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Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: Graham v. Sawaya

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In *Mullane v. Central Hanover Bank & Trust Co.*,[1] the United States Supreme Court held that constructive notice by publication satisfies the requirements of due process when it is not reasonably possible or practicable to give more adequate notice. Consistent with *Mullane,* Rule 4(f) of the Utah Rules of Civil Procedure provides for service by publication if "the person upon whom service is sought . . . has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid the service of process."[2] However, in *Graham v. Sawaya*[3] the Utah Supreme Court recently interpreted *Mullane* as authorizing service by publication only for actions in rem and concluded that the United States and Utah Constitutions require reasonable assurance of actual notice for an in personam judgment.[4] Finding that published notice fails to provide such assurance, the court held that notice by publication, even when accompanied by mailing to the last known address, does not measure up to the constitutional standard for an in personam judgment.[5]

I. The Instant Case

Graham v. Sawaya[6] was an original action in the Utah Supreme Court in which the plaintiffs sought an extraordinary writ

1. 339 U.S. 306 (1950).
2. Utah R. Civ. P. 4(f).
3. 632 P.2d 851 (Utah 1981).
4. An in rem judgment is based on the court's jurisdiction over the defendant's property and is limited to the value of that property. Judgments affecting a status like marriage are also in rem. An in personam judgment is based on jurisdiction over the person of the defendant and is not limited by the value of any property. *See* Pennoyer v. Neff, 95 U.S. 714 (1877).
5. 632 P.2d at 854.
6. *Id.* at 851.

to compel a district judge to enter an in personam default judgment.[7] The plaintiffs had filed suit in district court against one known and five unknown defendants for fraud in inducing the plaintiffs to invest in a pizza retail establishment and for conversion of the invested money.[8] Unable to locate any of the defendants after diligent inquiry, the plaintiffs obtained an order of publication from a district judge and published the summons pursuant to Rule 4(f) of the Utah Rules of Civil Procedure. Copies of the summons and complaint were also mailed to the named defendant's last known address.[9] None of the defendants having answered, the plaintiffs requested a hearing for the purpose of entering a default judgment against the named defendant. The request was not made to the district judge who had ordered publication, but to a different district judge, Judge Sawaya. Judge Sawaya maintained that the defendant had not been properly served and refused to hold the hearing.[10]

The Utah Supreme Court held that Judge Sawaya's refusal to conduct a hearing or to enter a default judgment in the case was proper and denied the requested extraordinary writ.[11] Relying principally on two United States Supreme Court cases, *Milliken v. Meyer*[12] and *Mullane v. Central Hanover Bank & Trust Co.*,[13] the court concluded:

> In this important matter, the United States and Utah Constitutions . . . require reasonable assurance of actual notice for an *in personam* judgment, not just a showing that the means of notice employed was the best available in the circumstance. Notice by publication, even when accompanied by mailing to the "last known address" of the defendant, does not measure up to the constitutional standard for an *in personam* judgment . . . .[14]

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7. *Id.* at 852.
8. Graham v. Pugh, No. C-80-2600 (3d Dist. Ct. Utah, filed March 20, 1980).
9. 632 P.2d at 852.
10. *Id.*
11. *Id.* at 854.
12. 311 U.S. 457 (1940).
13. 339 U.S. 306 (1950).
14. 632 P.2d at 854. The holding is unclear on one point. The court stated that the "governing principle" on which it based its holding was the due process requirement that "the mode of service be 'reasonably calculated to give [defendant] actual notice of the proceedings and an opportunity to be heard,' . . . or, more specifically, that the means of notice 'must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.'" *Id.* (citations omitted). It would follow that due process requires a method of service which gives reasonable assurance of actual notice, for this is

Due process, the court reasoned, requires that the means of notice employed be "reasonably calculated to give [defendant] actual notice"[15] and be "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[16] Since it is unlikely that notice by publication will actually inform the absentee,[17] especially if the action is in personam,[18] published notice for an in personam action can be neither a mode "reasonably calculated to give actual notice" nor a means "such as one might reasonably adopt to accomplish it." Therefore, the court concluded, published notice for an in personam judgment violates the requirements of due process, even when the defendant's whereabouts cannot be ascertained.[19]

