the United States Supreme Court, and the Court remanded the case for resolution of commerce clause issues in light of G.D. Searle & Company v. Cohn. Searle was a similar case in that the defendants were not represented in New Jersey and thus did not qualify for the exception to the tolling provision. The defendants moved for summary judgment based on the statute of limitations. The court held, however, that the tolling provision continued in force despite the advent of long-arm jurisdiction, and thus, the tolling provision applied to defendant Searle. On appeal to the United States Supreme Court,

62. 83 N.J. 282, 416 A.2d 372 (1980). In Velmohos, the plaintiff sought damages resulting from a defective machine supplied by an out of state corporation not registered to do business in the state. The court held that the statute which tolled against unrepresented foreign corporations, are amenable to long-arm service, was constitutional.

63. 628 F.2d 801 (3d Cir. 1980). Hopkins was an action against a non-resident manufacturer of oral contraceptives to recover for damages caused by a birth and/or the contraceptive pill. The court held that a statute tolling against foreign corporations not represented in the state, but amenable to long-arm jurisdiction, was constitutional.

64. Concerning the applicability of the tolling provision, the court distinguished New Jersey's statute, which expressly required representation within the state from other jurisdictions whose tolling provisions merely required absence from the state (e.g. California, Alabama, Ohio, and Texas). In the former, representation was to be more narrowly construed. Thus, corporations which were subject to long-arm service but which were not represented within New Jersey were not to be excluded from the tolling provision. Velmohos, 83 N.J. at 287, 416 A.2d at 378.

65. For a critique on the New Jersey tolling provision, see Comment, supra note 2.


68. G.D. Searle & Company was a Delaware corporation not authorized to do business in New Jersey. Its principal place of business was Illinois.

69. Searle, 447 F. Supp. at 912. The court based its decision on Velmohos, 83 N.J. 282, 416 A.2d 372 (1980), a New Jersey Supreme Court case which held that the tolling provision continued in force despite long-arm jurisdiction.
petitioner Searle contended that, in order to benefit from the statute of limitations, it would have had to obtain a certificate of authority by registering to do business in New Jersey. The corporation would have to subject itself to all the duties and liabilities imposed on a domestic corporation. This, Searle argued, was a violation of the commerce clause.\textsuperscript{70} The Supreme Court remanded the case, expressing concern that the commerce clause dispute was clouded with ambiguity.\textsuperscript{71}

Based on the foregoing commerce clause issues noted in \textit{Searle}, the New Jersey Supreme Court reversed and remanded \textit{Honda}.\textsuperscript{72} On remand, the appellate court held that a statute requiring an unrepresented foreign corporation to register in New Jersey in order to benefit from the statute of limitations violates the commerce clause. The court noted that state regulations affecting interstate commerce will be upheld if: (1) the regulation is rationally related to a legitimate state end; and (2) the regulatory burden imposed on interstate commerce, and any discrimination against it, are outweighed by the state interest in enforcing the regulation.\textsuperscript{73} However, some statutes are invalid without any balancing if they require licensing requirements imposed on foreign corporations involved in interstate commerce.\textsuperscript{74} The court held that there is no fundamental right to a statute of limitations defense, but rather statutes of limitations are a matter of legislative grace. However, this legislative control cannot exceed constitutional limits:

The legislature cannot accomplish indirectly that which it could not do directly: it cannot, in effect, force licensure on foreign

\textsuperscript{70} Congress has the power to regulate commerce among the states. \textit{See infra} note 97. Searle also argued that forcing a company to register to do business within the state was a violation of equal protection. The commerce clause challenge was upheld, the Equal Protection challenge was dismissed.

\textsuperscript{71} The ambiguity centered on dicta in \textit{Velmohos}, which stated: "We note that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the state." 83 N.J. at 293 n.10, 416 A.2d at 378 n.10 (also quoted in \textit{Searle}, 455 U.S. at 414). Similarly, in \textit{Hopkins v. Kelsey-Hayes}, 677 F.2d 301 (3rd Cir. 1982), the Third Circuit remanded the case to the district court for determination of the same commerce clause question.


\textsuperscript{74} For decisions which hold that a state cannot discriminate against a foreign corporation engaged in interstate commerce merely because it has failed to qualify to do business in that state, see \textit{Allenberg Cotton Co. v. Pittman}, 419 U.S. 20 (1974); and \textit{Dahnke-Walker Milling Co. v. Bondurant}, 257 U.S. 282 (1921).
corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional.  

