Civil Procedure -- Constitutionality of Constructive Service of Process on Missing Defendants

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less, if Congress fails to act, it is not improbable that the Supreme Court may intervene to provide the much-needed protection.

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Civil Procedure—Constitutionality of Constructive Service of Process on Missing Defendants

With the advent of far-reaching long-arm statutes[1] allowing a basis for in personam jurisdiction with only minimal contacts[2] in a state, courts in the future will be faced increasingly with the problem of what manner of service of process is to be allowed as a sufficient giving of notice to the defendant. It is only logical that as the geographical-power concept of jurisdiction diminishes and in personam jurisdiciton can be had over a greater number of nonresidents,[3] courts must give more attention and primary concern to notice requirements.

The purpose of service of process is to give the defendant notice of a suit pending against him so that he may come in and defend.[4] But what happens when the plaintiff has a basis for in personam jurisdiction and the defendant cannot be found so that he can be served with process?

[1] *See* N.C. GEN. STAT. § 1-75.4 (1969); WIS. STAT. ANN. § 262.05 (Supp. 1969). For a thorough discussion of these statutes, see Revision Notes to WIS. STAT. ANN. § 262.05 (Supp. 1969); Hinson, *Jurisdiction Over Persons and Property*, in NORTH CAROLINA BAR ASSOCIATION FOUNDATION, INSTITUTE ON JURISDICTION, JOINDER AND PLEADING UNDER NORTH CAROLINA'S NEW RULES OF CIVIL PROCEDURE II-1 (1968).

[2] There is extensive judicial development in the area of the minimal-contact theory. *E.g.*, Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See generally* Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

[3] In all the problematic situations dealt with in this note, it is assumed that the applicable state long-arm statute has provided the plaintiff with a basis for in personam jurisdiction. The only question for discussion is whether the plaintiff has achieved satisfactory service upon the defendant.

[4] In early American law, jurisdiction and service of process were approached as two aspects of the same thing. *E.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877). However, with the modern view of service as notice-giving, the two have become separate questions. No longer is the manner of notice that is to be given clearly defined by the type of jurisdiction acquired. No matter what type of jurisdiction is acquired, plaintiff is required to give defendant the best notice possible. *See* Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956).

The most common situation in which the problem of the missing defendant will arise is an automobile injury case. Plaintiff, a resident of state *A*, is injured in an automobile accident occurring in state *A*. At the scene of the accident, defendant, resident of state *A* or any other state, gives plaintiff his address. However, when plaintiff later files suit and attempts to serve defendant personally,[5] he cannot be found. An attempt is made to serve defendant by registered mail, but the letter is returned. May plaintiff, consistent with the constitutional standards of procedural due process, then serve defendant by publication and/or mailing to his last known address?[6] If there is no reason to believe that publication in a local newspaper or mailing a letter to defendant's last known address will *in fact* come to defendant's attention, is such service consonant with the present test for procedural due process—"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"?[7]

Although the United States Supreme Court has yet to directly pass on the question, dictum in *Mullane v. Central Hanover Bank & Trust Co.*[8] indicates that such service in some instances would be constitutional. For "persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constituional bar to a final decree foreclosing their rights."[9]

Recently, the New York Court of Appeals in *Dobkin v. Chapman*[10]

[5] Most statutes dealing with service of process provide for a preferred order of methods. Personal service is always the most desirable. Generally, the method favored next is leaving the summons at defendant's residence with a person of suitable age. Statutes then provide such alternatives as registered mail with return receipt requested and ordinary mailing along with nailing a copy of the summons to the door of defendant's residence. Certainly one, if not all, of these methods should be attempted before resorting to constructive service. *See, e.g.*, FED. R. CIV. P. 4(d); N.Y. CIV. PRAC. LAW § 308 (McKinney 1963); N.C.R. CIV. P. 4(j).

[6] The new North Carolina service statute provides for such constructive service:

> A party subject to service of process under this subsection (9) may be served by publication whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party under either paragraph a [personal service] or under paragraph b [registered mail] . . . .

N.C.R. CIV. P. 4(j).

[7] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[8] 339 U.S. 306 (1950).

[9] *Id.* at 317.

[10] 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

squarely faced the issue of the validity of an in personam judgment on a missing defendant when notice was given by constructive service. Consolidating three different lower court cases[11] then on appeal, the court held that constructive service on a defendant who could not be found is not violative of due process.