II. ANALYSIS

The *Graham* decision is based on the principle prescribed by the fourteenth amendment to the United States Constitution

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the type of notice that would be adopted by one who desires and reasonably calculates to actually inform the defendant. Yet in its holding the court did not conclude that the mode of service itself must give reasonable assurance of actual notice; it concluded only that there must be reasonable assurance of actual notice. The difference is this: on the one hand, if due process requires a method of service which gives reasonable assurance of actual notice, then a method of service like publication, which does not give such assurance, is inadequate even when it happens to result in actual notice; on the other hand, if due process requires only reasonable assurance of actual notice, then any method of service, including publication, will be adequate when the plaintiff can provide reasonable assurance that service has in fact resulted in actual notice.

The unanswered question, then, is whether an in personam judgment may be entered when service which is of a type that does not give reasonable assurance of actual notice nevertheless results in actual notice to the defendant. Apparently the court was answering this question when it stated that notice by publication "does not measure up to the constitutional standard for an *in personam* judgment." *Id.* However, the question was not properly before the court since it was neither alleged nor determined that any of the defendants in the district court action received actual notice. *See* Complaint for Extraordinary Writ—Rule 65B(b)(3), Graham v. Sawaya, 632 P.2d 851 (Utah 1981).

15. 632 P.2d at 854 (quoting Milliken v. Meyer, 311 U.S. at 463).

16. 632 P.2d at 854 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 315).

17. The court quoted the following from *Mullane:*

> It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts . . . . 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 ever reach him are large indeed.

632 P.2d at 853 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 315).

18. *See* text accompanying note 41 *infra.*

19. 632 P.2d at 854.

and the similar provision of the Utah Constitution that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law."[20] However, the Utah Supreme Court has overstated the requirements of due process as interpreted by the United States Supreme Court and has established a general rule that may work substantial injustice in specific cases.

A. Due Process

The due process clause as interpreted by the United States Supreme Court does not require reasonable assurance of actual notice for an in personam judgment when such notice is not reasonably possible or practicable. The Utah Supreme Court, however, misinterpreted *Milliken v. Meyer*[21] and *Mullane v. Central Hanover Bank & Trust Co.*[22] to conclude that it does.[23]

In *Milliken* the defendant challenged the jurisdiction of a Wyoming court to enter an in personam judgment against him. At the time the cause of action arose the defendant was a Wyoming resident. Subsequently he moved to Colorado, where he was personally served with Wyoming process.[24] In view of the territorial concept of jurisdiction promulgated by the Supreme Court in *Pennoyer v. Neff*,[25] it was not clear whether the Wyoming court could acquire in personam jurisdiction by service out of state. The Supreme Court held that substituted service on an

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20. U.S. CONST. amend. XIV, § 1. The Utah Constitution provides: "No person shall be deprived of life, liberty or property, without due process of law." UTAH CONST. art. I, § 7.

21. 311 U.S. 457 (1940).

22. 339 U.S. 306 (1950).

23. The court concluded that both the United States and Utah Constitutions require reasonable assurance of actual notice for an in personam judgment. Although at one point in its opinion the court cited several state cases (*see* note 39 *infra*), its analysis of whether published notice is permissible for in personam actions was based solely on United States Supreme Court cases interpreting the federal constitution. No analysis of the Utah Constitution was undertaken apart from the analysis of the federal constitution, and no Utah precedent or policy was referred to in support of the court's holding. Mention of the Utah Constitution may have been included in the court's conclusion to prevent review by the Supreme Court. However, it is questionable whether the court's nominal reliance on the Utah Constitution would be considered an adequate and independent state ground precluding review by the Supreme Court. *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 85-89 (1978).

24. 311 U.S. at 459.

25. 95 U.S. 714 (1877). *Pennoyer* assumed as a basic premise that "no State can exercise direct jurisdiction and authority over persons or property without its territory." *Id.* at 722.

absent domiciliary is permissible if "reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard."[26] Actual notice was what the defendant had been given.[27] Therefore, the Court did not consider whether actual notice would be required for an in personam proceeding when the defendant is missing or unknown and no actual notice is possible.