Because the tolling provision was regarded as a forced-licensure provision, it was struck down as a violation of the commerce clause. Honda Motor Co. of Japan was permitted to assert the statute of limitations defense.  

**B. Violation of Equal Protection**

A second issue raised by these opinions is an equal protection challenge. In the first *Honda* case, *Coons v. Honda Motor Co. Ltd., of Japan*, the defendants argued that the tolling provision was a violation of the Constitution's equal protection clause. They argued that there was no basis for the different treatment of represented corporations and unrepresented corporations which were amenable to long-arm service. However, the equal protection challenge was dismissed in all the cases. As the United States Supreme Court noted in *Searle*, "in the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends."  

The flaw in the defendant's argument was that it refused to acknowledge that among amenable foreign corporations there are de-
degrees of difficulty in effecting service. These degrees are the rational basis for distinguishing between represented corporations and those unrepresented but amenable to long-arm service.83 Quoting Hopkins v. Kelsey-Hayes,84 the Supreme Court noted:

Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state, non-represented corporate defendants may be difficult to locate let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants.85

California, unlike New Jersey, has followed the majority approach and held that, for corporate defendants, only nonamenability to service causes the tolling provision to apply.86 Furthermore, in California, amenability to service is not dependent upon registration to do business within the state.87 Thus, the Honda problem would not occur in California. Because Honda was subject to long-arm jurisdiction and could be served through the Secretary of State, it was amenable to service. However, in California, Honda would not have needed to register to do business in order to take advantage of the statute of limitations defense.

C. The California Problem

Although the Honda holding per se would not be a problem in California because foreign corporations need not register to do business to take advantage of the statute of limitations, the problem remains that defendants will be indefinitely subject to suit. In California, the problem arises when the defendant is a corporation in a country which does not permit service by mail.88 In these cases, service upon the Secretary of State89 is not effective notice to the out-of-

83. Velmohos, 83 N.J. at 295, 416 A.2d at 381.
84. Searle, 455 U.S. at 408 (quoting Hopkins v. Kelsey-Hayes Inc., 628 F.2d 801, 811 (3d Cir. 1980)).
85. Id. at 408.
87. See Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9th Cir. 1956); Taylor v. Navigazione Libera Triestina, 95 F.2d 907 (9th Cir. 1938); Reynolds, 275 Cal. App. 2d 997, 80 Cal. Rptr. 610 (1969).
88. Countries are able to object to service by mail through an international treaty, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. See supra text accompanying notes 36-39.
state defendant and thus is invalid. *Porsche* is a good example of the problem. In *Porsche*, the plaintiffs diligently attempted to serve the German defendants by registered mail both directly and indirectly through the Secretary of State. The court correctly held that neither method was in compliance with the Convention, thus rendering the service invalid. However, the court did not complete the analysis. There was no mention of the section 351 tolling provision. The court expressly held that service upon the Secretary of State was not valid under the Convention and that a California court could not exercise jurisdiction in violation of the Convention. These observations naturally lead to the conclusion that the section 351 tolling provision applies. *Loope* held that a foreign corporation can always be served through a designated or substituted agent, namely, the Secretary of State. Thus, the corporate defendants in countries which do not permit service by mail and do not have a designated agent within California are out of the state for tolling purposes and are subject to suit indefinitely.

From a planning perspective, indefinite liability creates problems for the foreign corporation and the California plaintiff encounters difficulties when attempting to serve these defendants. Thus, both the foreign corporation and the California plaintiff would benefit from a statutory amendment which provides for an agent to accept service of process.

**IV. Voluntary Appointment of an Agent**

In addition to reconfirming the fact that German defendants cannot be served through the Secretary of State, *Porsche* illustrates the difficulties encountered in trying to effectively serve defendants in countries which do not permit service by mail. It would appear that the voluntary rejection of service by mail by foreign corporations does not warrant special protection. However, the difficulties encountered when serving these defendants indicates that a change would be advantageous for both plaintiff and defendant.

