#J-600 3/31/82

Memorandum 82-48

Subject: Study J-600 - Dismissal for Lack of Prosecution (Comments on Tentative Recommendation)

In July 1981 the Commission distributed for comment its tentative recommendation relating to dismissal of civil actions for lack of prosecution. A copy of the tentative recommendation is attached. In general the tentative recommendation recodifies and systematizes existing statute and case law on dismissal. It also makes a number of substantive changes: (1) The time after which a motion for discretionary dismissal may be made is changed from two years after the action is commenced to three. (2) The provision requiring dismissal for failure to enter default judgment within three years after service or after the defendant makes a general appearance is repealed. (3) The courts are given discretionary authority to dismiss for failure to bring to trial within two years after a new trial or retrial is ordered. (4) The statutory rules for tolling the dismissal statutes are probably stated in broader terms than existing case law provides. This memorandum analyzes the comments received on the tentative recommendation.

General Reaction

Of the comments received, the reaction was generally favorable. Kenneth Arnold (Exhibit 4) is "very much in favor of codification of the case law." Mr. Arnold also had some technical drafting concerns that are matters of taste rather than substance, which we will not discuss here. Roger Arnebergh (Exhibit 5) felt that the tentative recommendation was "very well considered and should not only clarify the law but cover areas that heretofore have been only partially covered by statute and case law." The State Board of Equalization (Exhibit 6) sees no problems and the Department of Transportation (Exhibit 7) sees no great effect on their practice. Judge Philip Saeta (Exhibit 9) thinks the recommendation is excellent.

The Association of California Insurance Companies (Exhibit 8), however, is concerned that the tentative recommendation "will result not only in additional congestion in the court, something that is hardly desirable given the present state of the trial court backlog but, in addition, will work a fundamental unfairness on defendants who may be faced not only with long delays in presenting their defense but may also

have considerable difficulty relating to discovery and preparation of their defense."

Other comments addressed to specific points are discussed below.

§ 583.110. Definitions

Each term defined in Section 583.110 includes language intended for cases in which the dismissal provisions are applied to special proceedings--"claim for affirmative relief", "petition", "respondent", "petitioner". Mr. Arnold suggests that the preferable technique is to state directly to what extent the dismissal provisions apply to special proceedings. This we have done in Section 583.120. Mr. Elmore (Exhibit 10) offers some simplified language for the definitions that the staff will adopt.

Mr. Arnold also suggests that a provision be added to the effect that "shall" is mandatory and "may" is permissive, in order to avoid need for a court interpretation whether "shall" is mandatory or directory. The staff believes the statute has a special structure that makes such a provision unnecessary and unwise. The statement of public policy in the statute, along with the flexibility of exceptions to the dismissal requirements, control the construction of the statute.

§ 583.120. Application of chapter

Section 583.120 provides that the dismissal provisions do not apply to special proceedings (except to the extent incorporated by reference in the special proceeding). In addition Section 583.120 permits a court in a special proceeding to apply the dismissal provisions in its discretion if the proceeding is "in the nature of a civil action and is adversary in character." Mr. Arnold questions this provision and recommends that it be deleted; he believes it will result in excessive litigation over the meaning of the words. Mr. Arnold suggests instead that the court in a special proceeding be permitted to apply the dismissal provisions in its discretion "except to the extent inconsistent with the statute governing the special proceeding." The staff believes Mr. Arnold's objection to the present wording is good, but his suggested substitute wording also is inadequate. Mr. Elmore (Exhibit 10) suggests that the matter be simply left to the discretion of the court "pursuant to inherent authority." For Mr. Elmore's suggestions on inherent authority of the court, see discussion at the end of this memorandum.

§ 583.150. Transitional provisions

Mr. Elmore (Exhibit 10) notes that a "grace period" for dismissal at the time the new statute goes into effect might be useful. However, he recommends consideration of this matter be deferred until the Commission's substantive proposals are finalized.

