

STATUTE OF LIMITATIONS

HOSOGAI V. KADOTA: THE BEGINNING OF THE END OF THE STATUTE OF LIMITATIONS

On July 26, 1975, Hiroshi Kadota's automobile hit a motor home on a highway near Prescott, Arizona.¹ Kadota suffered severe brain damage. His passenger, Fukuo Hosogai, died of injuries sustained in the crash. At the time of the accident, Kadota was a Japanese citizen living in Arizona. Shortly thereafter, he returned to Japan to live with his family.

On March 25, 1976, Michiko Hosogai filed suit against Kadota for the wrongful death of her husband. Hosogai served process in three ways: 1) on the Arizona Superintendent of Motor Vehicles;² 2) on Kadota personally by a Japanese process server;³ and 3) on Kadota's Arizona guardian ad litem.⁴ The case went to trial and the jury awarded \$225,000 in damages.

The court of appeals reversed on the ground that the trial court lacked personal jurisdiction as a result of insufficient service of process.⁵ Service on the Arizona Superintendent of Motor Vehicles was defective because the plaintiff failed to file an affidavit indicating the use of registered mail or a return-mail receipt with the court after serving the Superintendent.⁶ Service by the Japanese process server failed to comply with the exclusive requirements of a United States treaty with Japan concerning service in that country.⁷ Finally, the court held that a guardian ad litem was not an agent authorized to accept service of process on an incompetent.⁸

The Arizona Supreme Court denied review of the case on March 11, 1980.⁹ While the case was on appeal, the statute of limitations ran. On March 19, 1980, the plaintiff filed a new wrongful death suit (*Hosogai II*). The trial court dismissed the suit, holding that the statute of limitations barred the action. The court of appeals affirmed.¹⁰ In *Hosogai v. Kadota*,

1. The facts of *Hosogai v. Kadota* are set forth in 145 Ariz. 227, 229-30, 700 P.2d 1327, 1329-30.

2. ARIZ. REV. STAT. ANN. §§ 28-502 and 28-503 (1982) provide for this method of service.

3. ARIZ. R. CIV. P. 4(e)(6)(a)(iii) provides for this method of service.

4. ARIZ. R. CIV. P. 4(d)(1) provides for this method of service.

5. *Kadota v. Hosogai*, 125 Ariz. 131, 140, 608 P.2d 68, 77 (Ct. App. 1980). See generally Casenote, *Service of Process on Foreign and Incompetent Defendants*, 22 ARIZ. L. REV. 1065 (1981).

6. *Hosogai*, 125 Ariz. at 133, 608 P.2d at 70.

7. *Id.* at 136, 608 P.2d at 73. The treaty in question was entitled *Service Abroad of Judicial and Extrajudicial Documents*, Feb. 10, 1969, United States-Japan, 20 U.S.T. 361-67, T.I.A.S. No. 6638. *Id.* at 134, 608 P.2d at 71.

8. *Hosogai*, 125 Ariz. at 138, 608 P.2d at 75. Here, the court found that ARIZ. R. CIV. P. 17(g) enables a guardian ad litem to sue or to defend a suit. It further stated that ARIZ. R. CIV. P. 4(d)(4) requires that parties serve a person who has been the subject of a judicial declaration of incompetency personally, in addition to serving the person's guardian. Rule 4(d)(4) did not apply in *Hosogai* because there was never a judicial declaration of incompetency concerning the defendant. *Id.*

9. *Hosogai II*, 145 Ariz. at 230, 700 P.2d at 1330.