91. *Id.* at 762, 177 Cal. Rptr. at 159.
92. CAL. CIV. PROC. CODE § 351 (West 1982). See *supra* text accompanying note 8 for relevant text.
93. *Porsche*, 123 Cal. App. 3d at 762, 177 Cal. Rptr. at 159. Furthermore, the court concluded that even if Porsche had actual notice, this would be insufficient to avoid the effect of noncompliance with the Convention.
95. *Porsche*, 123 Cal. App. 3d at 762, 177 Cal. Rptr. at 159.
The simplest solution to counter both the problems of indefinite exposure to suit and the difficulty in service is voluntary appointment of an agent to accept service of process in California. The California Code of Civil Procedure should be amended with respect to these special defendants as follows:

351(a) - Tolling Provision as applied to foreign corporate defendants in countries which do not permit service by mail-
A foreign corporate defendant, otherwise constitutionally ame-
nable to jurisdiction in this state, located in a country which
does not accept service by mail shall be deemed out of the state
for tolling purposes unless it has filed with the Secretary of
State a statement designating an agent to accept service of pro-
cess within the state. If (a) no such agent has been named, (b)
o such agent can be found, or (c) such agent is no longer au-
thorized to act, personal delivery of service upon the Secretary
of State is invalid. In these latter cases, service can only be effec-
tive if carried out in compliance with the Hague Convention on
Service of Process Abroad and the foreign corporate defendant is
deemed out of the state for tolling purposes. For purposes of
this section, such agent shall not constitute means for personal
jurisdiction by this state over any foreign corporation.

For purposes of the tolling provision, service would be complete
when the agent is served. Legislation providing for voluntary ap-
pointment of an agent in these special cases, where the defendant is a
corporation located in a country which does not permit service by
mail, would withstand the constitutional challenges.

A. Commerce Clause Challenge

The proposal must first withstand challenge under the com-
merce clause. The commerce clause was intended to insure that
everyone has free access to every market in the nation and that there
is no exclusion by state customs, duties, or regulations. As noted
Constitutional law scholar Laurence Tribe points out, "[in most
cases] [s]tate regulation affecting interstate commerce will be upheld
if, (a) the regulation is rationally related to a legitimate state end,

96. Service upon the appointed agent is completed when served. This is similar to the
treatment of service upon subsidiaries of foreign corporations. See, e.g., Ex Parte Volkswagen-
werk Aktiengesellschaft, 443 So. 2d 880 (Ala. 1983); Taca Int'l Airlines v. Rolls-Royce of
97. U.S. Const. art. 1, § 8, cl. 3 grants Congress the power to regulate commerce
among the several states. The provision was intended to foster development and maintenance
of a national common market and to eradicate trade barriers.
and (b) the regulatory burden imposed on interstate commerce, and any discrimination against it, are outweighed by the state interest in enforcing the regulation.\textsuperscript{99} When balancing the interests, courts look at the burden imposed on foreign corporations when they comply with the state statute at issue.\textsuperscript{100} If the regulation is a licensing requirement and is applied only to corporations engaged exclusively in interstate commerce, the regulation is a per se violation and no balancing is needed.\textsuperscript{109} California, however, does not require that a foreign corporation be licensed within the state in order for it to take advantage of the statute of limitations defense.\textsuperscript{108} The proposed statute is not a licensing scheme but, rather, a provision for voluntary appointment of an agent to accept service of process. Thus, to determine whether the proposal violates the commerce clause, a balancing test which focuses on the burden imposed by the proposed statute is used.

A similar analysis was employed by the Idaho District Court in \textit{McKinley v. Combustion Engineering, Inc.}\textsuperscript{104} In \textit{McKinley}, foreign corporations which failed to designate a person within the state for service of process were denied protection under the statute of limitations.\textsuperscript{108} The \textit{McKinley} court found that the purpose of the statute was to toll the statute of limitations during the time that defendants were not otherwise subject to jurisdiction. Consequently, the statute burdened interstate commerce by forcing a foreign corporation, in effect, to waive any minimum contacts objection to jurisdiction, ex-

\textsuperscript{101} Licensing in this context refers to permission to do business in the state.
\textsuperscript{103} Taylor v. Navigazione Libera Triestina, 95 F.2d 907 (9th Cir. 1938); Reynolds, 275 Cal. App. 2d 997, 80 Cal. Rptr. 610 (1969).
\textsuperscript{104} 575 F. Supp. 942 (D. Idaho 1983).
\textsuperscript{105} IDAHO CODE §§ 30-502, 30-509 (1939), provides in relevant part:

30-509 -Statute of Limitations- Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as aforesaid, upon whom such service can be made, shall be within the state.

