

Chapter 8—Challenging Service of the Summons

§ 8.01 Introduction

If the plaintiff fails to follow the prescribed procedures for notifying the defendant of the claim against him, through service of the summons and complaint, the court does not acquire personal jurisdiction over him. It makes no difference that the defendant knows from some source other than service of the summons that the plaintiff has initiated a lawsuit against him.¹ Therefore, one may challenge the service of the summons and complaint by challenging the court's personal jurisdiction.

§ 8.02 Motions to Quash Service of the Summons

The Code of Civil Procedure provides the motion to quash service of the summons as an alternative for responding to a complaint. A defendant may serve and file a notice of motion to quash service of the summons on the ground of lack of jurisdiction of the court over him based on defects in the service of the summons.² One must file the motion within the time to plead or within any further time the

¹ Kappel v. Bartlett, 200 Cal. App. 3d 1457, 1466, 246 Cal. Rptr. 815, 821 (1988).

² CODE CIV. PROC. § 418.10(a)(1). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 3:376–:378, :381, :392, :394, 4:169–:170.1, :172 (1996); 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* §§ 161, 165 (3d ed. 1985).

- ➡ Motions: Service
- ➡ Motions: Timing Issues

court may, for good cause, allow.³ The notice of motion must designate a hearing date not more than 30 days after the filing of the notice. Service and timing of the motion is governed by the normal rules.⁴

- ➡ Motions: Notice of Ruling

The service and filing of the notice of motion extends the defendant’s time to plead until 15 days after service of a written notice of entry of an order denying the motion. The court may, for good cause, extend the defendant’s time to plead for an additional period, not exceeding 20 days.⁵ Once the defendant files a [notice of motion](#) to quash service of the summons, the plaintiff may not take his [{default}](#) until his time to plead expires.⁶

- ➡ Personal Jurisdiction: Purposeful Availment

When a defendant properly files a motion to quash service of the summons due to lack of personal jurisdiction, the plaintiff bears the burden of proving by a preponderance of the evidence the prima facie facts entitling the court to assume jurisdiction.⁷ Once a plaintiff has established that a defendant has purposefully directed his activity at forum residents, the burden then rests upon the defendant to supply facts demonstrating that the assumption of jurisdiction would be unreasonable.⁸

- ➡ Personal Jurisdiction: Reasonableness

³ CODE CIV. PROC. § 418.10(a).

⁴ CODE CIV. PROC. § 418(b).

⁵ CODE CIV. PROC. § 418(b).

⁶ CODE CIV. PROC. § 418(d).

⁷ Crea v. Busby, 48 Cal. App. 4th 509, 514, 55 Cal. Rptr. 2d 513, 515 (1996).

⁸ Dialysis at Sea, Inc. v. Superior Court, 216 Cal. App. 3d 788, 793, 265 Cal. Rptr. 71, 74 (1989).

[A] Appellate Review

If the trial court denies the defendant's motion to quash service of the summons, the defendant may petition the appropriate reviewing court for a writ of mandate to require the trial court to enter an order quashing service of the summons. The defendant must file the petition within ten days after service of a written notice of entry of an order of the court denying the motion. For good cause the court may allow additional time not exceeding 20 days.⁹ If, before the expiration of his time to plead, the defendant serves on the plaintiff and files with the trial court a notice that he has petitioned for a writ of mandate, his time to plead is extended until ten days after service of a written notice of the final judgment in the mandate proceeding. The court may, for good cause, extend the time to plead for an additional period not exceeding 20 days.¹⁰

[B] Special Appearances

Normally, by invoking court proceedings one makes an [appearance](#) and submits to the court's jurisdiction. The Code of Civil Procedure saves the defendant from having to choose between defaulting and appearing by providing that a motion to quash service of the summons (or a [motion to dismiss on the ground of inconvenient forum](#) or a [{motion to dismiss for delay in prosecution}](#)) is deemed not to be a general appearance.¹¹ This is true even if the defendant combines his motion to

⁹ CODE CIV. PROC. § 418.10(c). If the written notice of entry of the ruling is served by mail, then the time to file a petition for a writ of mandate is extended five days or more pursuant to CODE CIV. PROC. § 1013(a). *Shearer v. Superior Court*, 70 Cal. App. 3d 424, 428, 138 Cal. Rptr. 824, 827 (1977).

¹⁰ CODE CIV. PROC. § 418.10(c). *See generally* 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 164 (3d ed. 1985).

quash with a {[motion for relief from mistake, inadvertence, surprise, or excusable neglect](#)}¹² or a {[motion to set aside a default](#)}¹³ or applies to the court or stipulates with the plaintiff for an [extension of time](#) to plead.¹⁴ In order to assemble the evidentiary support for the motion, the defendant may conduct {[discovery](#)} for this limited purpose without making a general appearance.¹⁵

If, however, the defendant has already made a general appearance by invoking some other court process, then the defendant has forfeited any objections to defects in the manner by which the plaintiff acquired jurisdiction over him.¹⁶ This is so even if the defendant has attempted to preserve his options by designating his motion as a “special appearance.”¹⁷

¹¹ CODE CIV. PROC. § 418.10(d).

