

SERVICE OF PROCESS IS NOW JUDGED LIBERALLY, BUT IF SERVICE IS DEFINITELY IMPROPER, EVEN ACTUAL NOTICE TO DEFENDANT WILL NOT CREATE DUTY TO ANSWER

In the recent case of *Summers v. McClanahan*, the defendant “played with fire” when he purposely ignored a lawsuit served on him through his business manager, and he got burned with a \$3.7 million dollar default and a refusal to grant his motion for relief from default. On appeal, he came back from the grave by convincing the court that the person served was not actually or seemingly authorized to accept things like lawsuits on his behalf. The take-away from the case is: 1) If a defendant is served off-premises through someone who is likely to be viewed as “authorized to accept service,” it is very risky to fail to answer; but 2) if a defendant is defaulted after such service, the default can still be fought and set aside if the court can be convinced that the person served was never actually or seemingly authorized to accept things like lawsuit papers for the defendant - *even if the defendant had actually received the lawsuit papers from the agent.*

The service statutes were changed in 1969 to let courts liberally interpret when service of a lawsuit has occurred, but the plaintiff must still prove that he has substantially complied with the service statute and cannot altogether violate it. If he does substantially violate the service statute, the service is void, and any ensuing default is void, even if the service did in fact result in actual notice to the defendant in time to answer.

The facts were: Mr. Summers and Ms. McClanahan were already embroiled in a lawsuit involving a failed joint business venture in the entertainment industry when Summers filed a related lawsuit for slander, libel and intentional infliction of emotional distress. He “served” this suit by having it delivered to Ms. McClanahan’s personal manager (whose job was to advise defendant on career choices), who had her own business and office separate from defendant’s office address. She then promptly sent the suit papers to defendant’s attorney, the same attorney as in the other

case, who admits that he got the lawsuit papers in time to answer. However, he felt there was improper service and refused to file an answer. A \$3.7 million default was taken. Defendant unsuccessfully filed a motion for relief from default, arguing that the service was improper under the *Code of Civil Procedure* and therefore void. The Code allows various means of service including leaving papers with a person “apparently in charge” at a defendant’s office, and substitute service at a household, but neither of those methods were at issue here because the defendant’s personal manager did not work for or at defendant’s office, and service was not at the defendant’s residence. Instead, plaintiff was attempting to use Code Section 416.90, which allows service on a person “authorized by [the defendant] to receive service of process.” The trial court found that the defendant’s career manager was never actually or seemingly authorized to accept lawsuit papers on defendant’s behalf, but found that since the papers timely got to defendant’s attorney, who simply refused to answer them, that service ended up being proper and that the default was therefore valid. The trial court denied two motions for relief from default and defendant appealed.

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FALSE ADVERTISING OR UNFAIR COMPETITION CLAIMS THAT HAVE NOT REACHED FINAL JUDGMENT MAY BE SUBJECT TO DISMISSAL IF THE PLAINTIFF DID NOT SUFFER ACTUAL INJURY

Plaintiff Webster Bivens, a senior citizen in San Diego, filed a lawsuit that alleged false advertising and unfair business practices claims against Gallery Corporation, on behalf of the general public, even though Bivens had not suffered any damages personally. Bivens alleged that on December 7, 2003, Gallery published an advertisement in the Los Angeles Times listing mattresses for sale, stating "PRICING AS LOW AS...\$48," and in smaller print "TWIN EA.PC." followed by much smaller print stating "SOLD IN SETS ONLY."

In *Webster Bivens v Gallery Corporation*, 2005 DJDAR 14083, Bivens alleged that the failure to list the total price for a mattress and box springs set or to define the term "set" would mislead consumers and listed causes of action under California *Business & Professions Code* §§17504, 17500, et seq. (False Advertising Act), and 17200, et seq. (Unfair Competition Law). Bivens sought a declaratory judgment that Gallery was using unlawful advertising techniques that provided an unfair competitive advantage over law abiding competitors and asked that a receiver be appointed to determine the amount of money Gallery received due to its unlawful advertising and to supervise restitution to customers who paid more than the advertised price for one mattress.