\textit{Id.} Code section 30-502 required a foreign corporation to designate a person within the state for service of process. Both codes were repealed subsequent to the filing of the lawsuit.
posing itself to personal jurisdiction in Idaho. Furthermore, the court concluded that the benefits of the challenged statute were insignificant. It noted that appointment of in-state representatives made it easier for Idaho residents to effect service on such corporations because a plaintiff did not have to locate and serve a distant defendant. The court found the real benefit, however, to be a mere cost and time savings, stating that "with the multitude of process-serving firms in every state, the chances of being completely unable to locate a foreign company doing business in Idaho are very small."107

Both of the McKinley conclusions concerning the burden and the benefit of the Idaho statute are significantly altered when applied to California's treatment of defendants in countries which do not permit service by mail. In order for a foreign corporate defendant to come within California jurisdiction, the defendant must have the requisite minimum contacts in California.108 Appointing an agent to accept service under the proposed statute does not waive the lack of minimum contacts defense.109 Only foreign corporations which have the required minimum contacts can be held liable in California, and only those corporations which anticipate being subject to California jurisdiction would be interested in voluntarily appointing an agent to accept service of process.

The proposed statute does not expose any corporate defendant to personal jurisdiction which is not already subject to jurisdiction.110 Thus, the burden of personal jurisdiction noted in McKinley is lessened, if not entirely lifted. Likewise, the minimal benefit of cost and time savings noted in McKinley is much more significant when applied to the special class of foreign defendants. Locating and serving a German defendant can be extremely difficult,111 in addition to be-

106. McKinley, 575 F. Supp. at 946.
107. Id. at 947.
108. Minimum contacts is a doctrine which requires that there be sufficient (minimum) contacts within the state before an out of state defendant may be sued in that state. See International Shoe Co. v. Washington, 326 U.S. 310 (1945); Seacrest Mach. Corp. v. Superior Court, 33 Cal. 3d 664, 660 P.2d 399, 190 Cal. Rptr. 175 (1983); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).
109. See supra text accompanying note 96. The proposed statute expressly maintains any minimum contacts defense.
110. Admittedly, the rules regarding jurisdiction through minimum contacts are not hard and fast guidelines. See supra note 102 and accompanying text. See generally Lilly, Jurisdiction Over Domestic & Alien Defendants, 69 VA. L. REV. 85 (1983). Nevertheless, a foreign corporation which has reason to question the contacts in California would not waive the minimum contacts defense by appointing an agent to accept service of process within California.
B. *The Preemption Challenge*

The proposed statute will also withstand a preemption challenge.\(^\text{118}\) It may be argued that federal law, through The Hague Convention on Service of Process Abroad,\(^\text{114}\) preempts the effect of the proposal. The United States Supreme Court in *De Canas v. Bica*\(^\text{116}\) discussed the tests employed to determine whether a state statute is preempted by the United States Constitution. The first test is whether Congress has clearly and manifestly evidenced an intent to occupy the field, or alternatively, whether the state statute is an obstacle to the congressional purpose.\(^\text{116}\) The conclusion that the proposed statute regulates in a field that Congress alone occupies should be reached only if "the nature of the regulated subject matter permits no other conclusion or [if] Congress has unmistakably so ordained."\(^\text{117}\) This is not the case with the proposed statute. Statutes of limitations are within state power. They are a matter of state procedure and left to each individual state. The Hague Convention\(^\text{118}\) does not deal with statutes of limitations but only service of process.

Additionally, the second prong, whether the proposed statute is an obstacle to congressional intent, also does not conflict with the proposal. Federal law may preempt a state law when the state law "stand[s] as an obstacle to the accomplishment of the full purposes that Congress sought to achieve."\(^\text{118}\) In *In re Aircrash in Bali, Indo-

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112. The Hague Convention requires that service on German defendants is made upon the applicable Central Authority and that it is translated into German. *See supra* notes 36-39 and accompanying text.

113. The idea that a federal law may preempt or take precedence over a state law is derived from the supremacy clause. *See supra* note 48 and accompanying text.

114. *See supra* note 36.

115. 424 U.S. 351 (1976) (The United States Supreme Court in *De Canas* reviewed a California statute that inflicted criminal and civil penalties upon employees who knowingly employed illegal aliens. Although the power to regulate immigration is vested in the federal government, the California statute was not preempted by constitutional power). *See also Elsworth v. Beech Aircraft Co.*, 37 Cal. 3d 540, 691 P.2d 630, 208 Cal. Rptr. 874 (1984).