¹² CODE CIV. PROC. § 473(b).

¹³ CODE CIV. PROC. § 473.5.

¹⁴ CODE CIV. PROC. § 418.10(d). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 3:379–:380 (1996); 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 162 (3d ed. 1985)

¹⁵ 1880 Corp. v. Superior Court, 57 Cal. 2d 840, 843, 371 P.2d 985, 986, 22 Cal. Rptr. 209, 210 (1962); Mihlon v. Superior Court, 169 Cal. App. 3d 703, 710, 215 Cal. Rptr. 442, 445 (1985).

¹⁶ Chitwood v. City of Los Angeles, 14 Cal. App. 3d 522, 526, 92 Cal. Rptr. 441, 444 (1971). A general appearance by a party is equivalent to [personal service](#) of the summons on that party. CODE CIV. PROC. § 410.50(a).

¹⁷ Greener v. Workers' Compensation Appeals Bd., 6 Cal. 4th 1028, 1037, 863 P.2d 784, 789, 25 Cal. Rptr. 2d 539, 544 (1993).

[C] Unlawful Detainer Actions

The unlawful detainer statutes provide an exception to the normal rules governing the defendant's **time to plead**: the defendant must respond within five days.¹⁸ If the complaint fails to state a cause of action for unlawful detainer, then a summons notifying the defendant that he has only five days to respond is defective. Therefore, one may attack the sufficiency of a complaint for unlawful detainer by means of a motion to quash service of the summons on the ground that the five-day summons was defective, given the insufficiency of the complaint.¹⁹ A **general demurrer**, the normal device to challenge the sufficiency of the complaint, is ineffective for this purpose in unlawful detainer cases because the complaint, though it fails to state a cause of action for unlawful detainer, may state a cause of action for breach of contract or some other cause of action. Furthermore, the making of a demurrer constitutes a **general appearance**, by which the defendant would forfeit any objection to the manner of service of the summons.²⁰

In unlawful detainer cases the notice of a motion to quash service of the summons must specify a hearing date not less than three days nor more than seven days after the filing of the notice.²¹ The service and filing of a notice of a motion to

¹⁸ CODE CIV. PROC. § 1167.

¹⁹ *Delta Imports, Inc. v. Municipal Court*, 146 Cal. App. 3d 1033, 1035, 194 Cal. Rptr. 685, 686 (1983). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 3:393, 4:171.1–2, 7:7a (1996).

²⁰ *Delta Imports, Inc. v. Municipal Court*, 146 Cal. App. 3d 1033, 1036, 194 Cal. Rptr. 685, 687 (1983). *But cf. Greener v. Workers' Compensation Appeals Bd.*, 6 Cal. 4th 1028, 1036, 863 P.2d 784, 789, 25 Cal. Rptr. 2d 539, 544 (1993) (expressly leaving the question open).

➡ Motions: Notice of Ruling

➡ Service of the Summons and Complaint

quash service of the summons extends the defendant's time to plead until five days after service of the written notice of entry of an order denying the motion. For good cause the court may extend the defendant's time to plead for an additional period not exceeding 15 days.²²

§ 8.03 Mandatory Dismissal for Failure to Serve Summons

The plaintiff must serve the summons and complaint upon the defendant within three years after [filing the complaint](#)²³ and file the [return of summons](#) or other proof of service within 60 days after the time the summons and complaint must be served upon the defendant²⁴ unless the defendant has made a [general appearance](#) before the expiration of the time to serve.²⁵ If the plaintiff does not serve the summons and complaint and file the return of summons or proof of service within the three-year/60-day time limits, any person interested in the action, whether named as a party or not, may move the court to dismiss the action.²⁶ The plaintiff may not take the

²¹ CODE CIV. PROC. § 1167.4(a).

²² CODE CIV. PROC. § 1167.4(b).

²³ CODE CIV. PROC. § 583.210(a). Fast track rules require the plaintiff to serve the summons and complaint within a short time after filing the action (*e.g.*, 60 days), though the court may extend the time for service for good cause. Violation of these rules may lead to dismissal of the action. See [{Fast Track Rules}](#). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:51–:52.1, :52.3–:55, :56.1–:58, :62.1–:71, :110–:111.4 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§ 107 (3d ed. 1985)

²⁴ CODE CIV. PROC. § 583.210(b). If the last day to serve falls on a [holiday](#), then the time to serve is extended to the next day which is not a holiday. CODE CIV. PROC. § 12a; *Ystrom v. Handel*, 205 Cal. App. 3d 144, 147, 252 Cal. Rptr. 110, 111 (1988).

defendant's {default} while his motion to dismiss for failure to serve the summons is pending.²⁷

The court may not dismiss the action if the plaintiff substantially complies with the service requirements.