In the first[12] of these three cases, the plaintiff, a resident of New York, was injured in an accident in New York. At the scene of the accident, the defendant produced a license with a Pennsylvania address. The plaintiff's attorney attempted to contact the defendant by ordinary mail, but his letters were neither answered nor returned. An unsuccessful attempt was made at personal service, and a registered letter containing the summons and complaint was returned marked "Moved, Left No Address." The court granted an ex parte order[13] permitting service by ordinary mail to the address given at the scene of the accident. A motion in the cause was thereafter filed by the Motor Vehicle Accident Indemnification Corporation[14] to vacate the ex parte order as being violative of the due process clause. This attack was rejected by the lower court's holding that service by ordinary mail in this instance was reasonably calculated to give notice to the defendant.

In the second case, *Sellars v. Raye*,[15] both the plaintiff and defendant were residents of New York. Again, the plaintiff could not effect service of process in a preferred manner at the address given by the defendant. The court ordered service upon the Secretary of State in addition to the sending of a copy of the summons and complaint by registered mail, with-

[11] Dobkin v. Chapman, 46 Misc. 2d 260, 259 N.Y.S.2d 733 (Sup. Ct. 1965), *aff'd*, 25 App. Div. 2d 745, 269 N.Y.S.2d 49 (Sup. Ct. 1966), *aff'd*, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968); Sellars v. Raye, 45 Misc. 2d 859, 258 N.Y.S.2d 62 (Sup. Ct. 1965), *aff'd*, 25 App. Div. 2d 757, 269 N.Y.S.2d 7 (Sup. Ct. 1966), *aff'd sub nom.* Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968); Keller v. Rappoport, 28 App. Div. 2d 560, 282 N.Y.S.2d 664 (Sup. Ct. 1967), *aff'd sub nom.* Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

[12] Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

[13] The New York service-of-process statute allows plaintiff to come into court and have the court direct the manner of service when it is impractical under the preferred methods. N.Y. CIV. PRAC. LAW § 308 (McKinney 1963).

[14] The Motor Vehicle Accident Indemnification Corporation is a public liability insurer. The corporation was set up by the New York Legislature to provide a source of recovery for the plaintiff who is injured by an uninsured or unknown motorist. The corporation's attorneys may enter an appearance in any suit in which it might be held financially liable. N.Y. INS. LAW §§ 600-26 (McKinney 1963).

[15] 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

out the filing of a return receipt, and the publication in the local newspaper circulated in the vicinity of the defendant's last known residence.

In *Keller v. Rappoport*,[16] the third case, the defendant was a resident of New York at the time of the accident. Upon inquiry of the defendant's insurer, the plaintiff was informed that the defendant had moved to California. Attempted service by registered mail to California was returned marked "Moved-left no address." The court issued an order for service by mailing to defendant's last known New York address and delivery of copies of the complaint to the insurance carrier.

The New York Court of Appeals, relying on the dictum in *Mullane*, upheld service in all three cases and noted that "due process is not . . . a mechanical formula or a rigid set of rules. Increasingly in modern jurisprudence, the term has come to represent a realistic and reasonable evaluation of the . . . circumstances of the particular case."[17] Courts in the future faced with the problem of constructive service on defendants whose actual whereabouts are unknown and unknowable by any ordinary means must carefully evaluate and balance a series of factors before determining whether constructive service meets the due process standard. None of these factors are conclusive in themselves, but a reading of the cases already decided by various state courts discloses the ones that are usually of determinative importance in automobile-accident cases. The remainder of this note will examine those factors.

I. Plaintiff's Interest

The plaintiff's need for an opportunity to recover was recognized by the United States Supreme Court when it observed that "the potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against [the defendant] provided only that he is afforded an opportunity to defend himself."[18] If the courts deny a chance for recovery in instances in which the defendant cannot be personally served, many an injured plaintiff will go without recompense, and the courts would, as a practical matter, be rewarding the defendant who absented himself.