On November 5, 2004, the trial court granted Gallery's demurrer to the complaint without leave to amend, stating that, as a matter of law, the advertisement gave adequate notice of the price of the sets and that the term "set" does not constitute "multiple units" within the meaning of section 17504. The court further stated that the advertisement did not contain false or misleading statements or unfair and deceptive advertising. The final ruling was confirmed on November 9, 2004 and the case was dismissed on February 23, 2005.

After Bivens filed the case, but before the hearing on the demurrer, voters passed Proposition 64 on November 2, 2004. That proposition amended portions of the Unfair Competition Law and the False Advertising Act to require litigants to now show an injury in fact, including the loss of money or property, and to comply with class action certification procedures.

Following passage of the proposition, Sections 17204 and 17535 now provide that actions for any relief pursuant to these sections can only be brought by a plaintiff who has *suffered injury in fact and has lost money or property* as a result of a violation of these sections.

Section 17535 goes on to state that *a plaintiff can only pursue representative claims on behalf of others if the claimant meets the standing requirements of this section and complies with Section 382 of the Code of Civil Procedure, which deals with class certification procedures.*

The end result is that an activist or other person who did not suffer any injury can no longer file a lawsuit on behalf of the general public. Under the current law, only persons who were injured in fact and lost money or property as a result of the alleged unfair competition or false advertising have standing to bring actions for relief under the UCL or the False Advertising Act.

On appeal, Bivens contended that these amendments did not apply to his case because it was filed before Proposition 64 was passed. However, the court held that based on prior cases, Proposition 64 applied retroactively to cases filed before the November 2, 2004 effective date, if they had not reached a final judgment because these are statutory remedies.

If a remedial statute is approved without a savings clause, it effectively stops all pending actions until final relief is granted. Thus, even those cases that were pending appeal would be stopped.

Because the legislature can abolish a statutory remedy at any time, that remedy only exists as long as the legislature allows it to continue and does not vest until final judgment, unlike common law rights.

Because Bivens did not allege any injury in fact or any loss of money or property, he no longer had standing

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to pursue his claims. Furthermore, Bivens did not make the allegations required for a class action lawsuit under California *Code of Civil Procedure* § 382 and could not amend the complaint to do so because his original complaint admitted that he was an unaffected plaintiff. The bottom line was that Bivens did not have standing to pursue his claims, which meant Bivens' claims failed as a matter of law and no claims remained for any new plaintiff.

Section 17504 requires that retail sellers, who sell consumer goods or services only in multiple units, must state the price of the minimum multiple unit offered. The court held that this section was clear and unambiguous as the phrase "multiple units" referred to more than one of the same kind of good or service. Gallery's advertisement stated that goods were sold in sets only, that is a mattress and a box spring, and listed the minimum price for one mattress or box spring. The court determined that a mattress and a box spring are two different types of goods and that a mattress and box spring set is not the same as a unit. Thus, the advertisement did not violate this section.

Section 17500 prohibits untrue or misleading advertising that induces consumers to purchase property or services. The court applied a "reasonable consumer" standard and determined that the advertisements would not mislead a reasonable consumer. As a result, the court held that the demurrer to this cause of action was appropriate.

Section 17200 prohibits unfair competition through the use of unfair, deceptive, untrue or misleading advertising, in effect borrowing violations from other laws, including Sections 17500 and 17504, to make them actionable as unfair competitive practices. When Bivens could not state a cause of action pursuant to either of these sections, the court held that his third cause of action was also insufficient. Bivens also alleged violations of *Civil Code* §1770, the Consumer Legal Remedies Act, which prohibits misleading advertising that is likely to deceive a reasonable consumer. The court determined that an advertisement to sell mattresses and box springs in sets only was not misleading or likely to deceive. Thus, Bivens could not prove a violation of section 17200.