The issue of service on missing and unknown persons arose ten years later in *Mullane v. Central Hanover Bank & Trust Co.*[28] The trust company petitioned a New York surrogate court for judicial settlement of its first account as trustee of a common trust fund in which 113 trusts had been pooled.[29] Although the company had on its books the names and addresses of some of the beneficiaries, pursuant to New York law it gave notice of this proceeding only by publication.[30] The court-appointed special guardian and attorney for all interested persons not appearing in the action objected to the method of service on the ground that notice by publication was inadequate to afford due process.[31] On appeal, the United States Supreme Court recognized that *Milliken* required "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action,"[32] but also indicated that due regard must be given for the practicalities and peculiarities of the particular case.[33] The Court observed:

> This Court has not hesitated to approve of resort to publication . . . where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of 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 constitutional bar to a final decree foreclosing their rights.[34]

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26. 311 U.S. at 463.
27. *Id.* at 459.
28. 339 U.S. 306 (1950).
29. *Id.* at 309.
30. *Id.*
31. *Id.* at 311.
32. *Id.* at 314.
33. *Id.* at 314-15.
34. *Id.* at 317. In fairness to the Utah court it should be observed that the cases cited by the Supreme Court in support of this statement, Cunnius v. Reading School Dist., 198 U.S. 458 (1905) (administration of estate), Blinn v. Nelson, 222 U.S. 1 (1911) (distribution of property held by receiver), and Jacob v. Roberts, 223 U.S. 261 (1912) (quiet title action), were all cases involving proceedings in rem. However, in view of the

Due process would require a more reliable means of notice than publication for the known beneficiaries.[35] However, published notice was constitutionally adequate for the unknown or missing beneficiaries whose interests or whereabouts could not with due diligence be ascertained.[36] The Court stated this rule:

> The reasonableness and hence the constitutional validity of any chosen method [of service] may be defended on the ground that it is in itself reasonably certain to inform those affected . . . , *or,* where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.[37]

Thus, only when actual notice is reasonably possible or practicable does due process require a means of service giving reasonable assurance of actual notice; actual notice is not required when the defendant is missing or unknown and cannot be located with due diligence within the state.[38]

The *Graham* court read *Milliken* as establishing a general requirement that the method of service be reasonably calculated to give the defendant actual notice and apparently interpreted *Mullane* as being consistent with that requirement. *Mullane* was one of several cases the court cited[39] as having found notice by

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Supreme Court's rejection of distinctions between actions in rem and in personam, the classification of these proceedings is of little import. *See* note 43 and accompanying text *infra.*

35. 339 U.S. at 318.

36. *Id.* Published notice was also held adequate as to a third group of defendants "whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee." *Id.* at 317. The Court reasoned that the state's interest in providing an economical mechanism for the administration of common trusts outweighed the need for actual notice to these beneficiaries, whose interests were so remote as to be "ephemeral." *Id.*

37. *Id.* at 315 (footnote and citations omitted) (emphasis added). In Walker v. City of Hutchinson, 352 U.S. 112 (1956), the Supreme Court stated with reference to *Mullane,* "That case establishes the rule that, *if feasible,* notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests." *Id.* at 115 (emphasis added).

38. *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 5 (Tent. Draft No. 5, 1978); Note, *Civil Procedure—Constitutionality of Constructive Service of Process on Missing Defendants,* 48 N.C.L. REV. 616 (1970).

