SERVICE OF PROCESS

WALKER V. DALLAS: ARIZONA'S LONG-ARM IS EXTENDED

The decline of the geographical-power concept of jurisdiction has extended the possibility of *in personam* jurisdiction over nonresident defendants.[1] This extension poses a difficult question for courts regarding the ritual of constructive service of process as "notification" to an absent defendant.[2] At the center of the dispute is a conflict between providing an effective avenue of relief for injured resident citizens of the state and ensuring that due process guarantees afforded an absent defendant are maintained.[3]

In *Walker v. Dallas*,[4] the plaintiffs were injured in an automobile accident. They brought an action against the nonresident driver of the other car and obtained a default judgment.[5] Despite extensive efforts to locate the defendant, she could not be found and personal service was not effected.[6] The Arizona Supreme Court reversed its previous stance[7] and held that the constitutional requirements of due process are not offended where a plaintiff has exercised due diligence in attempting to personally serve an absent nonresident motorist prior to service by publication.[8] The application of constructive service is limited by the court to those cases involving nonresident motorists where the insurer is on notice of the lawsuit.[9]

This Comment first explores the historical development of constructive service of process in an *in personam* action involving a nonresident defendant. After an analysis of the court's reasoning in *Walker*, the Comment then discusses the effect of the decision on Arizona law.

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1. Antiquated notions of territorial jurisdiction have been replaced by the minimum contact theory, *e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1986); Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court of California, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977); 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).

2. *See generally* Comment, *Court Ordered Service of Process*, 33 ALB. L. REV. 330 (1969); Comment, *Service by Publication of a Defendant Who Cannot be Located in California*, 3 U.S.F.L. REV. 320 (1969); Note, *Constitutionality of Constructive Service of Process on Missing Defendants*, 48 N.C.L. REV. 616 (1970); Comment, *Personal Jurisdiction Over Absent Natural Persons*, 44 CAL. L. REV. 737 (1956); Note, *Utah's Notice Requirements for In Personam Actions*, 1982 UTAH L. REV. 657.

3. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950). The dual interest of a state wanting to protect its citizens while protecting itself from the financial burden of automobile accident victims who are left without adequate remedy inspired the passage of nonresident motor vehicles statutes at the turn of the century. Jox, *Non-resident Motorists Service of Process Acts: Notice Requirements—A Plea for Realism*, 33 F.R.D. 151 (1963).

4. 146 Ariz. 440, 706 P.2d 1207 (1985).

5. *Id.* at 441, 706 P.2d at 1208.

6. *Id.* at 441-42, 706 P.2d at 1208-09.

7. *Id.* at 443, 706 P.2d at 1210; *see infra* notes 55-57 and accompanying text.

8. *Walker*, 146 Ariz. at 445, 706 P.2d at 1212.

9. *Id.*

HISTORICAL BACKGROUND

The due process clause of the fourteenth amendment to the United States Constitution[10] and Article 2 of the Arizona Constitution[11] require that deprivation of life, liberty or property by adjudication be preceded by notice of a hearing appropriate to the nature of the case.[12] Historically, notice of an impending action was linked with jurisdiction and the power of the court to render a binding decision.[13] This "power" concept, based on the presence of the defendant within the forum, was substantially altered in a series of cases beginning with *International Shoe v. Washington*[14] and culminating in *Shaffer v. Heitner*.[15]

Jurisdiction and notice are now viewed as two separate aspects of one due process guarantee resulting in the extension of jurisdiction far beyond a state's boundaries to parties with only constructive notice of the possibility of a claim against them.[16]

This expansion of a territorial notion of jurisdiction[17] resulted in established methods of service of process being unable to accommodate the reali-

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10. U.S. CONST. amend. XIV § 1.

11. ARIZ. CONST. art. II, § 4; "No person shall be deprived of life, liberty, or property without due process of law."

12. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (recognizing that although extensive controversy has surrounded interpretation of the due process clause, at a minimum this protection is afforded). *See also* Matthews v. Eldridge, 424 U.S. 319, 332-35 (1976); International Shoe v. Washington, 326 U.S. 310, 316-17 (1945).

13. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877). In an *in personam* proceeding for the recovery of attorney's fees, the *Pennoyer* Court based its holding on the theory that the "power" of a state to adjudicate a controversy was limited to the presence of the person or property of the defendant within the geographical boundaries of the state. *Id.* at 724.

14. 326 U.S. 310 (1945). *International Shoe* held that jurisdiction over a nonresident defendant may be obtained if the defendant has sufficient "minimum contacts" with the state in which the action is filed "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

15. 433 U.S. 186 (1977). *Shaffer* significantly altered traditional aspects of rem-type jurisdiction. An action was brought against corporate officers alleging misfeasance which resulted in substantial economic loss to the corporation. An assertion of jurisdiction was made by sequestration of the nonresident defendants' shares of a Delaware corporation. The shares were considered located in the state of Delaware, regardless of the location of the certificates, under the state's sequestration statute. The United States Supreme Court expressly overruled the previous case of Harris v. Balk, 198 U.S. 215 (1905), holding that the sequestration statute violated due process. The Court further stated "that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Shaffer*, 433 U.S. at 212.

16. *International Shoe* indicated that procedural due process requirements may not be violated by failing to personally serve an absent defendant if "the particular form of substituted service adopted . . . gives reasonable assurance that notice shall be actual." 326 U.S. at 320. Milliken v. Meyer, 311 U.S. 457, 463 (1940) held that *in personam* jurisdiction was effectuated outside the state by personal service because such notice was reasonably calculated to apprise the party of the pendency of the action. 311 U.S. at 463. Despite the reasoning of these decisions the Supreme Court was still uncertain whether personal service was required for an *in personam* judgment. *See, e.g.*, Propper v. Clark, 337 U.S. 472, 488 (1949) ("*Pennoyer v. Neff* merely holds that a personal judgment cannot be obtained against a nonresident on service by publication").

The jurisdictional basis of the case no longer controls the manner of notice to be given. Regardless of the jurisdictional basis the plaintiff must give the defendant the best notice possible. *See* Walker v. City of Hutchinson, 352 U.S. 112 (1956); Schroeder v. City of New York, 371 U.S. 208 (1962).

17. The origin of the expansion was the concept of forcing a corporation which was doing business in the forum state to "consent" to personal jurisdiction. *See*, Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148, 150 (S.D.N.Y. 1915). The theory continued to be expanded by allowing constructive service of process on the Secretary of State or some other public official for

ties of litigation in modern society.[18] The seminal case in the modernization of notice requirements is *Mullane v. Central Hanover Bank & Trust Co.*[19] The United States Supreme Court rejected the argument that the form of notice depends upon classification of an action as *in rem*, *quasi in rem*, or *in personam*.[20] The adequacy of notice is now evaluated by whether it is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections."[21]

Mullane recognizes the existence of a class of cases where it is not reasonably possible or practicable to give notice by personally serving the defendant or by serving through mail.[22] In important dictum the Court sanctions constructive service for "persons missing or unknown," stating that in certain circumstances an ineffective means of notification is all that the situation permits.[23] The Court reasoned that in such a situation the constitution does not bar the entering of a final decree foreclosing the defendant's right to appear and defend.[24]

After *Mullane* not all courts have been consistent in the application of the expanded notion of service of process.[25] The prevailing view is to reject *in rem* and *in personam* classifications as dictated by *Mullane* and judge the

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foreign corporations, Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917), and nonresident motorists, Hess v. Pawloski, 274 U.S. 352, 356-57 (1927).

18. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1949) ("The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification."). *See also*, Olberding v. Illinois Cent. R.R., 346 U.S. 338, 341 (1953) ("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.").

19. 339 U.S. 306 (1950).

