

Memorandum 83-7

Subject: Study J-600 - Dismissal of Civil Action (Recent Developments)

The Commission's recommendation relating to dismissal for lack of prosecution has been prepared for introduction in the Legislature. However, the bill has not yet been introduced pending selection of an author. See Memorandum 83-3 (1983 Legislative Program).

At the November 1982 meeting the Commission approved amendments to the recommendation to make clear that pendency of judicial arbitration within six months before expiration of the five-year period for bringing an action to trial has the effect of tolling the five-year period, and to provide that if the tolling operates in such a manner that at the end of the tolling period less than six months remains to bring the action to trial, the plaintiff has an additional six months to bring the action to trial. These amendments are set out in Exhibit 1. The staff has drafted the six-month extension to apply broadly to tolling for any reason, not just for judicial arbitration, despite the Commission's decision to apply the extension only to judicial arbitration. The problem of the plaintiff only having a short time to bring the action to trial following a period of tolling can arise in any situation where an event occurs shortly before the end of the five-year period that tolls the statute.

The staff has learned that the Judicial Council is also sponsoring legislation to cure the judicial arbitration/dismissal problems. We have not seen a draft yet, but have been informed by a representative of the Judicial Council that "the bill will provide for tolling after four and one-half years if a case is in arbitration. If a trial de novo is demanded following an arbitration award in any case, regardless of time, then ninety days are allowed for the case to be tried before dismissal under Section 583, subdivision (b) could be granted." The staff believes it is premature at this point to attempt to coordinate our efforts, although the Commission should decide if it prefers the Judicial Council approach to the one we have developed.

Finally, the Commission should be aware that there has recently appeared an exhaustive study of the law governing dismissal for failure to timely serve and return summons. Slomanson, Dismissal For Failure to

Serve and Return Summons in State and Federal Courts in California, 19 Cal. Western L. Rev. 1 (1982). The author points out a new federal rule (effective October 1, 1983) to require dismissal if summons is not served within 120 days after the complaint is filed (the dismissal is without prejudice and the complaint can be refiled). The author urges California to shorten its time for service from three years to one. The Commission's recommendation goes the opposite direction, extending the three-year requirement to four. This recommendation could prove to be a fairly controversial recommendation.

Respectfully submitted,

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EXHIBIT 1

Code Civ. Proc. § 1141.17 (amended)

SEC. 5. Section 1141.17 of the Code of Civil Procedure is amended to read:

1141.17. Submission of an action, or pendency of an action submitted, to arbitration pursuant to this chapter ~~shall not toll~~ **the running of the time periods contained in Section 583 as to actions filed on or after the operative date of this chapter.** Submission to arbitration pursuant to a court order within six months of the expiration of the ~~statutory period prescribed in Article 3 (commencing with Section 583.310) of Chapter 1.5 of Title 8 of Part 2~~ **shall toll the running of ~~such~~ the period until the filing of the arbitration award.**

Comment. Section 1141.17 is amended for consistency with the law and practice governing tolling after a civil action is submitted to arbitration. See Cal. Rules of Court 1601(d); Crawford v. Hoffman, 132 Cal. App.3d 1015, 183 Cal. Rptr. 599 (1982); Apollo Plating v. Superior Court, 135 Cal. App.3d 1019, ___ Cal. Rptr. ___ (1982).

§ 583.355. Six-month extension

583.355. If the time within which an action must be brought to trial pursuant to this article is tolled or otherwise extended pursuant to statute with the result that at the end of the period of tolling or extension less than six months remains within which the action must be brought to trial, the action shall not be dismissed pursuant to this article if the action is brought to trial within six months after the time within which the action must otherwise be brought to trial pursuant to this article.

Comment. Section 583.355 provides an extra six months for a plaintiff to bring an action to trial where a period of tolling operates in such a way that at the end of the period the plaintiff would have less than six months to obtain a trial. In this situation the plaintiff has in effect a total of five and one-half years, as adjusted for tolling, to bring the action to trial. Section 583.355 is intended to cure problems illustrated by such cases as Moran v. Superior Court, 135 Cal. App.3d 986, ___ Cal. Rptr. ___ (1982), where tolling pursuant to Section 1141.17 (judicial arbitration) left the plaintiff only a short time to bring the action to trial. Section 583.355 applies to other situations as well where the statutory period in which to bring the

action to trial is extended pursuant to statute. See, e.g., Section 583.350 (computation of time).

The six-month extension provided by Section 583.355 does not preclude the action from being brought to trial earlier, nor does it affect the general rule announced in Moran, supra, that the plaintiff has a reasonable period to obtain a trial. Section 583.355 simply provides a "safe harbor" from mandatory dismissal if the plaintiff brings the action to trial within the prescribed period. It does not affect the ability of the plaintiff to show that a longer period may be reasonable under the circumstances of the particular case.