39. 632 P.2d at 853 n.5. The *Graham* court also cited Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951) (upholding notice by publication for state escheat proceedings). In *Standard Oil* the Supreme Court quoted the following language from *Mullane:* "This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning." *Id.* at 434 (quoting Mullane v. Central Hanover Bank & Trust

publication acceptable for actions in rem or quasi in rem, "where, so far as defendant is concerned, the judgment affects only an interest in property or status within the territorial jurisdiction of the court."[40] The court explained:

> When a defendant has property or status subject to the jurisdiction of a particular state, there is some foundation for believing that a notice published in that state will come to defendant's attention and therefore serve as actual notice to defendant of a pending challenge to that property or status. This is especially true where publication is accompanied by some visible interference with the defendant's possessory or proprietary rights. This added element is absent in a case involving jurisdiction *in personam*.[41]

But *Mullane*'s authorization of notice by publication was based neither on a distinction between actions in rem and actions in personam, nor on any likelihood of publication resulting in actual notice. First, the *Mullane* court did not classify the proceeding as in rem or in personam. The Court indicated the difficulty of making such classifications[42] and then stated:

> Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of the law, or on other issues, or the reasoning which underlies them, we 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.[43]

Second, the *Mullane* court found no foundation for believ-

Co., 339 U.S. at 317). The Court gave no indication in *Standard Oil* that *Mullane* was limited to actions in rem.

In addition to *Standard Oil* and *Mullane*, the *Graham* court cited several state cases, 632 P.2d at 853 n.5, none of which dealt with the question whether notice by publication is acceptable for actions other than in rem.

40. 632 P.2d at 853.

41. *Id.* at n.5.

42. The Court stated:

> It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both *in rem* and *in personam*. But in any event we 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 state courts to define, may and do vary from state to state.

339 U.S. at 312.

43. *Id.* at 312-13. In Shaffer v. Heitner the Supreme Court reiterated: "[I]n *Mullane* we held that Fourteenth Amendment rights cannot depend on the classification of an action as *in rem* or *in personam* . . . ." 433 U.S. 186, 206 (1977).

ing that publication in the *Mullane* situation had resulted in actual notice. The notice did not name the parties to whom it was directed,[44] and there was no visible interference with the beneficiaries' interests.[45] The Court stated: "In weighing . . . [the] sufficiency [of published notice in this case] on the basis of equivalence with actual notice, we are unable to regard this as more than a feint."[46] *Mullane* upheld notice by publication not, as suggested by *Graham,* because the proceeding was in rem or because actual notice was likely to result, but because the trust beneficiaries, like the defendants in *Graham,* were either missing or unknown and actual notice was impossible.[47]

In sum, the Utah Supreme Court failed to support its holding that, even when the defendant is missing or unknown, notice by publication violates the requirements of due process for an in personam judgment. The court improperly relied on *Milliken,* a case which involved no issue of service on missing or unknown persons, and incorrectly limited *Mullane,* which held that notice by publication satisfies the requirements of due process whenever actual notice is not feasible, whether the proceeding is classified in rem or in personam.[48]

B. Practical Consequences

Although the outcome in *Graham* was not required by due process as interpreted by the United States Supreme Court, still *Graham* will promote the ideal of due process since fewer judg-

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44. 339 U.S. at 315.

45. *Id.* at 316.

46. *Id.* at 315.

47. *See* text accompanying note 34 *supra.*

48. Most state courts that have reached the issue have held that due process permits less than actual notice for in personam actions, at least in some circumstances. *See, e.g.,* Hayes v. Risk, 255 Cal. App. 2d 613, 64 Cal. Rptr. 36 (Ct. App. 1967); Cradduck v. Financial Indemnity Co., 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (Dist. Ct. App. 1966); Manley v. Nelson, 50 Hawaii 484, 443 P.2d 155 (1968), *appeal dismissed sub nom.* Soszka v. Manganaro, 394 U.S. 573 (1969); Krueger v. Williams, 410 Mich. 144, 300 N.W.2d 910 (1981); Rudikoff v. Byrne, 101 N.J. Super. 29, 242 A.2d 880 (1968); Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968); Dobbins v. Beal, 4 Wash. App. 616, 483 P.2d 874 (1967); First Wyo. Bank v. Trans Mountain Sales & Leasing, Inc., 602 P.2d 1219 (Wyo. 1979). *But see, e.g.,* Ticey v. Randolph, 5 Ariz. App. 136, 424 P.2d 178 (1967); Dorn v. Morley, 442 S.W.2d 929 (Mo. 1969). *Graham* failed to deal with any of these decisions. Other state courts have not reached the issue of notice by publication for actions in personam because their service of process statutes expressly limit notice by publication to actions in rem. *See, e.g.,* Ill. Civil Practice Act § 14, ILL. ANN. STAT. ch. 110, ¶ 14 (Smith-Hurd Supp. 1981-1982), *construed in* Lain v. John Hancock Mut. Life Ins. Co., 78 Ill. App. 3d 264, 398 N.E.2d 278 (1979).