§ 583.210. Time for service and return

Subdivision (a) of Section 583.210 notes that for purposes of the provision requiring service of summons within three years after the action is commenced, an action is deemed to commence at the time the complaint is filed. Mr. Arnold points out that Code of Civil Procedure Section 411.10 already provides that a civil action is commenced by filing a complaint with the court. However, some such language is necessary here because it is necessary to specify the time an action is commenced by cross-complaint, which is currently accomplished through this provision plus definitions. The staff will delete the general statement only if we are able to develop other satisfactory language to take care of cross-complaints.

Mr. Elmore (Exhibit 10) offers some technical language relating to the "general appearance" in subdivision (b), which we will adopt.

§ 583.230. Computation of time

Notwithstanding the general rule that summons must be served within three years after commencement of the action, Section 583.230 provides an excuse if service was "impossible, impracticable, or futile." This provision is based on case law allowing an excuse because of circumstances beyond the plaintiff's control.

Our consultant Mr. Elmore (Exhibit 1) has called our attention to a recent Supreme Court case, Hocharian v. Superior Court, 28 Cal.3d 714, 170 Cal. Rptr. 790, 621 P.2d 829 (1981), which elaborates the operation of the "impossible, impracticable, or futile" excuse. Mr. Arnold also notes the case. A copy of the case is attached as Exhibit 11.

The Hocharian case rejects objective impossibility as the basis for the excuse and substitutes a test based on the plaintiff's conduct. The three-year service period must be complied with unless the plaintiff shows that the plaintiff exercised reasonable diligence, i.e., that the delay was not due to the plaintiff's own unreasonable conduct. If the plaintiff sustains this burden of proof, the court must then balance the harm to the plaintiff of dismissal against the prejudice to the defendant

caused by the delay if the lawsuit is allowed to go forward. Dismissal is in the discretion of the court, tempered with the strong public policy that litigation be disposed of on the merits.

The Commission should decide whether to accept or reject the Hocharian test for excusing complicance with the three-year service requirement. The staff is not sure that in fact the new test of reasonable diligence by the plaintiff will yield any different results in practice. However, the test is indicative of a judicial attitude toward liberality in allowing excuses, which is consistent with the Commission's general philosophy of modest liberalization in the dismissal recommendation.

Mr. Elmore (Exhibit 10) believes that the guidelines for application of the "impossible, impracticable, or futile" excuse outlined in Hocharian should not be codified. He points out that the Legislature has in the past enacted general rather than detailed directions for the courts in this area. "To codify the Hocharian decision would tend to tie the hands of courts in other and potentially different cases." He suggests that the statute simply provide that the court, in computing the time for service, may exclude "a reasonable period determined by the court for the time when service of process was impossible, impracticable, or futile." The statute or Comment would then give guidance as to the court's determination depending on the policy of liberality or strictness adopted by the Commission. Mr. Elmore's view is that the court's determination should take into consideration, among other matters, the time when the delay occurred in comparison to the time remaining under the statute, whether impossibility was due in part to causes within or beyond the control of the plaintiff, the probable prejudice to the plaintiff and the defendant from allowing the exclusion, and whether the cause of action or claim for relief asserted by the plaintiff against the particular defendant has apparent merit.

The Association of California Insurance Companies (Exhibit 8) is likewise opposed to codification of the Hocharian reasonable diligence test. "Surely three years to accomplish discovery and service of a complaint and five years to bring an action to trial are sufficiently long without the necessity of additional motions and time-consuming hearings on the issues of reasonable diligence or prejudice to the defendant as set forth in the Hocharian decision." The insurance companies also believe that the tentative recommendation would in an unspecified manner encourage protracted litigation and squandering of judicial resources. They believe "it is incumbent upon the Commission to propose

a rule which would speed up the process, not provide further avenues for delay."