20. Where the ownership of property is the subject of the proceedings, such proceedings are *in rem* or *quasi in rem*:

> While, properly speaking, actions or proceedings *in rem* are against the thing itself, and for the purpose of disposing thereof without reference to the title of particular claimants, the term has in a larger and broader sense been applied to certain actions and proceedings between parties, where the object is to reach and dispose of property owned by them or in which they have an interest; but, as these are not strictly *in rem*, they have frequently and more properly been termed *quasi in rem*, or in the nature of actions or proceedings *in rem*.

Hook v. Hoffman, 16 Ariz. 540, 557, 147 P. 722, 729 (1915). *In personam* is used to refer to judgments determining personal rights and obligations between parties. Wells v. Valley Nat'l Bank, 109 Ariz. 345, 348, 509 P.2d 615, 618 (1973).

21. *Mullane*, 339 U.S. at 314. The Court found the distinctions to be ancient and amorphous for notice purpose:

> [W]e think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for the state courts to define, may and do vary from state to state. . . . [W]e do not rest the power of the state to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis.

Id. at 312.

22. *Id.* at 314; citing Milliken v. Meyer, 311 U.S. 457 (1940); *see also* Grannis v. Ordean, 234 U.S. 385 (1914); Priest v. Las Vegas, 232 U.S. 604 (1914); Roller v. Holly, 176 U.S. 398 (1900).

23. *Mullane*, 339 U.S. at 317. "This Court has not hesitated to approve of resort to publications as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning." *Id.*

24. *Id.*

25. *See, e.g.*, Newell v. Newell, 77 Idaho 355, 293 P.2d 663 (1956); Chapman v. Farmer's Ins. Group, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976); Graham v. Sayawa, 632 P.2d 851 (Utah 1981).

adequacy of notice by the sufficiency of process.[26] However, some courts continue to adhere to these classifications in determining the validity of published process. In these jurisdictions, all attempts at constructive service for *in personam* claims are rejected.[27]

In a majority of cases the distinction between the two views is immaterial. The controversy arises when an absent defendant either willfully evades service of process or is unlocatable even after a diligent search.[28] In jurisdictions adhering to a classification concept of process, no redress against the absent defendant is available. In this situation, courts are, practically speaking, rewarding a defendant who cannot be found.

WALKER V. DALLAS

In *Walker v. Dallas*,[29] the plaintiffs were injured in an automobile accident.[30] Two days after the accident, the defendant's insurer received notice of the accident and settlement negotiations were conducted but never finalized.[31]

Despite extensive efforts to locate the defendant, she could not be found and personal service was not effected.[32] Walker's counsel served the Superintendent of Motor Vehicles as the statutory agent for a nonresident motorist.[33] Also, copies of the summons and complaint were sent to Tucson and New York addresses listed by Dallas.[34] Both letters were returned undelivered.[35] During this time Walker instituted service of process by publication pursuant to statute.[36]

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26. *See infra* note 28.

27. *See supra* note 25.

28. *See* Bardwell v. Collins, 44 Minn. 97, 46 N.W. 315 (1890); Skala v. Brockman, 109 Neb. 259, 190 N.W. 860 (1920) (Notice by publication is constitutionally sufficient where the defendant willfully leaves the state to evade service of process). Other courts have authorized publication of process for *in personam* claims when nonresident motorists cannot be located after a diligent search. *E.g.*, Craddack v. Financial Indemnity Corp., 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (1966); Krueger v. Williams, 410 Mich. 144, 300 N.W.2d 910 (1981); Rasmussen v. Vance, 34 Ohio Misc. 87, 293 N.E.2d 114 (Ohio App. 1973).

29. 146 Ariz. 440, 706 P.2d 1207 (1985).

30. On February 14, 1979, Dallas allegedly ran a stop sign and crashed her rental car into Walker's car. All persons involved in the accident were injured. *Id.* at 441, 706 P.2d at 1208.

