

RESOLUTION 07-03-2007

DIGEST

Small Claims Court: Substituted Service of Process

Amends Code of Civil Procedure section 116.340 to allow for substituted service of a defendant in small claims court on the defendant's insurance company.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 116.340 to allow for substituted service of a defendant in small claims court on the defendant's insurance company. This resolution should be disapproved because it unduly deprives the small claims court defendant of due process.

It is unclear whether the resolution seeks to provide for substituted service on the insurance company of any defendant in small claims court, or only with regard to defendants involved in auto accidents. If the latter is intended, it is further unclear whether the resolution seeks to provide for substituted service of nonresident defendants only, or of both resident and nonresident defendants. Regardless, the resolution denies the defendant of fundamental due process rights by allowing service of process, and notice of the claim, to be made only on the defendant's insurance company.

Second, the defendant is the one being sued, not the insurance company, and is therefore the party entitled to notice of the claim. The resolution would not even require that the plaintiff exhaust all reasonable efforts to locate the defendant before serving process on the insurance company. Those efforts are often easily pursued; for instance, in auto accident cases, the plaintiff can have an attorney file an affidavit with the Department of Motor Vehicles to discover the defendant's residence address. (Veh. Code, § 1808.22, subd. (c).) Due process considerations and the availability of other service methods impel the conclusion that small-claims plaintiffs should have to exercise more diligence in effecting service than this resolution requires.

Furthermore, the interests of the defendant and the insurance company with regard to the claim may not coincide. For instance, the resolution does not require that the insurance company establish that coverage exists for the specific claim being brought under the policy, that there are no coverage disputes, or that there is no deductible for which the defendant will be exclusively liable. Perhaps, also, the defendant prefers to pay any claim himself as opposed to submitting it to the insurance company (especially possible when the claim is within the jurisdiction of small claims court). Without notice of the claim, the defendant is denied this choice. These are but a few of the myriad reasons why due process demands that a defendant be given proper notice of claims being brought against him.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommend that legislation be sponsored to amend Code of Civil Procedure section 116.340 to read as follows:

1 §116.340

2 (a) Service of the claim and order on the defendant may be made by any one of the
3 following methods:

4 (1) The clerk may cause a copy of the claim and order to be mailed to the
5 defendant by any form of mail providing for a return receipt.

6 (2) The plaintiff may cause a copy of the claim and order to be delivered to the
7 defendant in person.

8 (3) The plaintiff may cause service of a copy of the claim and order to be made by
9 substituted service as provided in subdivision (a) or (b) of Section 415.20 without the need
10 to attempt personal service on the defendant. For these purposes, substituted service as
11 provided in subdivision (b) of Section 415.20 may be made at the office of the sheriff or
12 marshal who shall deliver a copy of the claim and order to any person authorized by the
13 defendant to receive service, as provided in Section 416.90, who is at least 18 years of age,
14 and thereafter mailing a copy of the claim and order to the defendant's usual mailing
15 address.

16 (4) The clerk may cause a copy of the claim to be mailed, the order to be issued,
17 and a copy of the order to be mailed as provided in subdivision (b) of Section 116.330.

18 (b) Service of the claim and order on the defendant shall be completed at least 15
19 days before the hearing date if the defendant resides within the county in which the action is
20 filed, or at least 20 days before the hearing date if the defendant resides outside the county in
21 which the action is filed.

22 (c) Proof of service of the claim and order shall be filed with the small claims court
23 at least five days before the hearing.

24 (d) Service by the methods described in subdivision (a) shall be deemed complete
25 on the date that the defendant signs the mail return receipt, on the date of the personal
26 service, as provided in Section 415.20, or as established by other competent evidence,
27 whichever applies to the method of service used.

28 (e) Service shall be made within this state, except as provided in subdivisions (f)
29 and (g).

30 (f) The owner of record of real property in California who resides in another state
31 and who has no lawfully designated agent in California for service of process may be served
32 by any of the methods described in this section if the claim relates to that property.

33 (g) A nonresident owner or operator of a motor vehicle involved in an accident
34 within this state may be served pursuant to the provisions on constructive service in Sections
35 17450 to 17461, inclusive, of the Vehicle Code without regard to whether the defendant was
36 a nonresident at the time of the accident or when the claim was filed. Service shall be made
37 by serving both the Director of the California Department of Motor Vehicles and the
38 defendant, and may be made by any of the methods authorized by this chapter or by
39 registered mail as authorized by Section 17454 or 17455 of the Vehicle Code.