Example: *P* files a complaint against *D* and later amends it. Before the expiration of the three-year period, *P* serves *D* with a summons and complaint but mistakenly uses a superseded complaint in place of the current complaint. *P* serves *D* with the proper complaint after the expiration of the three-year period. The superseded complaint stated the same cause of action against *D* as the current complaint. The trial court grants *D*'s motion to dismiss.

The trial court erred. *P* substantially complied with the three-year statute.²⁸

²⁵ A general appearance made after the expiration of the time to serve does not extinguish the defendant's right to a dismissal. *Blank v. Kirwan*, 39 Cal. 3d 311, 333, 703 P.2d 58, 72, 216 Cal. Rptr. 718, 732 (1985); *Busching v. Superior Court*, 12 Cal. 3d 44, 52, 524 P.2d 369, 374, 115 Cal. Rptr. 246, 246 (1974). In principle, a general appearance made within the 60 day time to file the return of summons ought to preclude dismissal for delay in the service of the summons. *Wong v. Armstrong World Indus., Inc.*, 232 Cal. App. 3d 1032, 1034–35, 283 Cal. Rptr. 870, 871 (1991). *Accord*, *Biss v. Bohr*, 40 Cal. App. 4th 1246, 1250–51, 47 Cal. Rptr. 2d 692, 694–95 (1995). *Contra*, *Weatherby v. Ibaara*, 233 Cal. App. 3d 506, 509–11, 284 Cal. Rptr. 622, 624–26 (1991).

²⁶ CODE CIV. PROC. § 583.250. The court may dismiss the action without prejudice. *Id.* § 581(b)(4), (g).

²⁷ CODE CIV. PROC. § 585(a), (b). If the court denies the motion, it must allow the defendant to plead. *Id.* § 472a(e).

²⁸ *Davis v. Allstate Ins. Co.*, 217 Cal. App. 3d 1229, 1234, 266 Cal. Rptr. 668, 671 (1989).

The defendant's knowledge of the lawsuit from independent sources is, however, no substitute for service of the summons and complaint.²⁹

The parties may extend the time for service by written stipulation³⁰ or by oral agreement made in open court, if the agreement is entered in the court's minutes or is transcribed.³¹ The three-year/60-day time limits do not apply if the defendant agrees to the contrary (or makes a [general appearance](#)).³² The defendant or his attorney of record may sign the stipulation, but not the defendant's insurer.³³

To effect a "[return of summons](#)" for purposes of the dismissal statutes, the plaintiff need not provide hard evidence of the defendant's actual receipt of the summons and complaint, such as would support entry of a [{default judgment}](#); the plaintiff need only provide the court with notice that he has completed all acts necessary to effect service.³⁴ For purposes of the dismissal statutes, service is complete when the plaintiff has completed all of the acts required for service in the

²⁹ Bishop v. Silva, 234 Cal. App. 3d 1317, 1323, 285 Cal. Rptr. 910, 913 (1991).

³⁰ CODE CIV. PROC. § 583.230(a).

³¹ CODE CIV. PROC. § 583.230(b). Query: Why would an unserved defendant appear in court to stipulate to extend the time to serve?

A stipulation executed and filed after the expiration of the three-year service period is effective as a waiver of the right to dismiss. Big Bear Mun. Water Dist. v. Superior Court, 269 Cal. App. 2d 919, 923, 75 Cal. Rptr. 580, 583 (1969).

³² CODE CIV. PROC. § 583.220.

³³ Woodruff v. McDonald's Restaurants, 75 Cal. App. 3d 655, 658, 142 Cal. Rptr. 367, 369 (1977). Query: How can an unserved defendant have an attorney *of record*?

³⁴ Johnson & Johnson v. Superior Court, 38 Cal. 3d 243, 253–54, 695 P.2d 1058, 1064, 211 Cal. Rptr. 517, 523–24 (1985).

chosen manner, even though the relevant service statute may prescribe a grace period until the completion of service for purposes of determining the defendant's time to plead.³⁵

➔ Service of Process:
Service Upon a Party
in Another State

Example: *P* files a return of summons showing service on *D*, a nonresident, by first-class mail, return receipt requested,³⁶ one day before the expiration of the three-year period for service, but *P* does not attach the return receipt to the return of summons. The trial court denies *D*'s motion to dismiss.

The trial court ruled correctly. *P* "served" the summons and complaint on the date of mailing, even though the relevant statute provides that service by mail is deemed complete ten days later. The return of summons satisfied the statutory requirement.³⁷

The plaintiff need not return the original summons; a duly executed proof of service on a copy will suffice.³⁸

[A] Amended Complaints

{Amendment of the complaint} does not constitute a recommencement of the action and does not restart the three-year period.³⁹ This is true even if the original complaint failed to state a cause of action against the defendant.⁴⁰ Therefore, the

³⁵ *Johnson & Johnson v. Superior Court*, 38 Cal. 3d 243, 250, 695 P.2d 1058, 1062, 211 Cal. Rptr. 517, 521 (1985).