§ 583.240. Mandatory dismissal

Under Hocharian there is a presumption for dismissal of an action if service and return are not made within three years, which the plaintiff can rebut by sustaining the burden of showing that service within the three-year period was impossible, impracticable, or futile. Mr. Elmore (Exhibit 10) offers some statutory language to implement this procedure; his suggested rough draft is:

> The court, in the interests of justice, and upon such terms as may be just, may permit or recognize service or return made not later than (60) (90) days after the time for service and return would otherwise expire. The burden shall be upon the plaintiff to request and show good cause for such relief either in opposition to a motion to dismisss or, if none is pending, by plaintiff's motion for relief pursuant to this subdivision filed not later than 120 days after the time for service and return would otherwise expire. Written notice of plaintiff's motion shall be served upon the defendant or his attorney in such manner as the court may direct or, if the court does not fix the manner of notice, by first class mail addressed to defendant at his last known address or, if the defendant has appeared specially by an attorney or is represented by an attorney for other purposes in the action, addressed to the attorney of record, or by personal service upon the defendant or such attorney. In ruling on the matter, the court shall consider all relevant factors and, where appropriate, may assess costs, as a condition of permitting such late service or return.

The two significant features of this draft are that it would place a limit on the time within which late service would be permitted and that it would permit an award of costs as a condition of permitting late service.

Judge Saeta (Exhibit 9) raises the related point of whether a case tried in violation of the three-year statute results in a void judgment that can be set aside at any time because of lack of jurisdiction of the court. As Judge Saeta points out, Hocharian rejects cases that state the rule that such a judgment is void. 28 Cal.3d at 721, n.3. The staff agrees that it would be useful to add language to Section 583.240 to codify the rule that although dismissal is mandatory under the statute, lapse of the statutory period does not deprive the court of jurisdiction to try the case.

§ 583.310. Time for trial

Michael Zweig and Richard Keatinge (Exhibit 3) raise an issue not dealt with in the tentative recommendation or in existing case law but that should be dealt with. Under Section 1048 of the Code of Civil Procedure a court may order a bifurcation, or separate trial of causes of action or issues; under Section 598 a court may order separate trial of issues in a case. For example, under Section 598 in a malpractice case there may be first a trial on liability and sometime later a trial on damages.

If an issue or cause is bifurcated and brought to trial within the five-year period, does this excuse diligence in bringing the remaining issues or causes to trial? Zweig & Keatinge suggest that the statute make clear that the remaining issues or causes must be diligently prosecuted. They state:

> a. Plaintiffs and defendants alike would know what the limitation is on the duration of a bifurcated case.
> b. The plaintiff would be compelled by statute to bring his entire case to trial, not just a bifurcated portion of it, within a specified period of time or face the consequence of mandatory dismissal.
> c. Defendants would not have to endure litagation for an indefinite period of time and would be able to force, after a specified period of time, a termination of the dispute either by trial or by mandatory dismissal.
> d. The Superior Courts would be encouraged to use the device of bifurcation without fear of partly adjudicated cases lingering on in the courts for very long periods of time.
> e. All attorneys would be placed on notice that all cases, including bifurcated cases, must be prosecuted diligently.

The Zweig & Keatinge proposal could be effectuated by the following language, if the Commission decides this approach to the problem they raise is sound:

> § 583.305. "Brought to trial" defined
>
> 583.305. For the purposes of this article, if the court orders separate trial of a cause of action or issue, the action is brought to trial when the trial of the last cause or issue to be tried in the action is actually commenced.
>
> Comment. Section 583.305 recognizes the situation where a cause of action or issue is bifurcated for trial pursuant to Section 1048 or 598. In such a situation the plaintiff must proceed diligently as to all causes and issues, but the statutory period during which all must be brought to trial is tolled during the trial of the bifurcated cause of action or issue. See Section 583.340(d) (computation of time).

§ 583.340. Computation of time

583.340. In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

. . . .

(d) If the court orders separate trial of a cause of action or issue, from actual commencement of the trial of the cause or issue until adjudication of the cause or issue.