10. 145 Ariz. 254, 700 P.2d 1354 (Ct. App. 1984).

the Arizona Supreme Court reversed the lower courts.¹¹ The court found that equitable tolling of a statute of limitations is appropriate where it effectuates: 1) the policies behind the statute under which the cause of action arises; and 2) the policies underlying the statute of limitations.¹² The court held that equitable tolling furthered the remedial purposes of the Arizona Wrongful Death Act, under which *Hosogai* arose.¹³ The court also held that equitable tolling effectuates the policies underlying statutes of limitations when three factors are present: 1) timely notice to the defendant; 2) lack of prejudice to the defendant in having to defend a second claim; and 3) reasonable and good-faith conduct by the plaintiff in prosecuting the first action beyond the expiration of the statute of limitations and diligence in bringing the second action.¹⁴ The court held that the circumstances in *Hosogai* met all of the requirements for equitable tolling and tolled the statute.¹⁵

POLICIES UNDERLYING STATUTES OF LIMITATIONS

Statutes of limitations require plaintiffs to file their claims within a specified period of time.¹⁶ Claims that are not filed within the limitations period are barred.¹⁷ After a certain period of time passes, potential defendants no longer anticipate litigation.¹⁸ The primary purpose of statutes of limitations is to prevent such unsuspecting defendants from being sued on stale claims.¹⁹ The statutes also reflect public policy concerns²⁰ in that they encourage plaintiffs to file their claims before physical evidence is lost and before witnesses forget crucial factual details or are no longer available to testify.²¹

THE EQUITABLE TOLLING DOCTRINE

The equitable tolling doctrine stems from several common-law exceptions to the continuous running of statutes of limitations.²² Common-law reasons for tolling the limitations period included: 1) the defendant's fraud-

11. *Hosogai II*, 145 Ariz. at 227, 700 P.2d at 1327.

12. *Id.* at 231, 700 P.2d at 1331.

13. *Id.* at 232, 700 P.2d at 1332.

14. *Id.* at 233, 700 P.2d at 1333.

15. *Id.* at 234, 700 P.2d at 1334.

16. 1 H. WOOD, WOOD ON LIMITATIONS 1 (1916).

17. Some examples of Arizona's statutes of limitations are: 1) a two-year limitation period for injuries to person or property, wrongful death, conversion, forcible entry, and forcible detainer, ARIZ. REV. STAT. ANN. § 12-542 (1982 and Supp. 1985); 2) a three-year limitation period for certain breaches of contract, ARIZ. REV. STAT. ANN. § 12-543 (1982); and 3) a qualified twelve-year limitation period for product liability, ARIZ. REV. STAT. ANN. § 12-551 (1982). Arizona also has a general statute of limitation of four years for any action that does not qualify for a specific limitation period. ARIZ. REV. STAT. ANN. § 12-550 (1982).

18. *Hall v. Romero*, 141 Ariz. 120, 126, 685 P.2d 757, 763 (Ct. App. 1984).

19. *Burnett v. New York Central Railroad Company*, 380 U.S. 424, 428 (1965); *Brooks v. Southern Pacific Company*, 105 Ariz. 442, 444, 466 P.2d 736, 738 (1970); 1 H. WOOD, *supra* note 16, at 9.

20. *Ross v. Ross*, 96 Ariz. 249, 252, 393 P.2d 933, 934 (1964). See also *Zuckerman v. Transamerica Ins. Co.*, 133 Ariz. 139, 143, 650 P.2d 441, 445 (1982).

21. *Burnett*, 380 U.S. at 428; *Brooks*, 105 Ariz. at 444, 466 P.2d at 738; *Addison v. State*, 21 Cal. 3d 313, 317, 578 P.2d 941, 942, 146 Cal. Rptr. 224, 225 (1978).