³⁶ CODE CIV. PROC. § 415.40.

³⁷ *Johnson & Johnson v. Superior Court*, 38 Cal. 3d 243, 250, 253–54, 695 P.2d 1058, 1062, 1064, 211 Cal. Rptr. 517, 521, 523–24 (1985).

³⁸ *Courtney v. Abex Corp.*, 176 Cal. App. 3d 343, 347, 221 Cal. Rptr. 770, 772 (1985).

mandatory dismissal rule applies to a defendant originally named as a **fictitiously named (“Doe”) defendant** and later added as a defendant by amendment.⁴¹ If, however, an amended complaint adds a new defendant (as opposed to a defendant originally named as a Doe defendant), the three-year period begins to run as to the new defendant from the filing of the amended complaint.⁴² The same is true when the plaintiff amends the complaint to include the true name of a Doe defendant but at the same time changes the gravamen of the complaint.⁴³

Example: *P* files an action against several defendants for medical malpractice. *P* amends the complaint to state a cause of action for strict product liability and to substitute *D* for one of the Doe defendants. *P* serves *D* with the summons and amended complaint more than three years after filing the original complaint but less than three years after filing the amended complaint. The trial court grants *D*'s motion to dismiss.

The trial court erred. *P* commenced his action against *D* when he filed the amended complaint.⁴⁴

³⁹ Perati v. Atkinson, 230 Cal. App. 2d 251, 254, 40 Cal. Rptr. 835, 836 (1964); cf. CODE CIV. PROC. § 411.10. See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:58.1–:62 (1996).

⁴⁰ Elling Corp. v. Superior Court, 48 Cal. App. 3d 89, 95, 123 Cal. Rptr. 734, 737 (1975).

⁴¹ Lesko v. Superior Court, 127 Cal. App. 3d 476, 481–82, 179 Cal. Rptr. 595, 598 (1982).

⁴² Stearns Ranchos Co. v. Atchison, T. & S.F. Ry., 19 Cal. App. 3d 24, 38, 96 Cal. Rptr. 317, 327 (1971).

⁴³ Barrington v. A.H. Robbins Co., 39 Cal. 3d 146, 154, 702 P.2d 563, 567, 216 Cal. Rptr. 405, 409 (1985); American W. Banker v. Price Waterhouse, 12 Cal. App. 4th 39, 51, 14 Cal. Rptr. 2d 916, 923 (1993).

Waiting to add a defendant to an action involves a trade-off. By naming a defendant as a Doe in the original complaint, the plaintiff stops the running of the statute of limitations but starts the running of the three-year service statute. By waiting to add a defendant at a later time, the plaintiff avoids triggering the three-year service statute but may run afoul of the statute of limitations.

[B] General Appearances

If a defendant takes part in the proceedings before the expiration of the time to serve for any purpose other than to contest the court's jurisdiction over him, the defendant makes a [general appearance](#) and waives the requirement of service of process.⁴⁵

For purposes of the dismissal statutes, general appearances do not include:

- stipulating to extend the time to serve the summons and complaint⁴⁶
- moving to dismiss for delay in serving the summons and complaint (whether or not joined with a [motion to quash service of the summons](#) or a [motion to set aside a default judgment](#))⁴⁷

⁴⁴ *Barrington v. A.H. Robbins Co.*, 39 Cal. 3d 146, 154, 702 P.2d 563, 567, 216 Cal. Rptr. 405, 409 (1985)

⁴⁵ CODE CIV. PROC. § 583.220. A general appearance by a party is equivalent to [personal service](#) of the summons on that party. *Id.* § 410.50(a). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:72–:91.1 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§ 108–111 (3d ed. 1985).

⁴⁶ CODE CIV. PROC. § 583.220(a).

⁴⁷ CODE CIV. PROC. § 583.220(b).

- seeking an extension of the time to plead after a motion to dismiss for delay in serving the summons and complaint⁴⁸
- providing evidence as a witness⁴⁹
- having one's attorney observe court proceedings⁵⁰
- responding to a [cross-complaint](#) in the same action⁵¹
- answering [\[interrogatories\]](#) in one's capacity as an officer of a corporate defendant,⁵² or
- appearing in a separate action consolidated with the pending action for purpose of trial.⁵³

If an employer intervenes in an employee's personal injury action against a third party and serves its complaint on the defendant, the employee may not rely on the defendant's answer to the employer's complaint as a general appearance vis-à-vis the employee.⁵⁴ Nor may the employee resurrect his claim by intervening in the employer's action against the third party.⁵⁵

⁴⁸ CODE CIV. PROC. § 583.220(c).

⁴⁹ Slaybaugh v. Superior Court, 70 Cal. App. 3d 216, 224, 138 Cal. Rptr. 628, 633 (1977).

⁵⁰ Slaybaugh v. Superior Court, 70 Cal. App. 3d 216, 224, 138 Cal. Rptr. 628, 633 (1977).