Comment. Subdivision (d) is new. It ensures that in a bifurcated trial pursuant to Section 1048 or 598 the action will not be dismissed pursuant to this chapter because of time consumed in the trial of the bifurcated cause or issue. See Section 583.305 ("brought to trial" defined).

The Commission's consultant Mr. Elmore is strongly opposed to this solution to the Zweig & Keatinge problem, or for that matter any treatment of the problem, for the following reasons:

(1) Bifurcated trials should be handled in the same manner as "partial castrial" cases under existing law. See, e.g., Rose v. Boydston, 122 Cal. App.3d 92 (1981); Mercantile Inv. Co. v. Superior Court, 218 Cal. 770 (1933).

(2) This is a complex subject, not a single manageable subject.

(3) Bifurcation may be on motion of the defendant.

(4) Law on cross-complaints would need to be re-examined.

(5) In depth study is necessary.

(6) Outside scope of existing revision.

(7) Time available to plaintiffs and cross-complainants would be materially shortened.

"Brought to trial" defined

A recurring question in the dismissal cases is when is an action deemed to be "brought to trial" for purposes of satisfying the statutes? The law seems to be that an action is brought to trial when a jury has been selected and sworn or in a nonjury case when a witness has been sworn and examination begun. This has led to the practice, when the five-year period has almost expired, of impanelling a jury or swearing in a witness and then continuing the trial until some later time. The case of Hartman v. Santamarina, 30 Cal.3d 762 (1982), involved such a procedure. In that case a jury was impanelled, the case continued, and the jury discharged; the trial court subsequently dismissed the action upon motion of the defendant. The Supreme Court held that the case was "brought to trial" within the meaning of the dismissal statute when the jury was impanelled.

The staff believes it would be useful in order to minimize litigation to define by statute when an action is "brought to trial". For this purpose the language of Section 581 (plaintiff may dismiss at any time before "actual commencement of trial") may be useful: "A trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or his counsel, and if there shall be no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence." One virtue of such a provision is that it is generally consistent with existing case law on when an action is brought to trial for purposes of the dismissal statutes.

Mr. Elmore (Exhibit 10) opposes such a provision "unless a definition can be found that will meet with almost universal acceptance." He believes any definition will simply generate more litigation and more technical dismissals. He also believes the proposed language is inconsistent with existing case law and will be a trap for the unwary.

§ 583.340. Computation of time

Under existing law the five-year period within which an action must be brought to trial may be tolled during periods when it would have been impossible, impracticable, or futile to bring the action to trial. However, if impossibility, inpracticability, or futility ended sufficiently long before expiration of the statutory period so that the plaintiff still had a "reasonable time" to get the case to trial, the tolling rule doesn't apply.

The Commission's tentative recommendation liberalizes these rules for plaintiffs. In making a determination of impossibility, impracticability, or futility, the court is required to make a reasonable allowance for delay caused by "special circumstances that hindered the plaintiff." In addition, the tolling period is absolute, with the time during which any impossibility, etc., occurred being added to the five-year period.

Justice Kingsley (Exhibit 2) points out that the proposed rules on tolling do not conform to existing law. He is correct and one possible approach is to point out the change in the law in the Comment:

> Under subdivision (c) the time within which an action must be brought to trial is tolled for the period of impossibility, impracticability, or futility. Thus the time to bring the action to trial is extended regardless of the opportunity otherwise available to the plaintiff to bring the action to trial. See Hartman v. Santamarina, 30 Cal.3d 762, ___ P.2d ___, ___ Cal. Rptr. ___ (1982); contrast State of California v. Superior Court, 98 Cal. App.3d 643,

159 Cal. Rptr. 650 (1979); Brown v. Superior Court, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

Another possible approach is suggested by Mr. Elmore (Exhibit 10), which is to revise the statute to be more in conformity with case law. He would reinstate the existing statutory exclusion of the time when "the defendant was not amenable to the process of the court" and also would provide simply that the court, in computing the time for service, may exclude a reasonable period determined by the court for the time when bringing the action to trial was impossible, impracticable, or futile.