Recognizing that it is all too easy for a defendant to escape liability by secreting himself, many states have enacted statutes providing for service by publication when a resident defendant fraudulently conceals

[16] *Id.*
[17] *Id.* at 502, 236 N.E.2d at 457-58, 289 N.Y.S.2d at 170.
[18] Olberding v. Illinois Cent. R.R., 346 U.S. 338, 341 (1953).

himself to avoid service of process.[19] However, under most of these statutes, the plaintiff must prove fraudulent concealment. In *Harrison v. Hanvey*,[20] the North Carolina Supreme Court succinctly stated the problem:

> If a defendant . . . successfully keeps himself concealed . . . , a plaintiff with a good cause of action may be greatly disadvantaged and the defendant will profit from his fraud unless the plaintiff can serve him with process by publication. Of necessity, often no better notice can be given. No . . . resident of a state should be allowed, by . . . concealment, to escape his legal obligations and thwart the efforts of the courts of his state to enforce the rights of others against him.[21]

A California district court of appeals[22] recently upheld service by publication on an absent defendant without requiring proof by the plaintiff that the defendant was fraudulently concealing himself to avoid process. Noting that, as far as the plaintiff was concerned, it did not matter why the defendant disappeared, the court held that the availability of relief should not depend upon the motive of the defendant.[23] "The careless as well as the scoundrel owe equal responsibility to answer for their obligations."[24]

It might be argued that the plaintiff's interest would be protected adequately by the tolling of the statute of limitations so that the plaintiff would be allowed to file his complaint when he discovers the whereabouts of the defendant. This remedy is certainly not an attractive one for the plaintiff. It is quite likely that by the time he finds the defendant, if he ever does, his claim will be difficult to prove because the necessary witnesses may be unavailable, and even the available witnesses will have the inevitable lapse of memory from the passage of time. If the defendant

[19] *E.g.*, CAL. CIV. PRO. CODE §§ 412, 413, 417 (West 1954); ch. 553, [1957] N.C. Sess. L. 501 (repealed 1967). *See* Skala v. Brockman, 109 Neb. 259, 190 N.W. 860 (1922).

[20] 265 N.C. 243, 143 S.E.2d 593 (1965).

[21] *Id.* at 251, 143 S.E.2d at 599.

[22] Craddock v. Financial Indem. Co., 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (Dist. Ct. App. 1966).

[23] It is true that a defendant who is secreting himself is in a morally inferior position to one who cannot be found after due diligence. It does not follow that only the former is vulnerable to a personal judgment after published summons. Due process requires no more than "fair notice." Whatever his reason, Cervantes has disappeared. . . . It it [sic] obvious that no notice other than that which was given could have been given.

Id. at —, 52 Cal. Rptr. at 96-97.

[24] Note, *Service by Publication on a Defendant Who Cannot Be Located in California*, 3 U. SAN FRANCISCO L. REV. 320, 326 (1969).

cannot be found, even with a judgment the plaintiff may not be able to collect immediately. But, at least, by having the opportunity to secure an immediate judgment, plaintiff may be able to get at defendant's assets, including insurance; and he can avoid the problems of delay in having his claims heard. Clearly, granting the plaintiff an immediate right to a judgment is a compelling reason for upholding constructive service.

II. The State's Interest in Providing Plaintiff Relief

The second factor is closely related to the plaintiff's interest in recovery. Obviously the state wants to protect its citizens who are victims of automobile accidents by providing them with an adequate remedy. Not only does the state want to protect its citizens, but it also wants to protect itself from having its citizens become a financial burden upon the state. This dual interest was made apparent early in this century by the passage of nonresident motor vehicle statutes.[25] Such statutes allow the resident plaintiff to secure in personam jurisdiction over the nonresident defendant by the legal fiction of statutorily asserting that any nonresident motorist using the state's highways is thereby consenting to in personam jurisdiction over himself in an action arising out of any accident on those highways. Most such statutes provide for service on an instate agent with notice then being sent to the defendant by registered mail, return receipt requested.[26]

The states' interest in providing automobile-accident victims with an immediate and adequate remedy is also shown by laws requiring evidence of an automobile owner's financial responsibility. Some states have even set up agencies that provide a source of recovery for those injured by uninsured or missing drivers.[27]

III. Reasonableness and Diligence of Efforts Taken by the Plaintiff To Inform Defendant of the Suit

It is clear that, at the very least, the plaintiff must make a diligent attempt to notify the defendant by the preferred methods of service before he

[25] For a comprehensive discussion of nonresident motor vehicle statutes, see Jox, *Non-Resident Motorists Service of Process Acts: Notice Requirements—A Plea for Realism*, 33 F.R.D. 151 (1963).