⁵¹ Botsford v. Pascoe, 94 Cal. App. 3d 62, 67–68, 156 Cal. Rptr. 177, 180–81 (1979).

⁵² Semole v. Sansoucie, 28 Cal. App. 3d 714, 723–24, 104 Cal. Rptr. 897, 903 (1972).

⁵³ Sanchez v. Superior Court, 203 Cal. App. 3d 1391, 1397, 250 Cal. Rptr. 787, 790 (1988).

⁵⁴ Kuchins v. Hawes, 226 Cal. App. 3d 535, 541, 276 Cal. Rptr. 281, 284 (1990).

⁵⁵ Fairmont Ins. Co. v. Frank, 42 Cal. App. 4th 457, 460, 49 Cal. Rptr. 2d 670, 671–72 (1996); Mar v. Sakti Int'l Corp., 9 Cal. App. 4th 1780, 12 Cal. Rptr. 2d 388 (1992); Bishop v. Silva, 234 Cal. App. 3d 1317, 1327, 285 Cal. Rptr. 910, 916 (1991).

Whether a request for an extension of time constitutes a general appearance or otherwise constitutes a forfeiture of the three-year/60 day time limits depends on the language of the request. An agreement to extend time “to appear” or “to answer” constitutes a general appearance.⁵⁶

Example: After *P* serves *D* with the summons and complaint, *P* and *D* enter into a written stipulation extending *D*’s time “to appear.” After the expiration of the three-year/60-day time limit, the trial court denies *D*’s motion to dismiss for failure to file the return of summons.

The trial court ruled correctly. By agreeing to a step in the lawsuit beneficial to himself, *D* made a general appearance.⁵⁷

Because a motion to quash may be construed as a pleading, an agreement to extend time “to plead” does not constitute a general appearance.⁵⁸ There is a split of authority whether an insurer’s request for an extension of time on behalf of its insured constitutes a general appearance.⁵⁹ An agreement extending time to plead may, however, give rise to an estoppel, preventing the defendant from asserting the three-year/60 day time limits.

⁵⁶ *General Ins. Co. of Am. v. Superior Court*, 15 Cal. 3d 449, 455, 541 P.2d 289, 292, 124 Cal. Rptr. 745, 748 (1975) (extension of time to answer).

⁵⁷ *RCA Corp. v. Superior Court*, 47 Cal. App. 3d 1007, 1010, 121 Cal. Rptr. 441, 442 (1975).

⁵⁸ *Blank v. Kirwan*, 39 Cal. 3d 311, 333, 703 P.2d 58, 72, 216 Cal. Rptr. 718, 732 (1985); *cf.* CODE CIV. PROC. § 418.10(d) (a motion to quash, when joined with an application to the court or stipulation of the parties for an extension of time to plead, does not constitute a general appearance); *id.* § 583.220(c) (an extension of time to plead following a motion to dismiss for failure to serve the summons does not constitute a general appearance).

[C] Waiver and Estoppel

If a defendant, by his conduct, causes the plaintiff reasonably to believe that there is no need to serve the defendant within the three-year time limit, then the defendant may be estopped to assert that time limit.⁶⁰

Example: *P* serves *D* two months before the expiration of the three-year period and agrees with an adjuster for *D*'s insurer that *D* would have an open extension of time to plead. *P* refrains from filing the return of summons. After the three-year/60-day period expires, *P* requests that *D* answer. *D* moves to dismiss. The trial court denies the motion.

The trial court ruled correctly. By requesting an extension of time to answer, the adjuster induced *P* to overlook the return of summons.⁶¹

⁵⁹ Compare *Knapp v. Superior Court*, 79 Cal. App. 3d 799, 803, 145 Cal. Rptr. 154, 156 (1978) (insurer's request has same effect as request by the insured defendant or his attorney) with *Woodruff v. McDonald's Restaurants*, 75 Cal. App. 3d 655, 658, 142 Cal. Rptr. 367, 369 (1977) (insurer lacks authority to subject insured to personal jurisdiction).

⁶⁰ *Tresway Aero, Inc. v. Superior Court*, 5 Cal. 3d 431, 439–40, 487 P.2d 1211, 1217, 96 Cal. Rptr. 571, 577 (1971) (plaintiff was lulled into inaction by the defendant's request for an extension of time to answer); *State Air Resources Board v. Superior Court*, 93 Cal. App. 3d 803, 811, 155 Cal. Rptr. 726, 730–31 (1979) (defendant acknowledged service, waited until the expiration of the three-year period, and then moved to dismiss based on the plaintiff's failure to serve the Attorney General); see CODE CIV. PROC. § 583.140 ("Noting in this chapter abrogates or otherwise affects the principles of waiver and estoppel."). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11.92–:96.5 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§ 117–119 (3d ed. 1985).