22. *Hosogai II*, 145 Ariz. at 231, 700 P.2d at 1331.

ulent concealment of a cause of action;²³ 2) the defendant's inducement of the plaintiff to refrain from suing by promises of repair²⁴ or repayment,²⁵ or by settlement promises,²⁶ negotiations,²⁷ or agreements;²⁸ and 3) delays caused by disability on the part of the plaintiff,²⁹ or by war.³⁰ In addition to these common-law reasons for equitably tolling the limitations period, many modern courts toll the statute where the dismissal on technical grounds of an administrative proceeding or court action after the statute has run would unjustifiably bar a trial on the merits.³¹ Many courts also follow the general policy of relieving plaintiffs from the harsh impact of statutes of limitations when the plaintiff, possessing a variety of legal remedies, reasonably and in good faith pursues the one most likely to lessen his injuries or damages.³²

EXPLANATION OF THE CASE

Legislative Intent

Many state legislatures have passed savings statutes to deal with the problem of timely-brought civil actions dismissed on technical grounds after the statute of limitations has run.³³ Savings statutes permit parties to refile such actions within a statutorily-specified period.³⁴ Arizona does not have a general savings statute for civil actions.³⁵ Arizona does have statutes authorizing the tolling of statutes of limitations in some instances,³⁶ but none

23. *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946). *See generally* Annot., 15 A.L.R. 2d 500 (1951).

24. *Southern Cal. Enter. v. D.N. & E. Walter & Co.*, 78 Cal. 2d 750, 758, 178 P.2d 785, 790 (1947). *See generally* Annot., 68 A.L.R.3d 1277 (1976).

25. *Freeman v. Wilson*, 107 Ariz. 271, 275-76, 485 P.2d 1161, 1165-66 (1971). *See generally* Annot., 21 A.L.R. 4th 1121 (1983).

26. *Carruth v. Fritch*, 36 Cal. 2d 426, 433, 224 P.2d 702, 706-07 (1950). *See generally* Annot., 24 A.L.R.2d 1403 (1952).

27. *Benner v. Industrial Accident Comm.*, 26 Cal. 2d 346, 349, 159 P.2d 24, 27 (1945). *See generally* Annot., 39 A.L.R.3d 127 (1971).

28. *Waugh v. Lennard*, 69 Ariz. 214, 221, 211 P.2d 806, 813 (1949). *See generally* Annot., 43 A.L.R.3d 756 (1972).

29. *Hammons v. National Sur. Co.*, 36 Ariz. 459, 463, 287 P. 292, 296 (1930). *See generally* Annot., 30 A.L.R. 4th 1092 (1984).

30. *See* *Honda v. Clark*, 386 U.S. 484, 499 (1967).

31. *Addison*, 21 Cal. 3d at 317, 578 P.2d at 943, 146 Cal. Rptr. at 246. The *Hosogai* court stated that courts have "a legitimate interest in the procedural rules that govern lawsuits, especially to prevent such rules from becoming a shield for serious inequity." *Hosogai II*, 145 Ariz. at 231, 700 P.2d at 1331.

32. *Addison*, 21 Cal. 3d at 317, 578 P.2d at 943, 146 Cal. Rptr. at 246.

33. W. FERGUSON, *THE STATUTES OF LIMITATION: SAVINGS STATUTES* 1-2 (1978).

34. *Hosogai II*, 145 Ariz. at 230, 700 P.2d at 1330. *See also* W. FERGUSON, *supra* note 33, at 55. Professor Ferguson notes that "the savings statute was intended to relieve the plaintiff from the bar of the statute of limitations in certain situations. It is likewise obvious that the savings statute was not intended to destroy the statutes of limitations." *Id.* at 58. Savings statutes should not undermine the original purposes of statutes of limitations, but should insure that their purposes are satisfied. *Id.*

35. *See Hosogai II*, 145 Ariz. at 234, 700 P.2d at 1334, where the court noted that thirty-one states have already enacted general savings statutes for civil actions and called upon the Arizona legislature to do the same.