Mr. Zweig and Mr. Keatinge (Exhibit 3) object to relaxation of the mandatory dismissal requirement. "If anything, the exceptions to the five year period should be more restricted." They point out that five years is a long time for the defendant to be subjected to litigation and there may be additional time on appeal, with large costs of defense. They believe that a strong five-year statute, with very few exceptions, is necessary to ensure diligent prosecution by plaintiffs. Otherwise cases drag on and attorneys do not feel pressure to attend to the cases; attorneys believe it will be easier to persuade a judge to allow a trial on the merits than to dismiss the action, even if they have been dilatory. "It is therefore quite important for attorneys to know they must prosecute their cases diligently at all stages, or risk dismissal." This is also the position of the Association of California Insurance Companies (Exhibit 8), which points out the litigation-breeding potential of the tentative recommendation and is concerned about the impact on the judicial system of liberalizing the dismissal requirements.

§ 583.350. Mandatory dismissal

Mr. Elmore (Exhibit 10) suggests that additional procedure concerning the operation of the impossible, impracticable, and futile exclusions from the five-year mandatory trial statute would be useful. Mr. Elmore emphasizes that this suggestion is tentative:

> The court, in the interests of justice, and upon such terms as may be just, may extend the time within which the action must be brought to trial for such period of time, not exceeding (one year), as may appear appropriate to permit trial on the merits. The burden shall be upon plaintiff to show good cause for such extension, unless the condition of the court's general civil trial calendar has made necessary a continuance date beyond the date fixed by subdivision (a).

It should be noted that this draft would impose a maximum time limit for extension of the one-year period and would recognize trial court conges-

tion as an excuse. Mr. Elmore notes that a possible additional provision could state that the procedural rules apply "only in trial courts designated by the Judicial Council as a trial court having a congested civil trial calendar." He does not favor such a limitation as it would be difficult to apply.

Judge Saeta (Exhibit 9) makes the same point with respect to "mandatory" dismissal under the five-year statute as under the three-year statute: the time limit should not be "jurisdictional" in the sense that a judgment in violation of the time limit is void and subject to collateral attack.

A related problem raised by Judge Saeta is that the dismissal statutes permit the court to dismiss on its own motion. In such a case notice to the parties should be necessary and he suggests that language be added to make clear the dismissal is only "after notice." Judge Saeta points out that case law permits dismissal by the court without notice to the parties. "[M]any times the parties can have worked out agreements or stipulations that the court knows nothing about and a precipitous dismissal without notice would just create havoc."

§ 583.420. Time for discretionary dismissal

The tentative recommendation permits discretionary dismissal for failure to bring the case to trial within three years after the action is commenced; existing law permits discretionary dismissal after two years. Mr. Zweig and Mr. Keatinge (Exhibit 3) comment that this change is welcomed. "Given the length of discovery and the court congestion at present, the two year limit was no longer effective."

Mr. Elmore (Exhibit 10), however, believes the time should remain two years. The change is "not necessary, taking all courts statewide into consideration. Moreover, such an increase suggests a slackened pace is appropriate."

On the other hand, the tentative recommendation continues existing law which permits discretionary dismissal if service and return are not made within two years after the action is commenced. Mr. Elmore believes this could be reduced to 18 months. "This change would stress the need for expedition in serving process."

Mr. Elmore also points out that the discretionary dismissal times stated in Section 583.420 are ambiguous in their incorporation by reference of other provisions. The staff agrees and will revise the section to state the time periods directly, rather than by reference.