Example: *P* sues *D* on June 15, 1990. She serves *D* on June 9, 1993. The return of service is due by August 14, 1993. *D* requests “an extension,” and *P* grants *D* a 15-day extension to August 12. *P* receives nothing from *D* by August 12, and her attorney makes several unreturned telephone calls to *D*’s attorney. Sometime in September an attorney for *D* calls to say that *D* was not served, and he requests copies of relevant documents. *P* files the return of service on September 13. The trial court grants *D*’s motion to dismiss.

The court ruled correctly. Notwithstanding any reliance that was engendered when *D*’s attorneys asked for an extension, that reliance, or its reasonableness, evaporated on August 12 when it was not forthcoming as represented. On August 12, *P* had time to file the return of summons on time but failed to do so. That failure is not attributable to any conduct by *D*’s attorneys.⁶²

Given the statutory requirement of a *written* stipulation,⁶³ reliance on the defendant’s *oral* agreement to extend the time for service of summons and complaint may not be reasonable. As one court observed:

Surely, the reasonable thing for [the plaintiff] to have done . . . would have been to send a stipulation to [the defendant] extending time to make service. If [the defendant] signed the stipulation, there could be no problem regarding dismissal If, on the other hand, [the defendant] would not sign such a stipulation, then [the plaintiff] would have been alerted to the necessity of effecting service.⁶⁴

⁶¹ *Knapp v. Superior Court*, 79 Cal. App. 3d 799, 804, 145 Cal. Rptr. 154, 157 (1978).

⁶² *Biss v. Bohr*, 40 Cal. App. 4th 1246, 1253, 47 Cal. Rptr. 2d 692, 696 (1995).

⁶³ CODE CIV. PROC. §§ 583.220, .230(a).

Moreover, a defendant does not have a duty to warn the plaintiff of the expiration of the three-year period or of his intention to move to dismiss for failure to serve the summons.⁶⁵

A defendant waives his right to assert the three-year time limit if he knows of his right to dismiss and intentionally relinquishes it.⁶⁶

[D] Tolling

In computing the time within which the plaintiff must serve the summons and complaint, one excludes the time during which any of the following conditions existed:

- The defendant was not amenable to the process of the court (*i.e.*, the defendant would not have been subject to the personal jurisdiction of the court even if he had been served).⁶⁷

⁶⁴ Lesko v. Superior Court, 127 Cal. App. 3d 476, 487, 179 Cal. Rptr. 595, 601 (1982).

⁶⁵ Lesko v. Superior Court, 127 Cal. App. 3d 476, 486, 179 Cal. Rptr. 595, 601 (1982) (after the plaintiff gave the defendant an open extension of time, the defendant engaged in settlement negotiations without disclosing his intention to move to dismiss upon the expiration of the three-year period).

⁶⁶ Brookview Condominium Owners' Ass'n v. Heltzer Enters.—Brookview, 218 Cal. App. 3d 502, 514, 267 Cal. Rptr. 76, 83–84 (1990) (defendant did not waive its right to dismiss by answering, filing a cross-complaint, and participating in discovery and settlement negotiations).

⁶⁷ CODE CIV. PROC. § 583.240(a); Watts v. Crawford, 10 Cal. 4th 743, 761, 896 P.2d 807, 819, 42 Cal. Rptr. 2d 81, 93 (1995); Perez v. Smith, 19 Cal. App. 4th 1595, 1598, 24 Cal. Rptr. 2d 186, 188–89 (1993). The plaintiff bears the burden of proof on the issue of the defendant's amenability to service. *Id.* at 1597, 24 Cal. Rptr. 2d at 188. See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:97–:97.10, :98–:109.5 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§ 112–114, 116 (3d ed. 1985).

- A court stayed the prosecution of the action, and the stay applied to service of the summons and complaint.⁶⁸
- The parties were litigating the validity of service.⁶⁹
- For some other reason service was impossible, impracticable, or futile due to causes beyond the plaintiff's control.⁷⁰

The tolling continues as long as the condition continues.⁷¹

A defendant not subject to personal service is nevertheless amendable to the process of the court if the plaintiff can serve him by substituted service, including service by publication.⁷² Amenability to the process of the court refers to the state's

⁶⁸ CODE CIV. PROC. § 583.240(b).

⁶⁹ CODE CIV. PROC. § 583.240(c).

⁷⁰ CODE CIV. PROC. § 583.240(d); *see, e.g.*, *Shiple v. Sugita*, 50 Cal. App. 4th 320, 327, 57 Cal. Rptr. 2d 750, 754 (1996) (attorney's false report that service had been accomplished did not render service impossible, impracticable, or futile); *Graf v. Gaslight*, 225 Cal. App. 3d 291, 297, 274 Cal. Rptr. 759, 762 (1990) (court's mistaken dismissal of case on its own motion tolled the running of three-year period while the plaintiff obtained relief from the mistake), *overruled on other grounds by* *Watts v. Crawford*, 10 Cal. 4th 743, 758 n.13, 896 P.2d 807, 818 n.13, 42 Cal. Rptr. 2d 81, 92 n.13 (1995); *Highland Stucco & Lime, Inc. v. Superior Court*, 222 Cal. App. 3d 627, 644, 272 Cal. Rptr. 60, 64 (1990) (court order staying service excused delay in service); *Danielson v. ITT Indus. Credit Co.*, 199 Cal. App. 3d 645, 658, 245 Cal. Rptr. 126, 134 (1988) (bankruptcy does not render service impossible unless the plaintiff has exhausted available procedures to compel the bankruptcy trustee to prosecute the action or to allow the plaintiff to prosecute the action).