[26] Some states have held that good service is effected even if the signed receipt is not returned. *See, e.g.*, Powell v. Knight, 74 F. Supp. 191 (E.D. Va. 1947); Williams v. Egan, 308 P.2d 273 (Okla. 1957); *cf.* Kelso v. Bush, 191 Ark. 1044, 89 S.W.2d 594 (1935); Sorenson v. Stowers, 251 Wis. 398, 29 N.W.2d 512 (1947). *See also* 34 Mich. L. Rev. 1227 (1936).

[27] See note 14 *supra*.

undertakes publication and/or mailing to the last known address in order for such constructive service to withstand constitutional attack. Service of process statutes that permit constructive service generally require the plaintiff to file an affidavit with the court showing that despite due diligence the defendant cannot be found.[28] It is, however, unclear just how extensive an investigation to find the defendant will be required before constructive service may be undertaken. In *Mullane* the Supreme Court stated that "impracticable and extended searches are not required in the name of due process."[29] The Supreme Court probably will require greater diligence to discover the whereabouts of the defendant in a tort suit than was held essential on the facts of *Mullane*.[30]

In *Gribsby v. Wopschall*,[31] the South Dakota Supreme Court, interpreting the phrase "due diligence," stated that it is incumbent upon the plaintiff to ascertain if the defendant left any relatives, business associates, or friends in the vicinity. If so, inquiry would have to be made of them as to the defendant's whereabouts.[32] Moreover, exercise of due diligence ought to require that the plaintiff inquire as to defendant's present address at the post office[33] and from the Department of Motor Vehicles.[34] If the defendant's insurer is known, inquiry should be made of it.[35]

The ultimate limit of due diligence that can be required of the plaintiff is that he hire a private investigator to make an extensive search for the defendant. In two California cases[36] such searches were undertaken

[28] *E.g.*, N.Y. CIV. PRAC. LAW § 308 (McKinney 1963); N.C.R. CIV. P. 4(j).

[29] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317-18 (1950).

[30] The facts in *Mullane* are easily distinguished from the automobile-accident case and would therefore seem to require a different approach. In *Mullane* the court was considering contingent and unknown beneficiaries of a common trust fund. The court required notice by ordinary mail to those beneficiaries whose addresses were known. Significantly, in an action for the settlement of accounting of a trust fund, the group of present beneficiaries will adequately represent the interests of those beneficiaries who are absent.

[31] 25 S.D. 564, 127 N.W. 605 (1910). For a general discussion of due diligence see Annot., 21 A.L.R.2d 929 (1952).

[32] Grigsby v. Wopschall, 25 S.D. 564, 570, 127 N.W. 605, 607 (1910).

[33] *Id.*

[34] *Cf.* Hayes v. Risk, 255 Cal. App. 2d 613, —, 64 Cal. Rptr. 36, 39 (Ct. App. 1967); Dobkin v. Chapman, 21 N.Y.2d 490, 495, 497, 236 N.E.2d 451, 453, 454, 289 N.Y.S.2d 161, 164, 166 (1968).

[35] *Cf.* Dobkin v. Chapman, 21 N.Y.2d 490, 497, 236 N.E.2d 451, 454, 289 N.Y.S.2d 161, 166 (1968).

[36] Hayes v. Risk, 255 Cal. App. 2d 613, 64 Cal. Rptr. 36 (Ct. App. 1967); Cradduck v. Financial Indem. Co., 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (Dist. Ct. App. 1966).

before defendants were served by publication. However, since the hiring of a private detective would be such an expensive outlay for the plaintiff, it does not seem desirable to make private investigations essential to the validity of constructive service. To uphold such a requirement would be to greatly burden the impecunious plaintiff, perhaps to the point of foreclosing his remedy of suit altogether.[37]

IV. The Availability of Other Safeguards for the Defendant's Interests

Although some courts have held that a judgment based on constructive service can stand without provision for allowing the absent defendant to come in and have the judgment set aside at a later time,[38] it seems that procedural due process would require such a safeguard. It must be remembered that in tort actions judgments against defendants may run into the tens of thousands and even hundreds of thousands of dollars. No interests of the plaintiff or the state compel the result that a judgment may stand without provision for a previously unaware defendant with a meritorious defense to have the judgment set aside and the case re-opened for a contested trial on the merits within a certain time limit. Some states have statutes that specifically provide this safeguard for the absent defendant.[39]

Such relief for defendants is also available under the Federal Rules of Civil Procedure. A motion for relief from a judgment may be brought by the defendant under rule 60(b)(1)[40] on the ground that he never received actual notice.[41] Generally rule 60(b) is construed liberally and the courts are prone to resolve the controversy in favor of a trial on the merits. Therefore, if the defendant can meet the requirements of rule

[37] Since the test is reasonableness of the plaintiff's search, perhaps the dollar-value of the case and the plaintiff's resources should be factors in measuring how much effort is required. As the value of the case rises, the courts might lean toward requiring the plaintiff to hire a private detective.