36. Arizona statutes provide that statutes of limitations may be tolled if the defendant is absent from the state, ARIZ. REV. STAT. ANN. § 12-501 (1982); if the plaintiff is a minor, insane, or imprisoned, ARIZ. REV. STAT. ANN. § 12-502 (1982 and Supp. 1985); if a party is removing the action to this state, ARIZ. REV. STAT. ANN. § 12-507 (1982); or if there has been a breach of contract under the Uniform Commercial Code, ARIZ. REV. STAT. ANN. § 44-2404(C) (1967).

of these limitations exceptions apply to the factual situation in *Hosogai*.³⁷

The court of appeals believed that the legislature's failure to enact an applicable savings statute indicated its disapproval of the application of the equitable tolling doctrine in the circumstances *Hosogai* presented.³⁸ The Arizona Supreme Court did not agree that legislative inaction raised a presumption of disapproval.³⁹ The court found no evidence that the legislature had ever considered either a general civil savings statute or a specific savings statute applicable to the *Hosogai* circumstances.⁴⁰ Furthermore, the court discovered that the legislature had never expressly disapproved of either savings statutes or the equitable tolling doctrine.⁴¹ In 1978, the *Hosogai* court noted, the Arizona legislature passed a general savings statute for criminal actions.⁴²

The Burnett and Addison Tests

In order to determine whether equitable tolling was appropriate in the circumstances in question, the *Hosogai* court employed the test established by the United States Supreme Court in *Burnett v. New York Central Railroad Company*.⁴³ Under the *Burnett* test, equitable tolling must effectuate: the policies behind the statute under which the cause of action arises and the policies underlying the statute of limitations.⁴⁴

Hosogai arose under the Arizona Wrongful Death Act. The court found that the equitable tolling doctrine satisfied the first part of the *Burnett* test by furthering the Act's remedial purposes.⁴⁵ In support of its finding, the court noted that courts have held that the doctrine furthers the remedial purposes of several federal statutes.⁴⁶

In *Addison v. State*,⁴⁷ the California Supreme Court established three requirements for equitable tolling: 1) timely notice to the defendant; 2) lack of prejudice to the defendant in gathering evidence; and 3) reasonable and good-faith conduct by the plaintiff in prosecuting the first action beyond the expiration of the statute of limitations and diligence in bringing the second action.⁴⁸ The *Hosogai* court found that the presence of all three *Addison* factors satisfied the second part of the *Burnett* test by effectuating the policies underlying the statute of limitations.⁴⁹ The court held that the circumstances in *Hosogai* met all three requirements.⁵⁰

37. *Hosogai II*, 145 Ariz. at 230, 700 P.2d at 1330.

38. *Id.*

39. *Id.*

40. *Id.* at 231, 700 P.2d at 1331.

41. *Id.*

42. *Id.*

43. 380 U.S. 424 (1965). In *Burnett*, the Court held that equitable tolling was appropriate where the state court dismissed an action brought under the Federal Employers' Liability Act for improper venue and the plaintiffs refiled in federal court within eight days of the dismissal. *Id.* at 435-36.

44. *Id.* at 427-28.

45. *Hosogai II*, 145 Ariz. at 232, 700 P.2d at 1332.

46. *Id.* at 231, 700 P.2d at 1331.

47. 21 Cal. 3d 313, 578 P.2d 941, 146 Cal. Rptr. 224 (1978).

48. *Id.* at 319, 578 P.2d at 943-44, 146 Cal. Rptr. at 226-27.

49. *Hosogai II*, 145 Ariz. at 233, 700 P.2d at 1333.

50. *Id.*

Application of the Addison Factors to Hosogai

Timely Notice

The *Hosogai* court stated that a defendant receives timely notice for equitable tolling purposes if the plaintiff files the first action within the limitations period and if both actions rely upon the same right or claim.⁵¹ The first and second actions in *Hosogai* were identical and therefore provided the requisite notice to the defendant.⁵²

Prejudice to the Defendant

Equitable tolling will result in prejudice to the defendant if the second action differs substantially from the first.⁵³ Where this is the case, the defendant will have to conduct an entirely new investigation in order to defend the second action.⁵⁴ He may be unable to locate evidence and witnesses because of the amount of time that has elapsed.⁵⁵