ments will be rendered against defendants who have not actually received notice.[49] However, it is not surprising that this increased protection for the defendant will impose a heavier and occasionally unjustifiable burden on the plaintiff. When the defendant is missing or unknown, the plaintiff must delay his lawsuit, as his evidence deteriorates, until he can identify and locate the defendant. If the defendant cannot be found, the plaintiff must forgo his suit.

One might question the value of an in personam default judgment against a missing or unknown defendant. Since there is no property attached in an in personam action out of which the plaintiff can satisfy his judgment, all he can gain is a missing or unknown judgment debtor.[50] But that is a significant gain if the statutory limitation period is about to expire. Prior to *Graham,* if a plaintiff were unable to find the defendant with due diligence, he could commence his lawsuit within the applicable limitation period,[51] publish notice,[52] and obtain a default judgment,[53] thus gaining eight more years to seek out the defendant and collect the judgment.[54] Now, unless the court allows the plaintiff to take advantage of a loophole in the statute of limitations,[55] the plaintiff can recover a judgment only if he finds the defendant prior to the expiration of the limitation period.

The argument that an in personam default judgment gives the plaintiff nothing but a missing or unknown judgment debtor also ignores that a plaintiff can have purposes for bringing suit in addition to the purpose of recovering a money judgment. For example, when a partner or corporate officer has absconded with

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49. *Graham* requires "reasonable assurance of actual notice," not positive proof; thus, occasionally a valid default judgment might be entered without actual notice to the defendant.

50. This argument was made on defendant Judge Sawaya's behalf. Memorandum of Points and Authorities in Support of Answer to Complaint for Extraordinary Writ at 5, Graham v. Sawaya, 632 P.2d 851 (1981).

51. UTAH CODE ANN. § 78-12-1 (1953).

52. UTAH R. CIV. P. 4(f).

53. UTAH R. CIV. P. 55.

54. UTAH CODE ANN. § 78-12-22 (1953).

55. Technically, a plaintiff can prolong the time in which to find the defendant. After filing the complaint within the applicable limitation period, he must serve process within one year or his action will be deemed dismissed. UTAH R. CIV. P. 4(b). However, if the plaintiff is unable to serve process within that time and consequently suffers dismissal, he will be allowed an additional year to start a new action since his dismissal is not a failure on the merits. UTAH CODE ANN. § 78-12-40 (1953). Whether these provisions may be so applied has not been decided in any reported case, but it appears that the plaintiff can file his complaint, suffer dismissal, and file again *ad infinitum.*

embezzled funds, the plaintiff may seek a judgment in order to maintain the confidence of the investing public in the remaining partners or officers. When the plaintiff has been involved in a transaction or accident which casts a shadow on his character, he may seek a judgment in order to clear his name. Important nonmonetary purposes such as these may be accomplished by a default judgment, even if the defendant is missing or unknown.

In some circumstances it will be patently unjust to bar the plaintiff from judgment until he can find and give notice to the missing or unknown defendant. The defendant who is aware of the possibility of suit and therefore intentionally avoids proper service should need no further notice.[56] The defendant involved in an automobile accident is on notice by that fact that he may be sued.[57] The defendant who commits an intentional tort likewise ought to be on notice. Yet plaintiffs who even with the utmost diligence cannot find such defendants will have judgment denied them.