[38] Cradduck v. Financial Indem. Co., 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (Dist. Ct. App. 1966). *But see* Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

[39] N.Y. Civ. Prac. Law § 317 (McKinney 1963) allows defendant to come in within one year after learning of the judgment but in no event more than five years after entry of the judgment.

[40] Fed. R. Civ. P. 60(b)(1) states: "[T]he court may relieve a party . . . from a final judgment . . . for . . . (1) mistake, inadvertance, surprise, or excusable neglect . . . ." *Accord,* N.C.R. Civ. P. 60(b)(1).

[41] *See* Ellington v. Milne, 14 F.R.D. 241 (E.D.N.C. 1953); Huntington Cab Co. v. American Fidelity & Cas. Co., 4 F.R.D. 496 (S.D. W. Va. 1945).

60(b)(1) and also can show a meritorious defense, the likelihood that the requested relief will be granted is great. There is, however, one serious drawback to using rule 60(b)(1)—a motion under it must be brought within one year after the judgment was entered.

In order to avoid the one-year limitation, there has been at least one attempt[42] to use rule 60(b)(6),[43] under which a motion may be filed within a reasonable time. This approach probably would not be very satisfactory since federal courts have regarded rules 60(b)(1) and 60(b)(6) as mutually exclusive.[44] Rule 60(b) provides for a more reliable approach to avoid the one-year limitation; when equitable principles warrant relief, the rule allows the defendant to bring an *independent action*, as distinct from a motion for relief from a judgment, even if the time for relief under 60(b)(1) has run.[45]

V. Other Factors Weighing in Plaintiff's Favor

There are several other aspects of an automobile-injury case that would make it easier for courts to uphold constructive service on the defendant who cannot be located. Unlike many other actions, "in an automobile case, no defendant need be without notice unless he chooses and wants to be."[46] It is perfectly clear that one involved in such an accident should be aware of the likelihood of a suit arising from it. Since a suit should come as no surprise, it is reasonable for the courts to place the responsibility on him to make and keep his presence known.

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[42] *See* Tozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951).

[43] Fed. R. Civ. P. 60(b)(6) states: "[T]he court may relieve a party . . . from a final judgment . . . for . . . (6) any other reason justifying relief from the operation of the judgment." *Accord*, N.C.R. Civ. P. 60(b)(6). For a general discussion of the rule, see Note, *Federal Rule 60(b): Relief from Civil Judgments*, 61 Yale L.J. 76 (1952).

[44] *E.g.*, Davis v. Wadsworth, 27 F.R.D. 1 (E.D. Pa. 1961). *But see* Klapprott v. United States, 335 U.S. 601, 613-14 (1949) (Black, J.) (although rules 60(b)(1) and 60(b)(6) are normally exclusive, a motion permissible under 60(b)(6) if more than excusable neglect is shown).

[45] Fed. R. Civ. P. 60(b) states: "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . . ." *Accord*, N.C.R. Civ. P. 60(b). *See, e.g.*, West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702 (5th Cir. 1954). There is another advantage to the use of the independent action. Granting a rule 60(b) motion is in the discretion of the trial judge, and, therefore, no appeal may be taken unless there is an abuse of discretion. However, the independent action is a separate equity action from which an appeal may be taken as of right.

[46] Dobkin v. Chapman, 21 N.Y.2d 490, 504, 236 N.E.2d 451, 459, 289 N.Y.S.2d 161, 173 (1968).