31. *Id.*

32. Inquiry into defendant Melanie Dallas' address included checking voter registration lists, tax rolls, the phone directory, the city directory, investigator's records, and the post office. *Id.* at 441-42, 706 P.2d at 1208-09.

33. *Id.* at 442, 706 P.2d at 1209. Counsel acted pursuant to ARIZ. REV. STAT. ANN. § 28-502(B) which provides for:

> [A]ppointment of the assistant director for the motor vehicle division by the nonresident as his true and lawful attorney upon whom may be served all legal process in an action against such nonresident growing out of any accident or collision in which the nonresident, his agent or other person operating a motor vehicle owned by him with his express or implied permission on a public highway in this state is involved.

34. Counsel was acting pursuant to ARIZ. REV. STAT. ANN. § 28-503. It was not argued by counsel that service of process complied with this statute. *Walker*, 146 Ariz. 442, 706 P.2d 1209.

35. Copies of the summons and complaint were sent to Dallas' local and New York addresses on January 28, 1982. This procedure was repeated on February 23, 1982. *Walker*, 146 Ariz. at 442, 706 P.2d 1209.

36. ARIZ. R. CIV. P. 4(e)(3), Summons: Service by Publication, which states in part:

> Service by publication shall be made by publication of the summons in a newspaper published in the county where the action is pending, and if no newspaper is published in such

Contact was made with the current resident of the New York address. She revealed that Dallas had moved to England shortly after the accident in Arizona.[37] Continued efforts to deliver the process papers to Dallas were frustrated,[38] resulting in a default judgment against her.[39]

After entering the default judgment, the trial court denied a motion to set aside the judgment on the basis of deficient service of process.[40] On appeal, the court of appeals reversed and dismissed the judgment, concluding that service of process was in fact deficient.[41] On petition by the injured parties, the Arizona Supreme Court held that upon a showing of reasonable diligence in attempting to personally serve the defendant, the ritual of service by publication is permitted. The court limited constructive service to cases involving absent nonresident motorists where the insurer is on notice of the lawsuit.[42]

Arizona's Long-Arm Statute

Arizona Rule of Civil Procedure 4(e)(3) establishes two conditions necessary to authorize service by publication.[43] First, the law must not require personal service, and second, the party must be subject to service under Rule 4(e)(1).[44] The *Walker* court found compliance with these requirements and validated the constructive service of process.

The court in *Walker* easily disposed of the second requirement by a common-sense analysis of the statute. Rule 4(e)(1) authorizes service by publication when the defendant is either a transient person or one whose residence is not known.[45] Analyzing the facts, the court placed the defendant in one of these two categories. Stating that she could "certainly be served as 'one whose residence is unknown' and perhaps also as 'a transient person,' " the court held application of Rule 4(e)(1) permissible.[46]

Notice Requirements

The court directed it's analysis towards the first requirement that per-

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county, then in a newspaper published in an adjoining county, at least once a week for four successive weeks and the service shall be complete thirty days after the first publication.

37. Helen Putnam, a close friend of Dallas', resided at the address listed by Dallas on her New York driver's license. Putnam stated that Dallas and her husband had moved to England shortly after the accident. Efforts by Putnam to deliver service of process to Dallas were frustrated, and eventually she lost the suit papers. *Walker*, 146 Ariz. at 442, 706 P.2d at 1209.

38. Dallas renewed her New York driver's license in 1983 again listing the Putnam residence as her address. Putnam was unable to inform Dallas of the lawsuit by letter and has not spoken to her since. *Id.*

39. *Id.* at 441, 706 P.2d at 1208.

40. The motion to dismiss was filed pursuant to ARIZ. R. CIV. P. 60(c)(4) ("On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment . . . for the following reasons: . . . (4) the judgment is void").

41. Walker v. Dallas, 2 CA-CIV, filed December 21, 1984 (Memorandum Decision No. 5111).

42. *Walker*, 146 Ariz. at 445, 706 P.2d at 1212.

