

Daily Journal

www.dailyjournal.com

TUESDAY, DECEMBER 27, 2011

LITIGATION

The five-year mandatory dismissal statute may be back in vogue thanks to court cuts

By Robert Wright

Many California litigators have never confronted the state statute requiring the dismissal of all civil cases that have not gone to trial within five years. The era of lengthy trial delays that once made the statute a common feature of practice are largely forgotten. But with devastating cuts in the judicial branch's budget, lengthy trial delays may be returning, and with them, we may see the mandatory dismissal statute applied with increasing frequency.

Earlier this year, the state Supreme Court took a timely look at the mandatory dismissal statute in *Bruns v. E-Commerce Exchange Inc.*, 51 Cal. 4th 717 (2011), and clarified that trial courts have broad discretion when calculating the five-year dismissal period. Given the slower pace of litigation likely to accompany recent budget cuts, now is the time for lawyers to take renewed interest in the statute as well.

Thirty years ago, many cases waited close to five years for trial. One commentator colorfully noted: "[I]n a race between a snail and the civil justice system in Southern California you would have been wise to bet on the snail." *"Raising an Objection to Delay: Three-Year-Old Reform Enacted to Speed Civil Cases Seems to Be Working," Los Angeles Times*, Oct. 29, 1993. But the Trial Court Delay Reduction Act in 1986 began a sustained effort to reduce trial court delays, and the effort was largely successful. In the most recent court year for which statistics are available (2008-2009), about 90 percent of unlimited civil cases in California were resolved within two years. Judicial Council of California, 2010 Court Statistics Report 49.

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But dramatically reduced court budgets have put that success at risk. The statewide court budget was reduced \$350 million this year. Maura Dolan and Victoria Kim, *"Budget Cuts to Worsen California Court Delays, Officials Say," Los Angeles Times*, July 20, 2011. And over the last three years, the courts have seen a 30 percent reduction in state general funds. As a result, last summer, the San Francisco County Superior Court announced that because of budget shortfalls, it would close 25 courtrooms and lay off more than 175 employees. According to the *Los Angeles Times*, court officials "predicted a five-year wait for lawsuits to get to trial." After approval of an emergency loan, that court was able to scale back the proposed cuts. But in October, it was still forced to lay off 67 staff employees and close courtrooms. Ari Burack, *"San Francisco's Superior Court Cuts 67 Workers, Services," San Francisco Examiner*, Oct. 3, 2011.

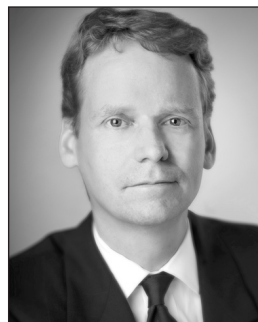
By all accounts, the cutbacks are about to get much worse. For fiscal 2011-2012, courts have been able to rely on reserve funds and one-time capital transfers to make ends meet. See Judicial Council of California, Report to the Judicial Council 2 (2011). But the courts are running out of maneuvering room. The Los Angeles County Superior Court projects an additional 600 layoffs next October — more than 10 percent of existing staff. Sherri M. Okamoto, *"Superior Court Offers Commissioners Incentive to Step Down," Metropolitan News-Enterprise*, Oct. 7, 2011. This comes on top of last year's layoffs of 329 employees. Los Angeles County Superior Court, Annual Report 5 (2011).

Against this backdrop, the five-year mandatory dismissal statute, California Code of Civil Procedure Section 583.310, looms large. It requires an action "be brought to trial within five years after the action is commenced against the defendant." Otherwise, dismissal is "mandatory and ... not subject to extension, excuse, or exception except as expressly provided by statute." Code of Civil Procedure Section 583.360(b). The statute's aim is to prevent disputes from remaining in limbo and to promote the trial of cases before evidence is lost and memories fade. *Moran v. Superior Court*, 35 Cal. 3d 229, 237 (1983).

The five-year deadline is not absolute. It can be extended by stipulation. It is also tolled during any period in which "[t]he jurisdiction of the court to try the action was suspended," "[p]rosecution or trial of the action was stayed or enjoined," or "[b]ringing the action to trial, for any other reason, was impossible, impracticable, or futile." Code of Civil Procedure Section 583.340(a), (b) and (c).

In *Bruns*, the state Supreme Court considered the application of two of the statute's tolling exceptions. It first addressed the requirement that, in computing the five-year period, courts should not count the time during which "[p]rosecution or trial of the action was stayed or enjoined." The plaintiff in *Bruns* argued that partial stays — such as stays of discovery occasioned by complex case management — automatically tolled the five-year period. The Court rejected that argument. It held the exception "applies only when a stay encompasses all proceedings in the action and does not include partial stays." The Supreme Court next addressed the tolling exception for periods when "[b]ringing the action to trial, for any other reason, was impossible, impracticable, or futile." In the course of rejecting the plaintiffs' arguments under this exception, the Court emphasized that "[t]he critical factor ... is whether the plaintiff exercised reasonable diligence in prosecuting his or her case." The application of this exception is "fact-sensitive" and "is best resolved by the trial court," because the trial court "is in the most advantageous position to evaluate these diverse factual matters in the first instance." By emphasizing the trial courts' advantageous position for evaluating the facts, *Bruns* confirms that the trial courts exercise broad discretion when applying the catch-all tolling exception for impossibility, impracticability, and futility. Reasonable minds can differ about when a case cannot reasonably be brought to trial, and the trial court's determination will generally prevail. This is good news for defendants who obtain dismissal under the five-year statute. It also means that plaintiffs' lawyers should be circumspect when relying on this tolling exception and should not do so without first seeking clarification from the trial court regarding its application to their clients' cases.

Barring an unlikely change in the judicial branch's budget woes, we may soon enter another era where it takes almost five years for civil cases to go to trial. That is bad enough. Don't compound the situation by forgetting about the mandatory dismissal statute.



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