C. Suggestions for Statutory Change

Changes in Utah statutes and court rules could palliate some of the difficulties for plaintiffs caused by *Graham*'s preclusion of published notice for in personam judgments. Section 78-12-35 of the Utah Code provides that any period of time during which the defendant is out of state shall not be computed as part of the limitations period.[58] Since the purpose of the statute is "to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state dur-

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56. A Pennsylvania rule authorizes publication by court order when there is evidence that the defendant is culpably avoiding service. 231 PA. CODE 2079 (1979), *construed in* Cobb v. Gray, 269 Pa. Super. 267, 409 A.2d 882 (1979).

57. The Supreme Court of Hawaii, upholding notice by publication against a nonresident motorist who could not be found for service of process, reasoned:

> If a nonresident operator of a motor vehicle involved in an accident or collision sincerely desires to be informed when suit is commenced, it is a simple matter for him to leave with a person injured or suffering damages or involved in the collision or with a police officer investigating the accident his permanent address and if and when he changes his address to so notify the person or persons of the change.

Manley v. Nelson, 50 Hawaii 484, 491, 443 P.2d 155, 160 (1968), *appeal dismissed sub nom.* Soszka v. Manganaro, 395 U.S. 573 (1969).

58. UTAH CODE ANN. § 78-12-35 (1953). Presently this section is of use to the plaintiff only if he can prove the defendant's absence from the state. *See* Tracey v. Blood, 78 Utah 385, 3 P.2d 263 (1931).

ing the period of limitation,"[59] and since it makes little difference whether the defendant so deprives the plaintiff by absenting himself from the state or by avoiding service within it (whether intentionally or not), the legislature might consider amending this statute so as to apply whenever the defendant cannot be found with due diligence within the state. Alternatively, Rule 4(b) of the Utah Rules of Civil Procedure could be modified to extend the one year time limit for service of process, at least when the defendant cannot be found with due diligence, thus allowing the plaintiff more time to find the defendant.[60] These changes would protect the plaintiff from having his right to recovery defeated by the defendant who eludes service of process until the statute of limitations expires. However, the plaintiff still would have to wait until he finds the defendant in order to obtain an in personam judgment.

The Utah legislature could eliminate this delay for the plaintiff by enacting legislation similar to that in Texas. Texas law provides for service by publication,[61] but if notice is published and the defendant fails to appear, the court is empowered to appoint an attorney to represent the missing defendant's interests.[62] The plaintiff is awarded judgment only after establishing in an adversary proceeding that she is entitled to relief.[63] In this manner, even if the plaintiff is never able to find the defendant and enforce the judgment, the plaintiff can achieve significant nonmonetary purposes such as vindicating her personal or business reputation.

The Utah Supreme Court might uphold such a procedure. Although *Graham* contains dicta to the effect that due process requires reasonable assurance of actual notice for *any* judgment in personam, the case involved only a default judgment. The court could find that due process is satisfied by a statutory scheme similar to that used by Texas, even though the scheme permits notice by publication for in personam judgments, since judgments are not awarded without trial, and absent defendants'

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59. Snyder v. Clune, 15 Utah 2d 254, 255, 390 P.2d 915, 916 (1964).

60. Rule 4 of the Federal Rules of Civil Procedure contains no time limit for service of process. If the complaint is filed within the statutory limitation period, notice may be served much later, even though the limitation period has expired. United States v. Wahl, 583 F.2d 285 (6th Cir. 1978).

61. TEX. R. CIV. P. 109.

62. TEX. R. CIV. P. 244.

63. *Id. See generally* Pohl & Kirklin, *Judgments by Default—A Survey of Texas Law*, 31 SW. L.J. 465 (1977).

interests are represented.

III. Conclusion

In *Graham v. Sawaya* the Utah Supreme Court held that due process requires reasonable assurance of actual notice for an in personam judgment and that notice by publication does not provide such assurance. The court misinterpreted the leading case on due process notice requirements, *Mullane v. Central Hanover Bank & Trust Co.*,[64] which permits notice by publication if actual notice is impossible or impracticable. The *Graham* decision, by unconditionally requiring this protection for the defendant, will in some cases unjustly deprive the plaintiff of judgment. The Utah legislature should respond to *Graham* by enacting statutory protections for the plaintiff who cannot with due diligence find a missing or unknown defendant.

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64. 339 U.S. 306 (1950).