43. ARIZ. R. CIV. P. 4(e)(3), Summons: Service by publication. "Where by law personal service is not required, and a person is subject to service under section 4(e)(1), such service may be made by either of the methods set forth in section 4(e)(2) or by publication."

44. *See* Brennan v. Western Savings & Loan Association, 22 Ariz. App. 293, 526 P.2d 1248 (1974).

45. ARIZ. R. CIV. P. 4(e)(1).

46. *Walker*, 146 Ariz. at 443, 706 P.2d at 1210.

sonal service not be required by law.[47] *Walker* interpreted Rule 4(e)(3) as allowing personal service as far as constitutionally permissible.[48] The State Bar Committee Note to the rule supports this interpretation.[49] The drafters failed to specify when personal service is required because the "question is one of constitutional law which it has seemed impractical to attempt to solve by rule."[50]

Walker expressly overrules the previous Arizona decisions of *Knight v. Mewszel*[51] and *O'Leary v. Superior Court*.[52] These two cases interpreted Rule 4(e)(3) as applying only to *in rem* and *quasi in rem* actions, holding that constructive service of process for an *in personam* claim was not permissible.[53] By refusing to categorize actions in applying Rule 4(e)(3), *Walker* brings Arizona in line with the majority of jurisdictions which follow the reasoning set forth in *Mullane*.[54]

Adequacy of Notice

Evaluating the adequacy of notice requires a balancing of competing interests. On one side the state desires to provide an immediate and adequate remedy for wrongs committed against its residents. On the other side,

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47. "We must therefore decide whether obtaining *in personam* jurisdiction by service through publication and reasonable diligence in attempting to personally serve the defendant offends the due process clause of the Constitution." *Id.*

48. "It is apparent from the State Bar Committee Note to Rule 4(e) that the court intended to permit service by publication as far as the Constitution allows." *Id.*

49. State Bar Committee Note to Rule 4(e)(1), 1961 Amendment, states in part:

> The rule, therefore, is revised to bring directly to the attention of counsel the necessity of determining in each case whether personal service is or is not required. At the same time by making personal service available at counsel's discretion whether it is required or not, the purpose of the revised rule is to avoid any possibility of error of choice for anyone who uses either service by registered mail or what is denominated in this rule direct service. This leaves only one pitfall for counsel in his choice of method that of determining when service by publication will be adequate in situations where he is incapable of getting service by either of the other means. This question is one of Constitutional law which it has seemed impractical to attempt to solve by rule.

50. *Id.*

51. 3 Ariz. App. 295, 413 P.2d 861 (1966). Service of process by publication pursuant to Rule 4(e)(3) on a resident defendant in an automobile accident case was not sufficient to confer jurisdiction on the court to enter an *in personam* judgment against the defendant, even though a diligent search had been conducted to locate and personally serve the defendant with process.

52. 104 Ariz. 308, 312, 452 P.2d 101, 105 (1969). "[I]n order to obtain a judgment *in personam* it is necessary to serve the defendant within the state; that where such service is not feasible, only a judgment *in rem* may be obtained. . . ." (citing Pennoyer v. Neff, 95 U.S. 714 (1877)). "*Pennoyer's* impact has been circumscribed in some ways by International Shoe Co. v. Washington Office of Unemployment Comp., etc., [citations omitted] and other cases on this subject, but the above principles are still valid and form the very basis of all courts' jurisdictions." *Id.* at 312, 452 P.2d at 105.

53. *See, e.g.*, Knight v. Mewszel, 3 Ariz. App. 295, 297, 413 P.d 861, 863 (1966) ("In the instant case, the plaintiffs are attempting to obtain a money judgment against the defendants. This would be an *in personam* judgment and the action against the defendants in this case is an *in personam* action."); Price v. Sun Master, 27 Ariz. App. 771, 775, 558 P.2d 966, 970 (1976) ("It is well-settled that in order to obtain a judgment *in personam*, personal service on the defendant is required." Citing Wells v. Valley National Bank of Ariz., 109 Ariz. 345, 509 P.2d 615 (1973)); Ticey v. Randolph, 5 Ariz. App. 136, 138, 424 P.2d 178, 180 (1967) ("It seems much more reasonable that the critical words in Rule 4(e)(3) intend to limit the use of service by publication to actions traditionally denominated *in rem* or *quasi in rem* actions").