117. *De Canas*, 424 U.S. at 356 (quoting *Florida Lime and Avocado Growers*, 373 U.S. at 142), noted in *Doe*, 628 F.2d at 452.

118. *See supra* text accompanying note 37.

119. *Hines*, 312 U.S. at 67. *See also Elsworth*, 37 Cal. 3d at 548, 691 P.2d at 634, 208 Cal. Rptr. at 878.
nesia on April 22, 1974,\textsuperscript{120} the Ninth Circuit Court of Appeals was called upon to decide if a California statute had been preempted by the Warsaw Convention.\textsuperscript{121} The court held that the statute in question was a violation of the congressional scheme embodied in the Convention because it prevented the application of a Convention provision. Consequently, the California statute was preempted.\textsuperscript{122}

The proposed statute is not preempted by the purposes and objectives underlying the Hague Convention. The major purposes of the Hague Convention were to bring actual notice to the recipient in sufficient time to enable him to defend himself and to facilitate proof that service has been affected abroad.\textsuperscript{123} The scope of the Convention does not extend to the statute of limitations. It merely establishes methods for service of process. A statute of limitations determines the amount of time a plaintiff has to serve process, not the manner of the service. The Convention does concern actual notice. A state’s limitation of the period for filing suit, however, does not interfere with the scope of the Convention. Nor does tolling the limitation period while the defendant is out of the state interfere with the scope of the Convention. Rather than conflicting with the Convention’s underlying policy of bringing actual notice to the defendant, the proposed statute, in fact, enhances the Convention’s objectives. Providing for appointment of an agent to accept service of process within California simplifies the notice procedure and does not require objecting countries to permit service by mail. California’s treatment of foreign defendants in countries which do not accept service by mail will withstand any constitutional scrutiny.

C. Benefits of the Proposal to the Foreign Corporation

The proposed statute not only withstands constitutional scrutiny and assists California plaintiffs in effectuating service, but the statute also benefits foreign defendants. Corporations in countries which do not permit service by mail remain subject to suit indefinitely, which is not advantageous. The corporation’s prospectus remains inaccurate

\textsuperscript{120} 684 F.2d 1301, 1308 (9th Cir. 1982) (The California law which precluded a person from contractually compromising his survivors’ right to wrongful death recovery was preempted by the Warsaw Convention to the extent that California law would prevent the application of the Convention’s limitation on liability).


\textsuperscript{122} In Re Aircrash in Bali, 684 F.2d at 1308.

\textsuperscript{123} See generally Maarten Kluwer’s Internationale Uitgeversonder neming, \textit{supra} note 37.
because of the possibility of litigation claims. Corporate investments and company insurance rates may continue to fluctuate unpredictably. A corporate planning perspective requires relief from indefinite liability. Indefinite liability may also create evidence problems when witnesses die, memories fade, and/or evidence is lost. Judicial economy is best served when claims are filed promptly. The appointment of an agent to accept service of process within California will also enhance the foreign defendant's business reputation. By complying with the statute, the foreign corporation essentially represents that it does not intend to dodge responsibility and is willing to defend claims against it. This showing of good faith by the foreign corporation will possibly be rewarded through increased product sales in California.

V. Conclusion

California Civil Procedure Code section 351 tolls the statute of limitations during the period an individual defendant is out of the state. However, if the defendant is a corporation, the statute of limitations is not tolled during the same period. Individual and corporate defendants are treated differently because corporations may be served through alternative means, either directly through the mail or indirectly through the Secretary of State. However, some foreign corporate defendants, through their country's ratification of an international treaty, the Hague Convention on Service Abroad, have objected to service by mail. This special class of defendants may not be served pursuant to California law. Consequently, these defendants are not out of the state for tolling purposes and are subject to liability indefinitely.

This situation is particularly advantageous for the California plaintiff because suit may be filed at any time. Yet, the difficulty of service makes it simultaneously disadvantageous. Indefinite liability is also disadvantageous to the foreign corporate defendant due to difficulty of accurate business planning and adequate defense preparation. Both the California plaintiff and the foreign corporate defendant would benefit from a modification of Civil Procedure Code section 351. The California tolling statute should be amended to provide for voluntary appointment of an agent to accept service of process within California.

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