⁷¹ *Graf v. Gaslight*, 225 Cal. App. 3d 291, 297, 274 Cal. Rptr. 759, 762 (1990), *overruled on other grounds by* *Watts v. Crawford*, 10 Cal. 4th 743, 758 n.13, 896 P.2d 807, 818 n.13, 42 Cal. Rptr. 2d 81, 92 n.13 (1995).

⁷² *Watts v. Crawford*, 10 Cal. 4th 743, 761, 896 P.2d 807, 819, 42 Cal. Rptr. 2d 81, 93 (1995).

► Parties: Children and Incompetents

authority to exercise jurisdiction over a defendant rather than to the reasonable availability of that defendant for service of process.⁷³ A plaintiff's incompetence does not render impossible service of process by his *guardian ad litem* or excuse compliance with the time limits for service of the summons and complaint.⁷⁴ But an estate is not amenable to service during the period before the appointment of a personal representative.⁷⁵

Example: *P* files a personal injury action against *D* in October of 1968. *D* dies in June of 1969. The probate court appoints an administratrix in October of 1971. In January of 1973, the trial court dismisses *P*'s action.

The court erred. The estate was not amenable to service of process until the administratrix's appointment, and the running of the three-year period was tolled during that period.⁷⁶

The plaintiff, opposing a motion to dismiss for delay in prosecution, has the initial burden to show excusable delay. Only after he has done so does the court consider other factors such as prejudice.⁷⁷ One court has suggested that trial courts should accord broad deference to the plaintiff's attorney's tactical decision to delay service:

⁷³ *Watts v. Crawford*, 10 Cal. 4th 743, 755, 896 P.2d 807, 815, 42 Cal. Rptr. 2d 81, 89 (1995).

⁷⁴ *Tzolov v. International Jet Leasing, Inc.*, 214 Cal. App. 3d 325, 328, 262 Cal. Rptr. 606, 608 (1989).

⁷⁵ *Polony v. White*, 43 Cal. App. 3d 44, 48, 117 Cal. Rptr. 341, 344 (1974).

⁷⁶ *Polony v. White*, 43 Cal. App. 3d 44, 48, 117 Cal. Rptr. 341, 344 (1974).

⁷⁷ *Putnam v. Clague*, 3 Cal. App. 4th 542, 549, 5 Cal. Rptr. 2d 25, 29 (1992).

If the excuse is credible and not clearly unreasonable, however, the court should consider all other factors, including prejudice to the defendant, before ordering dismissal. Otherwise, the statutory policy favoring trial on the merits could be nullified by a judicially constructed rule.

When the plaintiff offers some explanation or excuse reflecting a conscious decision not to serve or otherwise prosecute the action, we believe there are two essential questions the court must initially address. Is the explanation credible under all the circumstances? If the facts are disputed and the trial court finds on substantial evidence that the explanation is merely an after-thought or pretext designed to cover up neglect, dismissal may be warranted. If the explanation is credible, however, the court should consider whether the reasons given for the decision are clearly unreasonable. That is, could a reasonably competent attorney conclude that delay was justified under the circumstances? If . . . the stated reason simply makes no sense, the plaintiff has not met his burden. In considering this question, however, courts should be careful not to engage in second-guessing attorneys' litigation decisions. If the decision is one which a reasonably competent attorney might have made under the circumstances, the burden should shift to the defendant to show that other factors, such as prejudice, support dismissal.⁷⁸

Other courts are less deferential.⁷⁹ All courts agree, however, that mistakes by the plaintiff or his attorney do not toll the three-year period.⁸⁰ Circumstances creating

⁷⁸ Putnam v. Clague, 3 Cal. App. 4th 542, 557–58, 5 Cal. Rptr. 2d 25, 35 (1992).

⁷⁹ Roach v. Lewis, 14 Cal. App. 4th 1179, 1184–85, 18 Cal. Rptr. 2d 281, 283–84 (1993).