Inherent Power of Court

Mr. Elmore (Exhibit 10) believes there are a number of problems caused by delay that are not dealt with adequately by the statute. For example, the statute may not be applicable where the ground is not failure to bring the action to trial. See Rose v. Boydston, 122 Cal. App.3d 92 (1981). Another problem is unique cases such as will contests. See Horney v. Superior Court, 83 Cal. App.2d 262, 188 P.2d 552 (1948). Mr. Elmore does not believe the discretionary dismissal provisions are adequate to handle these problems. He suggests that the proposed provisions on discretionary dismissal be narrowed and a new article on inherent power of the court to dismiss for delay be added. The new article would take roughly the following form:

Article 5. Inherent Authority of Court to Order Dismissal

§ 583.510. Other cases or circumstances

583.510. (a) This chapter does not preclude a dismissal for lack of prosecution pursuant to inherent authority of the court in cases or circumstances not provided for by this chapter.

(b) In determining a motion or proceeding for dismissal pursuant to inherent authority, the court, where appropriate, shall give consideration to the procedures and policy stated in this chapter and to their adoption, as nearly as may be.

Comment. Subdivision (a) of Section 583.510 expressly recognizes the court's inherent authority to order a dismissal for lack of prosecution in cases or matters not controlled by Chapter 1.5. It does not undertake to state the grounds for, or circumstances under which, the inherent power should be exercised, leaving this to future judicial decisions, rules, or statutes. However, subdivision (b) suggests the procedures and policy contained in Chapter 1.5 may be considered for adoption in some "inherent authority" proceedings.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

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July 25, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
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Att.: Mr. Sterling
Re: No. J 600- Dismissal For Lack Of Prosecution

Dear sirs:

This confirms recent conversation that the following recent decision of the California Supreme Court will require consideration and, I believe, a substantive Commission decision, before Final Recommendation is adopted:

HOCHARIAN V. SUPERIOR COURT (1981) 28 CAL. 3d 714.

Briefly, the majority opinion (Bird, C. J.,) states that the effect of failure to serve and return summons within 3 years under Sec. 581a is to create a rebuttable presumption of non-compliance; that the plaintiff must overcome the presumption by proving "reasonable diligence"; that even if the presumption is overcome, the trial court "may " order a dismissal under "balancing" guidelines stated in the court's opinion, such as harm to plaintiff from dismissal prejudice to defendant from delay, state policy favoring trial on merits. Certain statements in court of appeal cases at variance with the new interpretation were disapproved. The minority opinions (Richardson and Clark, JJ.,) in effect contend that Sec. 581a and the concept of "impossible, impractical or futile" are being "re-written," The minority would confine the exception to "causes beyond the control" of the plaintiff (and exclude such factors as "economic " and "subjective" considerations) .

The Hocharian case appeared February 5, 1981 as I was completing my Consultant's Report for the Commission. Unfortunately, it did not come to the writer's attention until recently (after the Commission had met in SanDiego). I apologize for the error.

It will probably also be necessary to await, or allow for, the expected decision of the California Supreme Court in

HARTMAN V. SANTAMARINC (1981) -hearing granted in July, 1981, after 2 to 1 decision of court of appeal-118 Cal. App. 3d 87.

The (unoffical) statement of the issues involved lists the

following: 1-whether jury impanelment is sufficient as a "trial"; 2- exclusion of delay caused by disqualification of two assigned trial judges (resulting in an apparently long delay in new trial date); 3- should the five year statute be applied if the plaintiff makes a showing of "reasonable diligence."

It is believed the "Amicus" Committee of the California Trial Lawyers Association has already appeared in support of plaintiff in the Hartman case (note opinion by Kaufman, J., referring to an apparent charade).

The writer does not have the Tentative Recommendation as yet. However, from prior drafts, I believe it is necessary that changes be made in the background, draft statute and comments to reflect either the incorporation or rejection of the majority opinion in the (1981) Hocharian case.

As the matter now stands, proposed sections 583.230, 583.240 and perhaps other sections appear to me to be inconsistent with such decision. It would be unfortunate to reject that decision sub silentio. For that reason, I believe that substantial further work should take place at Staff level for submission to the Commission.