54. *Walker*, 146 Ariz. at 443, 706 P.2d at 1210. "In refusing to determine 'where personal service is required,' we believe the court intended to also permit the range of service by publication to expand as necessity demands."

the defendant has a right not to be deprived of property or liberty without an opportunity to present a defense.[55] Obviously, when a defendant is absent and unlocatable this balancing process becomes extremely difficult.

Published process was upheld in *Mullane* because the state's interest in settling the trustee's accounts outweighed the unlocatable beneficiaries' right to notice.[56] The analysis of sufficiency of process was not based on the *in rem* nature of the proceeding, but rather on a deeper analysis of the fairness and justice of the procedures used to give notice.[57]

In analyzing the sufficiency of process, *Mullane* states that the method chosen must have a reasonable probability of informing the affected parties of the litigation.[58] It is legal fiction to suppose that service by publication affords anyone notice of an impending lawsuit. It is not likely that a resident defendant would become aware of a suit filed against him by reading the legal notice section of a local newspaper.[59] The chances of publication reaching an absent defendant are extremely remote where, as in *Walker*, the publication of process occurs in a Pima County newspaper while the defendant's probable residence is in either New York or England. The United States Supreme Court recognized this problem, however, and reasoned that in certain circumstances such notice is constitutionally valid.[60]

The *Mullane* court stated that notice of publication may be sufficient where it is "not reasonably possible or practicable to give more adequate warning."[61] This dicta has been used to support decisions allowing service by publication where the defendant is willfully avoiding service of process, or where a defendant cannot be located after diligent efforts to effect personal service.[62]

The *Walker* court declines to address whether Dallas willfully evaded service of process, although the facts possibly support such a claim.[63] The focus of inquiry is centered on the diligence of the efforts of the plaintiff to locate the absent defendant.[64]

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55. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

56. *Id.* at 314.

57. *Id.* at 317-18.

58. *Id.* at 312-13.

59. Noting that the greater number of cases coming before the Court concerning the question of adequacy of notice have been concerned with actions founded on publication of process through local newspapers, the *Mullane* Court states:

> Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

Id. at 315.

60. *Id.* at 317; *accord*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Schroeder v. City of New York, 371 U.S. 208, 212 (1962); Walker v. City of Hutchinson, 352 U.S. 112, 115-16 (1956).

61. *Mullane*, 339 U.S. at 317.

62. *See supra* note 28.

63. *Walker*, 146 Ariz. at 445, 706 P.2d at 1212. ("It is, of course, not altogether easy to believe that it slipped Dallas' mind that she was involved, a short time before she left town, in a car accident that caused extensive damage to both cars and sent all participants to the hospital.")

64. *Id.*

Diligent Search

In Arizona a diligent effort in attempting to personally serve an absent defendant is required before jurisdiction through publication will be granted.[65] It is not enough to merely state that the defendant's residence is unknown. The plaintiff must set forth the efforts made to locate the party.[66]

Although definite factors outlining the adequacy of a diligent search have not been advanced in Arizona, prior cases provide a vague concept of what a diligent search entails. It has been held that due diligence requires asking the present occupants of the residence listed by the defendant if they know where the defendant might be found.[67] It is not required to canvass the entire state of Arizona to locate an absent resident defendant.[68] Attempts to ascertain a defendant's residence by inquiry into records kept by credit bureaus, public utilities, post office and directory assistance files are considered adequate.[69] Additional factors such as the geographical area surveyed and the population covered must also be considered in making a diligent search.[70]