Where the first and second actions are similar, the defendant can use the evidence he has already gathered to defend the second action. In *Hosogai*, the court found that equitable tolling would not prejudice the defendant because the two actions were identical and the defendant had gathered enough evidence to defend a jury trial in the first action.⁵⁶

Good-Faith Effort in Prosecuting the First Action and Reasonable Diligence in Filing the Second Action

Under the final *Addison* factor, equitable tolling is not appropriate unless the plaintiff can show: 1) that he acted reasonably and in good faith in prosecuting the first action beyond the statute of limitations; and 2) that he diligently filed the second action.⁵⁷

The *Hosogai* court noted that the trial court in the first action ruled that

51. *Hosogai II*, 145 Ariz. at 233, 700 P.2d at 1333. *But see* Retail Clerks Union Local 648 v. Hub Pharmacy, 707 F.2d 1030 (9th Cir. 1983). Applying California law, the court held that the plaintiff had fulfilled the notice requirement by filing the first action even though the second suit was not based on the same cause of action. *Id.* at 1035. Mere communications between parties did not give the requisite notice, but the court found that the plaintiffs' filing of the first action put the defendants on notice. *Id.* at 1033. In the first action, the National Labor Relations Board found Hub Pharmacy guilty of unfair labor practices when it refused to comply with a collective bargaining agreement. *Id.* at 1032. The plaintiffs filed the second action in district court, four and one-half years after the collective bargaining agreement expired. *Id.* at 1034. The plaintiffs' cause of action in the second suit was the breach of the collective bargaining agreement. *Id.* The court found that the plaintiffs had acted reasonably and in good faith. *Id.* at 1036. The court also found that the plaintiffs satisfied all of the prerequisites for equitable tolling and tolled the statute of limitations. *Id.* at 1037.

52. *Hosogai II*, 145 Ariz. at 234, 700 P.2d at 1334.

53. *Id.*

54. *See id.*

55. *Id.* at 317, 578 P.2d at 943, 146 Cal. Rptr. at 226.

56. *Hosogai II*, 145 Ariz. at 234, 700 P.2d at 1334. The court followed the argument set forth by the plaintiff-appellant in her brief:

In the present case, Appellee had ample opportunity to investigate after the first action, depositions and other discovery was conducted and, because the first action went to trial, a record of all witness testimony was preserved. Given these facts, Appellee is in no position to claim substantial prejudice simply because time has passed.

Brief for Appellant at 7, *Hosogai v. Kadota*, 145 Ariz. 227, 700 P.2d 1327 (1985).

57. *Addison*, 21 Cal. 3d at 319, 578 P.2d at 944, 146 Cal. Rptr. at 227.

there had been valid service of process.⁵⁸ After the statute of limitations ran, the court of appeals reluctantly reversed, noting that the trial court's erroneous ruling induced the plaintiff not to remedy the allegedly defective service.⁵⁹

The *Hosogai* court rejected the defendant's assertion that the plaintiff should have voluntarily dismissed the first action in spite of the trial judge's ruling that service of process was effective.⁶⁰ Such a result, the court stated, would be detrimental to judicial economy.⁶¹ The court also refused to require a plaintiff to preserve his rights by filing a second action before the statute of limitations expired in case the first action later resulted in dismissal after the statute ran.⁶² This requirement, the court reasoned, would place unjustifiable burdens on both the litigants and the judicial system.⁶³

In the first action, the plaintiff served process in three ways.⁶⁴ The court found that she acted reasonably in believing that at least one of these methods resulted in effective service of process.⁶⁵ Consequently, the court also found that the plaintiff acted reasonably in prosecuting the action beyond the expiration of the statute of limitations.⁶⁶ She satisfied the diligence requirement by filing the second action eight days after the court denied review of the appellate court's decision in the first action.⁶⁷

ANALYSIS OF THE *HOSOGAI* DECISION

The circumstances in *Hosogai* clearly satisfied the notice requirement of the first part of the *Addison* test. Although the defendant never received effective service of process, he did receive actual notice of both actions and defended them from their inception.⁶⁸

The *Hosogai* court found that equitable tolling would not prejudice the defendant because he could defend the second action with the evidence he had gathered to defend the first action.⁶⁹ Although this finding of lack of prejudice to the defendant satisfied the second part of the *Addison* test, there is another aspect of prejudice that the court did not address.

