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April 20, 2005

The Honorable Governor Bill Owens
State Capitol
136 State Capitol
Denver, CO 80203-1792

Sent by facsimile transmission: Colorado
(303) 866-2003

Re: Please VETO HB 1121

Dear Governor Owens:

The National Association of Mutual Insurance Companies (NAMIC) on behalf of its approximate 1,400 national member insurance companies that underwrite 43 percent of the property/casualty premium written in the United States respectfully requests that you **veto** HB 1121, *Concerning Substitute Service of Process Upon the Secretary of State Due to Defendant's Absence From the State in Civil Actions Arising From the Operation of a Motor Vehicle*, for the following reasons:

A. HB 1121 is arguably unconstitutional

In essence, HB 1121 would allow substitute service of process upon the Colorado Secretary of State in any civil action against a Colorado resident or non-resident for damages or injuries sustained as a result of the operation of a motor vehicle. Substitute service would be allowed after the plaintiff used reasonable diligence to locate the defendant and 120 days has elapsed. This standard would fundamentally change current law, which requires that a defendant be personally served with notice of the claim.

HB 1121 would arguably violate the defendant's right to due process, because the defendant would not be provided with "actual" or even "constructive" notice of the legal action being filed against him/her. The basic intent of procedural and substantive due process is to provide the defendant with knowledge of the fact that a legal action is being asserted against him/her and an opportunity to refute the contentions alleged. Service upon an executive officer of the state does not provide practical and/or meaningful knowledge to the defendant of the existence of a pending legal action against him/her. Moreover, there is controlling case law that states that substitute service is unconstitutional. *Clemens v. District Court of Denver*, 390 P.2d 83 (Colo. 1964).

B. HB 1121 is inconsistent with the tenets of tort reform

One of the primary objectives of tort reform is to prevent abuse and misuse of the legal system. HB 1121 would be harmful to the legal system, in the following ways: 1) It will lead to

cases being filed with the court that can never be fully adjudicated, because the defendant cannot be located to provide testimony to the court or information to his/her insurance carrier so that it can tender a defense on his/her behalf; and 2) It would create a C.R.C.P. Rule 11 problem for the court to address. Specifically, Rule 11 mandates that any attorney who files a pleading with the court must certify that he/she has reasonably investigated the facts of the case and the contentions filed in the pleadings before filing a responsive pleading with the court. How could the defendant's insurance carrier's attorney comply with this ethical and professional duty, if the defendant cannot be located by either party to be questioned about the claim? HB 1121 would put the insurance carrier's attorney in jeopardy of violating a fundamental procedural rule, i.e. don't file a complaint or answer without first investigating and evaluating the facts of the case and the contentions of the respective parties. This violation of Rule 11 could subject the attorney to Rule 11 Sanctions by the court. Thus, HB 1121 is inconsistent with basic procedural and ethical standards of law, and is likely to create serious procedural problems for the legal system.

C. HB 1121 would be problematic from a procedural law standpoint

Since the bill does not require a court to review the reasonableness of the plaintiff's efforts to locate and serve the defendant personally, there is incentive for plaintiffs to rush to this substitute service procedure in an effort to secure a swift default judgment against a defendant. This could result in an increase in the number of Motions to Set Aside Default Judgments being filed by defendants, who allege that they could have been and should have been personally served with the summons and complaint, but that the plaintiff improperly used the substitute service of process procedure to avoid having to litigate the merits of the case. This could create a procedural problem for the legal system that would waste limited judicial resources and cause delays in the adjudication of meritorious claims.

D. HB 1121 is unnecessary, because the issue is currently being addressed by the legal system

The Civil Rules Committee of the Colorado Supreme Court is currently considering changes to C.R.C.P. Rule 4 (Service of Process) that may ultimately provide a right to substitute service in motor vehicle disputes. Since this committee will be evaluating this issue in light of constitutional law and procedural law issues, it would be prudent to afford the legal system the time it needs to complete its review of the legal and practical implications of substitute service of process. HB 1121 could adversely impact the legal community's ability to thoroughly investigate and address this complex legal issue.

In closing, NAMIC respectfully requests that HB 1121 be **vetoed** so that this bill does not erode the tort reform movement in Colorado and creates procedural problems for the legal system.

Respectfully,

Christian John Rataj, Esq.
NAMIC State Affairs Manager