In almost all automobile-accident cases, the courts are dealing with an insured interest. In those cases in which the defendant's insurer is known to the plaintiff, notice should be given to the insurance company so that it can come in and defend on behalf of the missing insured.[47] If the insurer is present,[48] the absent defendant's interest should be adequately protected. It is, of course, advantageous to the plaintiff to have the insurer present because it will be liable up to the monetary limits of the defendant's policy, and the plaintiff will have immediately available a source of recovery for his injuries.[49]

VI. CONCLUSION

Certainly the problem of the constitutionality of constructive service on the missing defendant must be decided by the Supreme Court in the near future. It is probable that, in balancing all of the factors involved, the Court will hold that any time the defendant cannot be found after a diligent effort on the part of the plaintiff, constructive service will be sufficient to meet a due process challenge so long as there is a reasonable time limit in which the defendant can set aside the judgment. In fact, it is possible that if a private detective is hired and defendant's insurer came in to defend, the Supreme Court might properly go so far as to not require an opportunity for the judgment to be set aside. Under such circumstances the Court might find that the defendant's interests were

[47] *Id.* at 497, 236 N.E.2d at 454, 289 N.Y.S.2d at 166. A few states have direct-action statutes that provide for direct suit against the insurer. *E.g.*, LA. REV. STAT. ANN. § 22:655 (1959). For an extremely interesting holding that the insurer's obligation to defend is an attachable debt allowing the complaint to be filed wherever insurer is located, see Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

[48] If the disappearance of the insured were found to be a violation of the cooperation clause of the insurance policy, the insurer would have no duty to defend. However, since the main purpose of the cooperation clause is to prevent collusion between the injured and the insured, it seems apparent that in the situation of the insured who has disappeared, the courts will not find non-cooperation. Public policy would seem to indicate a decision in favor of the innocent plaintiff rather than the innocent insurer; at least the insurer has received some payment for his duty to defend. *Cf.* Lane v. Mutual Ins. Co., 258 N.C. 318, 128 S.E.2d 398 (1962); Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

[49] In North Carolina the law is unclear as to the liability of the insurer when the insured has disappeared. There is some authority to indicate that when the insured is not present, the insurer will only be liable up to the statutory minimum insurance requirements rather than the policy limits. *See* Swain v. Nationwide Ins. Co., 253 N.C. 120, 127, 116 S.E.2d 482, 487-88 (1960). *Cf.* Muncie v. Travelers Ins. Co., 253 N.C. 74, 116 S.E.2d 474 (1960). These two cases are based on an interpretation of N.C. GEN. STAT. § 20-309 (1965) and N.C. GEN. STAT. § 20-279.21(f) (1965).

adequately protected in the initial proceeding.[50] If every possible means of reaching the defendant have been exhausted, it would be unreasonable for the court not to sustain the validity of constructive service. If it were impossible to get a valid personal judgment under these circumstances, "it would seem that the plaintiff would be unduly burdened and the defendant pemitted the advantage of a windfall gained through his own undesirable conduct."[51]

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Civil Procedure—Finality of Determinations under Federal Rule 23(c)(1)

On January 11, 1966, two indictments alleging a criminal conspiracy to monopolize the low pressure pipe industry were returned in the federal District Court for New Jersey.[1] The defendants pled *nolo contendere* and were sentenced on April 29, 1966.[2] On April 28, 1967, the City of New York, alleging the identical conspiracy, brought an antitrust action against some of the defendants in the New Jersey criminal action.[3] New York City filed the complaint as representative for a Federal Rule 23(b)(3)[4] class alleged to include "all state and municipal governments, government agencies, authorities and subdivisions in the United States."[5] This action was begun within one year following the end of a federal criminal antitrust prosecution during which the running of the statute of limitations is suspended.[6] The defendants moved to strike allegations of

[50] For a similar conclusion reached by a state court, see Cradduck v. Financial Indem. Co., 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (Dist. Ct. App. 1966). But, of course, the insured is his own best witness, and therefore it can be forcefully argued that his interests can never be adequately protected without his presence.

[51] Comment, *Personal Jurisdiction Over Absent Natural Persons*, 44 CAL. L. REV. 737, 742 (1956).

[1] United States v. International Pipe & Ceramics Corp., Criminal No. 9-66 (D.N.J., Apr. 29, 1966); United States v. International Pipe & Ceramics Corp., Criminal No. 10-66 (D.N.J., Apr. 29, 1966).

[2] *See* City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 296-97 (2d Cir. 1969).

[3] City of New York v. International Pipe & Ceramics Corp., 67 Civil No. 1698 (S.D.N.Y., filed Apr. 28, 1967).

[4] FED. R. CIV. P. 23(b)(3).

[5] City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 296 (2d Cir. 1969).

[6] Clayton Act, 15 U.S.C. §§ 15b, 16(b) (1964).