The defendant has defended himself through the judicial hierarchy twice. Should he once again have to bear the burden of litigating the issue of his negligence because of an unreasonable error on the part of the plaintiff's counsel? The policies underlying statutes of limitations are undercut when the judicial system requires defendants to be prepared constantly for

58. *Hosogai II*, 145 Ariz. at 234, 700 P.2d at 1334.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 229, 700 P.2d at 1329. See *supra* notes 2-8 and accompanying text.

65. *Hosogai II*, 145 Ariz. at 234, 700 P.2d at 1334.

66. *Id.*

67. *Id.*

68. *Id.* at 229-30, 700 P.2d 1329-30. See also RESTATEMENT (SECOND) OF AGENCY § 9(1) (1958) ("A person has notice of a fact if he knows the fact, has reason to know it, should know it, or has been given notification of it.").

69. *Hosogai II*, 145 Ariz. at 234, 700 P.2d at 1334.

litigation.⁷⁰

The *Addison* test's third requirement is the crux of the *Hosogai* court's decision. Contrary to the court's finding, the plaintiff arguably did not make a reasonable and good-faith effort to serve the defendant.

The court found that the plaintiff acted reasonably in serving the defendant in accordance with the provisions of the Multilateral International Convention on service of process.⁷¹ The plaintiff, the court stated, could not reasonably have known that for purposes of the treaty between the United States and Japan, Japan's objections to the Convention had the force of law.⁷² While it may be true that the plaintiff could not reasonably have known that the provisions under which she served the defendant did not apply in Japan, the defendant's objections early in the litigation notified her of this fact.⁷³ The plaintiff would have been able to serve process as many times as necessary within one year after filing the complaint.⁷⁴ If the one-year limit lapsed without effective service, the court would have dismissed the plaintiff's complaint without prejudice, and she could have continued to refile and to serve process an unlimited number of times within the limitations period.⁷⁵ As a precaution, the plaintiff should have re-served the defendant in accordance with alternative methods of service available under the treaty.⁷⁶

While the plaintiff's error concerning the treaty's provisions may have been reasonable, the same cannot be said of errors in the two other methods by which she attempted to serve process. Arizona statutes clearly set forth the requirements for these methods.⁷⁷

Arizona's Non-Resident Motorist statute authorizes service of process by registered mail.⁷⁸ The statute requires the plaintiff to file an affidavit of compliance and the defendant's return-mail receipt with the court.⁷⁹ In *Hosogai*, the plaintiff failed to file the affidavit and the return-mail receipt with the court after she served the defendant by mail.⁸⁰

The Non-Resident Motorist statute also allows the plaintiff to serve the defendant through a process server and to file the return of service with the court.⁸¹ The Japanese process server's return of service did not meet this

70. See W. FERGUSON, *supra* note 33, at 46.

71. 145 Ariz. at 234, 700 P.2d at 1334.

72. *Id.*

73. See Brief for Appellee at 20, *Hosogai v. Kadota*, 145 Ariz. 227, 700 P.2d 1327 (1985).

74. ARIZ. R. CIV. P. Rule 6(f). The plaintiff could also amend her process once she had notice of the alleged defects. Such an amendment is permitted at the discretion of the court. ARIZ. R. CIV. P. Rule 4(i).

75. ARIZ. R. CIV. P. Rule 6(f).

76. *Hosogai v. Kadota*, 125 Ariz. at 135-36, 608 P.2d at 72-73. The court of appeals stated: "The complete Convention . . . appears to authorize all of the methods of service provided for in the Arizona Rules of Civil Procedure plus some additional methods." See also Casenote, *supra* note 5, at 1073.