The bottom line is that any matter dealing with false advertising or unfair competition claims that have not reached final judgment, even if on appeal, may be subject

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to dismissal if the plaintiff did not suffer an injury in fact, or any monetary or property loss. New claims under these statutory regulations should be carefully scrutinized to ensure the plaintiff has standing to pursue the claims and has complied with any requirements related to class actions.

- Patsy Hopkins Moore

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The Court of Appeal held that if service results in actual knowledge to the defendant, that fact *can*, in appropriate circumstances, lead to a conclusion of proper service, but not necessarily. If there has been “substantial compliance” with the service statute, service is held good, and the fact that a defendant actually got knowledge of the lawsuit is often good evidence that the statute was substantially complied with. If, however, the statute was totally violated, and not even substantially complied with, the service is bad and the default is void even if defendant learned of, but purposely ignored the lawsuit.

In 1969, the service statute was overhauled to get rid of old technical provisions that required literal compliance with service rules. Now substantial compliance with the rules is enough. However, the court held, there are still rules, and the “substantial compliance” doctrine does not lead to a rule that “a summons may be served on anyone, by any means which results in actual notice of the action in time to defend.” In this case, the rule about having to serve someone who was actually or seemingly authorized to accept service was totally violated and not substantially complied with. A personal manager who has her own business in a separate building is not someone seemingly authorized to accept service of lawsuits, even if she did in fact promptly forward it to the defendant’s attorney.

**OTHER WAYS TO BEAT DEFAULTS:
PLAINTIFF MUST ALSO PERSONALLY SERVE A
STATEMENT OF DAMAGES, AND THE
DOCTRINE OF EXTRINSIC MISTAKE**

Wesierski & Zurek LLP has successfully extricated many clients from default judgments, even very old ones that normally can no longer be challenged, where the plaintiff did not personally serve the defendant a statement of damages before the default was taken. This is a JURISDICTIONAL issue, and the court is forced to undo the default at any time if plaintiff committed this error. Also, if the defendant turned over his lawsuit papers to the adjuster or someone else who told him they would be responsible for taking care of them, and if it was then that person’s fault that the suit did not get timely answered, there is a doctrine of “extrinsic mistake” that can be used to undo the default. The rules about these doctrines are complex. The Firm has extensive experience prevailing on them in both the trial court and on appeal.

**A WORD ABOUT “REGISTERED AGENTS
FOR SERVICE OF PROCESS”: THE PLAINTIFF
IS NOT FORCED TO SERVE THROUGH THE
REGISTERED AGENT, HE CAN STILL SERVE
DEFENDANT IN PERSON, OR THROUGH A
PERSON “APPARENTLY IN CHARGE” IN ONE
OF DEFENDANT’S PLACES OF BUSINESS**

Clients often wonder if service is valid if plaintiff ignores the registered agent for service, and opts to serve a manager at one of their places of business instead. The answer is that a plaintiff does not have to serve through the registered agent, but plaintiff still has to comply with the rules of whatever other Code section he is relying on, such as the rule allowing service on someone “apparently in charge.” Who is “apparently in charge” at a business location is a case-by-case call and an attorney should be consulted anytime lawsuit papers are delivered by any means to a defendant’s business offices or places of business. The law requires corporations to have a registered agent for service of process to prevent shady individuals from setting up corporations as an anonymous front from which to do fraudulent business, and guarantees that such a corporation can always be found for purposes of serving a lawsuit. But it is just one option for service and a plaintiff can always choose among various service options allowed by the Code, so anytime a lawsuit is learned of, counsel should be contacted immediately to determine what needs to be done to block any possibility of a default. There is a rule in California that it is considered ethically improper to take a secret default if the defendant is known to be represented by counsel, so often a simple fax from counsel goes a long way toward preventing trouble, while still preserving the right to demur or move to quash the complaint for improper service.

- Paul J. Lipman

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