Also, the granting of the hearing in July, 1981) in the Hartman case introduces the potential of a significant and new interpretation of the 5 and 3 year provisions. It would seem to me that briefs and information as to oral argument should be obtained. Proposed sections 583.330 and 583.340 are likely to be affected. Particularly, it is believed the wording and comment should be reviewed, to guard against inadvertencies and unintended effect.

Two recent cases on estoppel and waiver that preclude application of the 5 year or 3 year statute are:

Borgland v. Bombadier, Ltd. (1st Dist., Smith , J.) noted in July 18, 1981 issue of The Recorder, see Daily Jnl. p.2171.
Holder v. Sheet Metal Worker's Intern. Assn. (4th Dist. Weiner, J. noted in July 8, 1981 issue of Metrop. News, see Daily Jnl. p 2172.

These decisions (if final) establish a strong policy against the older "strict" application of the statutory provisions.

If, as Consultant, I am expected to do further work on these matters, please advise me at your early convenience.

Respectfully submitted,

Garrett H. Elmore

Garrett H. Elmore

EXHIBIT 2

STATE OF CALIFORNIA
COURT OF APPEAL
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ROBERT KINGSLEY
ASSOCIATE JUSTICE

August 4, 1981

California Law Revision,
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Gentlemen:

The proposed section 583.230 does not conform to existing law. The cases hold that the five-year statute is applicable if the plaintiff has delayed unduly either before or after the "impossible -- impracticable" period. Thus a plaintiff may suffer dismissal if he waited too long to seek the writ which made trial impractical or too long after those proceedings were terminated. (See, for example, Brown v. Superior Court (1976) 62 Cal.App.3d 197, and State of California v. Superior Court (1979) 98 Cal.App.3d 643.)

Yours very truly,

Robert Kingsley

EXHIBIT 3

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August 4, 1981

John H. DeMoulley
Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Re: Comments on "Tentative Recommendation Relating to Dismissal for Lack of Prosecution"

Dear Mr. DeMoulley:

The "Tentative Recommendation Relating to DISMISSAL FOR LACK OF PROSECUTION", dated July 16, 1981, was brought to my attention by Richard Keatinge of this office. I have had some interest in the mandatory dismissal statutes due to certain issues that have arisen in litigation I am handling. After discussing the Tentative Recommendation with Mr. Keatinge, we submit the following comments to the California Law Revision Commission.

I. The Applicability of Mandatory Dismissal Statutes to Bifurcated Cases.

Incredibly, there is a dearth of California Law, both statutory and case law, pertaining to the applicability of the mandatory dismissal statutes to bifurcated or severed cases. This gaping hole in the law ought to be addressed.

The growing problem of court congestion has triggered various ripple effects in the Superior Courts. One ripple effect has been the increasing use of bifurcation of issues in cases. Hopefully, the adjudication of bifurcated issues will precipitate termination of such cases short of full trials on the merits. The authority of the court to bifurcate a portion of the case has been long recognized in C.C.P. § 1048(b), and has been more recently embellished in C.C.P. § 598. We do not know the number of bifurcated cases pending in the Superior Courts, but estimate the number has greatly increased recently and will continue to increase.

Our research indicates no case law either applying or refusing to apply the mandatory dismissal statutes of C.C.P. § 583(b) and 583(c) to bifurcated cases that have been partly adjudicated. Given the strong public policy that some statutory period must apply to a case at all times when the case is not in trial, in order to compel a plaintiff to bring his case to trial and to limit the duration for which unwilling defendants must endure the expense and aggravation of litigation, it would seem appropriate that the mandatory dismissal statutes apply in some way to bifurcated cases.

Analysis indicates one of two possible courses for the law to take.