77. The plaintiff's two other methods of service were through the Arizona Non-Resident Motorists Statute. ARIZ. REV. STAT. ANN. § 28-503 (1982), and through a guardian ad litem under ARIZ. R. CIV. P. Rule 4.

78. ARIZ. REV. STAT. ANN. § 28-503 (1982).

79. *Id.*

80. *Hosogai II*, 145 Ariz. at 229, 700 P.2d at 1329.

81. ARIZ. REV. STAT. ANN. § 28-503 (1982).

requirement in *Hosogai* because service did not comply with the treaty provisions.⁸² The defendant's objections should have alerted the plaintiff to the possibility that if service was ineffective under the treaty, it would also be ineffective under the Non-Resident Motorist statute.

The defendant also attempted to serve process on the defendant's guardian ad litem.⁸³ A guardian appointed following a judicial declaration of incompetency can accept service of process so long as the incompetent also receives service.⁸⁴ There was never any judicial declaration of incompetency concerning the defendant in *Hosogai*.⁸⁵ Nothing in the Arizona Rules of Civil Procedure authorizes service of process on a guardian ad litem.⁸⁶ Consequently, it was not reasonable for the plaintiff to rely upon the effectiveness of this method.

In analyzing the reasonableness and good-faith nature of the plaintiff's prosecution of the first action, the court failed to note that the defendant raised the issue of ineffective service of process early in that action.⁸⁷ The plaintiff had ample opportunity to re-serve the defendant correctly through alternative methods available under the treaty.⁸⁸

Parties cannot invoke equity where there is an adequate remedy at law.⁸⁹ An adequate remedy is one that practically and efficiently serves the administration and the ends of justice.⁹⁰ The plaintiff in *Hosogai* may have had an adequate remedy at law in the form of a malpractice action against her counsel.⁹¹

Attorneys are responsible for knowing the law, in order to provide clients with competent representation.⁹² The plaintiff's counsel may have acted reasonably with regard to service of process under the treaty. However, her counsel should have been familiar with the provisions of the Arizona Rules of Civil Procedure dealing with service of process.

The plaintiff's counsel failed to file the affidavit of compliance and the return-mail receipt required by the Non-Resident Motorist statute for serving process by registered mail.⁹³ If service was ineffective under the treaty, it was also ineffective under the Non-Resident Motorist statute's provision for

82. *Hosogai II*, 145 Ariz. at 229, 700 P.2d at 1329.

83. *Id.*

84. ARIZ. R. CIV. P. Rule 4(d)(4).

85. *Hosogai v. Kadota*, 125 Ariz. 131, 138, 608 P.2d 68, 75 (Ct. App. 1980).

86. *Id.* The court of appeals in *Hosogai* further stated that, "Although Rule 17(g), Arizona Rules of Civil Procedure, authorizes a court to appoint a guardian ad litem for an incompetent person to sue or defend in a particular suit, there is no rule which authorizes the guardian ad litem to accept service of process for the incompetent." *Id.*

87. See Brief for Appellee at 20, *Hosogai v. Kadota*, 145 Ariz. 227, 700 P.2d 1327 (1985).

88. See *supra* note 76.

89. W. DEFUNIACK, HANDBOOK OF MODERN EQUITY 9-10 (2d ed. 1956); B. McCORMICK, EATON ON EQUITY 26 (2d ed. 1923).

Equity consists of the "mitigating principles, by the application of which substantial justice may be attained in particular cases wherein the prescribed or customary forms of ordinary law seem to be inadequate." BALLENTINE'S LAW DICTIONARY 411 (1969).

90. C. BARNEY, EQUITY AND ITS REMEDIES 24 (1915).

91. See generally M. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION 372-82 (1979).

92. 17A ARIZ. REV. STAT. Sup. Ct. Rule 42, ER 1.1 states: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation."