A review of the record indicates that the plaintiff in *Walker* easily complied with these standards.[71] Investigation into normal address records of Pima County, attempts to personally serve Dallas in both Tucson and New York, and sending the complaint and summons by registered mail to both addresses constituted a diligent effort on the part of Walker.[72]

Thus, by application of *Mullane* standards permitting constructive service of process for an *in personam* action after a diligent effort to serve the defendant personally, the requirement of Rule 4(e)(3) was established by the *Walker* court.[73]

SCOPE OF THE *WALKER* DECISION

By adhering to the principles of *Mullane*, the *Walker* court significantly expanded the reach of Arizona's long-arm statute. However, the *Walker* decision places a significant limitation on the use of service by publication under Rule 4(e)(3). *Walker* restricts the use of Rule 4(e)(3) to obtain *in personam* jurisdiction by constructive service of process "to cases involving absent nonresident motorists wherein the insurer is on notice of the lawsuit."[74] Recognizing the insurer as a real party in interest in this type of

65. Preston v. Denkins, 94 Ariz. 214, 382 P.2d 686 (1963).

66. *Id.*; Brennan v. Western Saving & Loan Assoc., 22 Ariz. App. 293, 296, 526 P.2d 1248, 1251 (Ct. App. 1974); Llamas v. Superior Court, 13 Ariz. App. 100, 101, 474 P.2d 459, 460 (Ct. App. 1970).

67. *Brennan*, 22 Ariz. App. at 296, 526 P.2d at 1248; Lown v. Miranda, 34 Ariz. 32, 37, 267 P. 418, 420 (1928).

68. *Brennan*, 22 Ariz. App. at 296, 526 P.2d at 1248.

69. *Id.* at 297, 526 P.2d at 1249.

70. *Id.*

71. *See supra* note 32 and accompanying text.

72. *Walker*, 146 Ariz. at 445, 706 P.2d at 1212.

73. *Id.*

74. To help curb the potential for abuse of Rule 4(e)(3) the court places this limitation on service by publication, recognizing "[a]lthough this distinction may be artificial, we reserve the right to balance the burdens and the benefits of liberalizing the requirements for service of process in other areas of the law." *Id.*

case, the court states that the degree of prejudice suffered because of the absence of the defendant is a factor that the trial court may consider.[75] Conceding questions relating to the coverage of the insurance policy, the insurer probably has more of a stake in the lawsuit than the absent defendant.[76] In a case such as this, where the insurer received prompt notice of the lawsuit, the absent defendant's interest should be adequately protected.[77]

CONCLUSION

Assuring the constitutional guarantees of due process cannot be achieved by a mechanical formula or a rigid set of rules. Necessity dictates a flexible approach which realistically and reasonably evaluates the circumstances of a particular case. *Walker v. Dallas* adopts such an approach greatly modernizing the previous standard.

With the significant limitation of requiring notice to the insurer in a lawsuit involving an absent nonresident motorist, the Arizona Supreme Court has sanctioned publication of process to obtain *in personam* jurisdiction pursuant to Rule 4(e)(3). In the future, Arizona courts will be required to adhere to these limitations when faced with the problem of constructive service for an *in personam* action where the defendant cannot be located by ordinary means. In addition, the courts must carefully evaluate and balance a series of factors required by the Constitution before validating constructive service for a personal judgment. However, the avenue of relief available to injured plaintiffs in Arizona has been substantially expanded.

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75. *Id.* For a discussion of the increasing recognition of the insurer as the real party in interest in automobile accidents, see Bailey & Bailey, *Joinder of Insurance Companies: Arizona's Changing Policy*, 1978 ARIZ. ST. L.J. 225, 226. Some jurisdictions have allowed the plaintiff to serve the insurer where the named defendant cannot be located. APPELMAN, INSURANCE LAW & PRACTICE, § 11564 (1980); Note, *Substituted Service on Non-Resident Motorists Liability Insurance Carrier*, 11 S.C.L.J. 385 (1958).

76. *Walker*, 146 Ariz. at 444, 706 P.2d at 1211.

77. *Id.*