40 (h) If the defendant was insured at the time of the accident, and either failed to
41 provide a current address at the time of the accident, or later moved with no forwarding

42 address; and if the insurance company has acknowledged the existence of a policy covering
43 the defendant at the time of the accident, but refuses to disclose the defendant's current
44 address for service of process, the defendant may be served by substituted service on the
45 insurance company on the defendant's behalf. Service on the insurance company may be
46 made pursuant to (a)(1) above.

47 (i) If an action is filed against a principal and his or her guaranty or surety pursuant
48 to a guarantor or suretyship agreement, a reasonable attempt shall be made to complete
49 service on the principal. If service is not completed on the principal, the action shall be
50 transferred to the court of appropriate jurisdiction.

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

PROPONENT: National Lawyers Guild—Los Angeles Chapter

STATEMENT OF REASONS:

Existing Law: While existing law allows for service of process in a small claims case against a nonresident defendant by service on the Director of the California Department of Motor Vehicles, it still requires service on the defendant.

This Resolution: Would close a current loophole in the small claims statutes that operates to deny personal injury plaintiffs the right to pursue their claims in small claims court when the defendant cannot be located after the accident, and the insurance company who is duty bound to indemnify the defendant knows the defendant's location but refuses to disclose it.

The Problem: There is no mechanism in small claims court for an order for publication when a defendant cannot be located. There are often car accident cases in which the defendant either provides an outdated address, or moves after the accident without leaving a forwarding address. The plaintiff has been in discussion with the defendant's insurance company but they fail to reach a settlement. When the plaintiff tries to file a small claims action against the defendant the insurance company informs the plaintiff that the defendant has moved, but refuses to disclose the defendant's whereabouts. Without a current address to serve the defendant the plaintiff is unable to avail her/himself of the small claims court. This proposed amendment would close a loophole in the statute to allow plaintiffs in personal injury actions to serve the defendant through the defendant's insurance company when the defendant's whereabouts are unknown.

IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Tina L. Rasnow

COUNTERARGUMENT

ORANGE COUNTY BAR ASSOCIATION

This resolution proposes an amendment to Section 116.340 of the Code of Civil Procedure (“Section 116.340”) that inappropriately lessens the due process protections afforded to defendants in small claims proceedings. Section 116.340 sets forth a series of procedures that safeguard a defendant’s constitutional right to be notified of claims pending against him or her in small claims court. The proposed amendment would modify the protections of Section 116.340 by allowing a plaintiff to serve a defendant with notice of a claim by substituted service on an insurance company if the insurance company has acknowledged the existence of a policy covering the defendant at the time of the accident and if the insurance company refuses to disclose the defendant’s current address for service of process. The proposed amendment, as currently drafted, does not adequately protect a defendant’s right to notice.

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” (*Mullane v. Central Hanover Bank & Trust Co* (1950) 339 U.S. 306, 314.) The United States Supreme Court has noted that personal service by written notice is the “classic form of notice that is always adequate,” but has also allowed for other means of notice where under the circumstances it is not “reasonably possible or practicable to give more adequate warning.” (*Id.* at 313, 317.)

The circumstances described in the proposed amendment leave open too many questions to justify anything less than written notice to a defendant. For example, the proposed resolution does not appear to limit its application to those situations where a plaintiff has been unable with due diligence to ascertain the address of a defendant. As long as a defendant failed to give a current address or moved with no forwarding address, a plaintiff can resort to substitute service – even if the plaintiff has the defendant’s telephone number. This in effect leaves a defendant unnecessarily dependent on a third party for notice of the pending claim.

Further, the proposed amendment does not provide sufficient guidance regarding which insurance company can be served on behalf of a defendant. By the terms of the proposed amendment, the plaintiff can serve defendant by substituted service on an “insurance company [that] has acknowledged the existence of a policy covering the defendant at the time of the accident.” There is no requirement that the insurance company acknowledge that the policy actually provided coverage for the accident or that it has agreed to defend and indemnify its policyholder. Thus, a defendant could find itself dependent for notice on an insurance company that intends to disclaim or has disclaimed coverage under an exclusion in the insurance policy or an insurance company who, by operation of the deductible under the insurance policy, bears no liability for the outcome of the proceedings in small claims court.