⁸⁰ Dale v. ITT Life Ins. Corp., 207 Cal. App. 3d 495, 502–03, 255 Cal. Rptr. 8, 12–13 (1989) (plaintiff's obtaining of an improper default judgment against the defendant did not render service of process impracticable during the time that the default judgment remained in effect); Nelson v. State, 139 Cal. App. 3d 72, 77, 188 Cal. Rptr. 479, 482 (1982) (plaintiff's failure to notice that the state had not answered on behalf of its employees did not toll the three-year period); Tandy Corp. v. Superior Court, 129 Cal. App. 3d 734, 743, 181 Cal. Rptr. 319, 324 (1982) (plaintiff's mistake in failing to follow proper procedures for service of process by mail did not toll the three-year period).

difficulties in bringing a case to trial do not excuse the plaintiff's delay in serving the summons and complaint.⁸¹

§ 8.04 Discretionary Dismissal for Failure to Serve Summons

The court may in its discretion dismiss an action for failure to serve the summons and complaint within two years after the action was commenced against the defendant.⁸² In order to make a prima facie case for the exercise of the court's discretion in his favor, the defendant need only show that the plaintiff failed to serve the summons and complaint within the two-year time period.⁸³ The burden then rests upon the plaintiff to demonstrate a reasonable excuse for the delay,⁸⁴ at which point the court may address the issue of prejudice to the defendant.⁸⁵

⁸¹ Paul v. Drost, 186 Cal. App. 3d 1407, 1411, 231 Cal. Rptr. 361, 363 (1986); *see, e.g.*, Scarzella v. DeMers, 17 Cal. App. 4th 1762, 1769, 22 Cal. Rptr. 2d 329, 333 (1993) (delay in serving summons and complaint in legal malpractice not excused by pendency of appeal in the underlying case); Tandy Corp. v. Superior Court, 129 Cal. App. 3d 734, 742, 181 Cal. Rptr. 319, 323 (1982) (plaintiff's lack of evidence did not toll the three-year period). *Contra*, Putnam v. Clague, 3 Cal. App. 4th 542, 560, 5 Cal. Rptr. 2d 25, 36 (1992) (plaintiff's prosecution of "lead" case excused plaintiff's delay in serving the summons and complaint in a subsequent action); Deas v. Knapp, 129 Cal. App. 3d 443, 451, 181 Cal. Rptr. 76, 80 (1982) (pendency of appeal in underlying action justified delay in serving summons and complaint in action to enforce the judgment).

⁸² CODE CIV. PROC. §§ 583.410(a), .420(a)(1). The court may dismiss the action without prejudice. *Id.* § 581(b)(4), (g). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:111.5–:113 (1996).

⁸³ An unexcused failure to serve a summons within the two-year period prima facie constitutes a sufficient ground for dismissal. In such a case there is no requirement for an affirmative showing of prejudice. Scarzella v. Demers, 17 Cal. App. 4th 1762, 1768–69, 22 Cal. Rptr. 2d 329, 333 (1993).

► Dismissal for Failure to
Serve Summons:
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The plaintiff must show facts that excuse the failure to serve the summons and complaint; general financial inability to prosecute the action as a whole will not suffice.⁸⁶ The plaintiff must supply specific facts showing that the plaintiff exercised diligence in handling the case.⁸⁷ When ruling on two-year discretionary dismissals for failure to serve the summons, the court must consider the statutory excuses that apply to computation of time for mandatory dismissals for failure to serve the summons in three years and the same factors it considers when deciding a {[motion to dismiss for delay in bringing a case to trial](#)}.⁸⁸ Important considerations include the plaintiff's diligence in attempting to locate the defendant⁸⁹ and the prejudice to the defendant.⁹⁰ If the plaintiff deliberately refrained from serving the defendant for tactical reasons, the court must consider whether the plaintiff's explanation is credible and whether the delay was justified under the circumstances.⁹¹

⁸⁴ *Scarzella v. DeMers*, 17 Cal. App. 4th 1762, 1768–69, 22 Cal. Rptr. 2d 329, 333 (1993). Proof of a reasonable excuse does not automatically entitle the plaintiff to denial of the defendant's motion; the court may nevertheless exercise its discretion in the defendant's favor. *Williams v. Los Angeles Unified School Dist.*, 23 Cal. App. 4th 84, 94 n.4, 28 Cal. Rptr. 2d 219, 225 n.4 (1994).

⁸⁵ *Putnam v. Clague*, 3 Cal. App. 4th 542, 549, 5 Cal. Rptr. 2d 25, 29 (1992).

⁸⁶ *American W. Banker v. Price Waterhouse*, 12 Cal. App. 4th 39, 55–56, 14 Cal. Rptr. 2d 916, 926 (1993).

⁸⁷ *Trailmobile, Inc. v. Superior Court*, 210 Cal. App. 3d 1451, 1456, 259 Cal. Rptr. 100, 103 (1989).

⁸⁸ *Danielson v. ITT Indus. Credit Co.*, 199 Cal. App. 3d 645, 651, 245 Cal. Rptr. 126, 129 (1988).

⁸⁹ *Cubit v. Ridgecrest Community Hosp.*, 194 Cal. App. 3d 1552, 1565, 240 Cal. Rptr. 346, 354 (1987).

⁹⁰ *Clark v. Stabond Corp.*, 197 Cal. App. 3d 50, 58, 242 Cal. Rptr. 676, 680 (1987).

⁹¹ *Putnam v. Clague*, 3 Cal. App. 4th 542, 557–58, 5 Cal. Rptr. 2d 25, 35 (1992).