93. *Hosogai II*, 145 Ariz. at 230, 700 P.2d at 1330.

serving process through a process server.⁹⁴ In this situation, the plaintiff had only the service upon the guardian ad litem left to support jurisdiction.⁹⁵ At the least, plaintiff's counsel should have made certain that service upon the guardian ad litem was effective.

The court failed to address another issue in *Hosogai*. Statutes of limitations are legislatively-created. As a result, only the legislature, of the three branches of government, retains the exclusive right to alter or to repeal them.⁹⁶ By judicially enacting what amounts to a savings statute,⁹⁷ the *Hosogai* court encroached upon an area belonging solely to the legislature.⁹⁸

CONCLUSION

In *Hosogai*, the Arizona Supreme Court developed a test for the equitable tolling of statutes of limitations. The test incorporates the requirements of two previously established tests. Under the first of these, the *Burnett* test, courts may toll the statute where tolling: 1) furthers the underlying policies of the statute that is the basis of the suit and 2) furthers the general underlying purpose of statutes of limitations.⁹⁹

The *Hosogai* court found that the presence of the three factors set forth in *Addison* satisfied the second part of the *Burnett* test.¹⁰⁰ Under this interpretation, equitable tolling furthers the underlying purposes of statutes of limitations where: 1) the defendant has timely notice; 2) tolling will not prejudice the defendant by requiring him to gather new evidence and to defend the second suit; and 3) the plaintiff acted reasonably and in good faith in prosecuting the first action beyond the statute's expiration and diligently brought the second action.¹⁰¹

Wielding its broad equitable powers, the Arizona Supreme Court has judicially enacted the equivalent of a savings statute.¹⁰² The decision, however, places no time limits on the refiling period and consequently, has a much greater potential impact than a savings statute would, because savings statutes normally specify such limits.¹⁰³ By allowing plaintiffs to invoke equitable tolling when their attorneys fail to comply with the Arizona Rules of

94. *Hosogai v. Kadota*, 125 Ariz. at 138, 608 P.2d at 75. See also Casenote, *supra* note 5, at 1069.

95. See *Hosogai II*, 145 Ariz. at 229-30, 700 P.2d at 1329-30.

96. E. CRAWFORD, STATUTORY CONSTRUCTION 10 (1940). The legislature is the only branch of government that has this right. *Id.* The people, however, also have the right to alter or to repeal statutes, by initiative and referendum. *Id.* at 36.

97. Most savings statutes allow the filing of a new action upon the same cause of action if it is commenced within one year after the dismissal of the original action. See COLO. REV. STAT. § 13-80-128 (1971); UTAH CODE ANN. § 78-12-40 (1951).

98. See generally E. CRAWFORD, *supra* note 96, at 15.

The legislature's powers consist of creating, amending, and appealing laws. *Id.* Arizona's constitution specifically separates the powers of the government into three separate branches. ARIZ. CONST. art. III. The constitution further states that "[s]uch departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." *Id.*

99. *Hosogai II*, 145 Ariz. at 231, 700 P.2d at 1331. See *supra* notes 43-50 and accompanying text.

100. *Hosogai II*, 145 Ariz. at 232-33, 700 P.2d at 1332-33.

101. *Id.*

102. See *supra* notes 33-35 and accompanying text.

103. See *supra* note 34 and accompanying text, and note 97.

Civil Procedure, the decision substantially decreases the professional liabilities of Arizona attorneys.¹⁰⁴

Ann E. Birmingham

104. See *supra* notes 91-94 and accompanying text. See also *Tannhauser v. Adams*, 31 Cal. 2d 169, 187 P.2d 716 (1947), where the court refused to toll the statute of limitations even though the second action involved the same parties, facts, and claim as the first action. The *Tannhauser* court stated that tolling was not appropriate where the plaintiff's failure to secure a trial on the merits in the first action was the result of his own or his attorney's neglect. *Id.* at 175, 187 P.2d at 722.