(1) The first alternative is that the severence and subsequent adjudication of a portion of a case prior to trial on the remaining issues fails to "bring the case to trial" and therefore does not satisfy the five year requirement of C.C.P. § 583(b). The plaintiff would still be required to bring the remainder of his case to trial prior to the expiration of five years or face dismissal. This has some basis in the case law as the standard for determining whether or not a proceeding "brings the case to trial" is whether it was a proceeding at which final disposition of the case was to be had. King v. State 11 Cal.App. 3d 307, 310, 89 Cal.Rptr. 715, 716 (1970). The adjudication of a bifurcated issue is generally not such a proceeding. Under this analysis, however, plaintiffs should be permitted to toll § 583(b) for that period of time when it is impracticable to bring the entire case to trial due to the bifurcation. In most cases, tolling of the five year statute would occur from the time the case is bifurcated to the time the bifurcated portion of the case is adjudicated. Once adjudication of the bifurcated portion has been made, the plaintiff is again free to bring his case to trial on all of the issues.

(2) Alternatively, the adjudication of a bifurcated issue would "bring the case to trial" under § 583(b), however, once the bifurcated portion is adjudicated, a three year period of time would commence to run to bring the remainder of the case to trial pursuant to § 583(c). We have noted very little case law under § 583(c). In the few cases decided, the courts have broadened the scope and applicability of § 583(c) to reach beyond the literal reading of the statute. See McDonough Power Equipment Company v. Superior Court of Los Angeles County, 8 Cal. 3d 527, 531, 105 Cal.Rptr. 330, 332 (1972) (three year

statute applies even though no previous full trial on the merits and even though no specific new trial order has been made); Briley v. Sukoff, 98 Cal.App. 3d 405, 159 Cal.Rptr. 452, 455-456 (1979)(three year statute applicable even though no express order for a new trial made).

If neither 583(b) nor 583(c) applies to a bifurcated case, then there is no statute compelling the plaintiff to bring the remaining part of his case to trial. After adjudication of the bifurcated part of the case, the litigation would be in a procedural limbo.

Either of the above proposed alternatives would have a variety of beneficial effects:

a. Plaintiffs and defendants alike would know what the limitation is on the duration of a bifurcated case.

b. The plaintiff would be compelled by statute to bring his entire case to trial, not just a bifurcated portion of it, within a specified period of time or face the consequence of mandatory dismissal.

c. Defendants would not have to endure litigation for an indefinite period of time and would be able to force, after a specified period of time, a termination of the dispute either by trial or by mandatory dismissal.

d. The Superior Courts would be encouraged to use the device of bifurcation without fear of partly adjudicated cases lingering on in the courts for very long periods of time.

e. All attorneys would be placed on notice that all cases, including bifurcated cases, must be prosecuted diligently.

Please consider the following two rough drafts as alternative proposals:

(1) Section 583(b) [583.311]. An action which has been bifurcated pursuant to C.C.P. § 1048 or § 598 is only "brought to trial" pursuant to section 583(b) [583.310] when the trial of the entire action is commenced against the defendant.

Section 583.340(d) [Computation of Time]. In a bifurcated action, the time from the court order issuing the bifurcation until the court order adjudicating the bifurcated portion of the action.

(2) Section 583(c) [583.321]. In an action where a portion of the case has been bifurcated pursuant to C.C.P. § 1048 or § 598 and adjudication of the bifurcated portion has been completed, the plaintiff shall have three years from the date of that adjudication to bring the remainder of the case to trial against the defendant.

II. Other Comments

A. Section 583(a)

Your proposed change altering the time period for discretionery dismissal from two years to three years is welcomed. Given the length of discovery and the court congestion at present, the two year limit was no longer effective.

B. Section 583(b) [Proposed Section 583.230]

The well intended provisions relaxing the mandatory dismissal statute of 583(b) by easing the constraints on tolling the statute will have, in our view, a deleterious effect. If anything, the exceptions to the five year period should be more restricted. Five years is a very long time for a defendant to be dragged through litigation. The same defendant may very well spend another two years or so on appeal. The costs of defense are enormous. The effect of a strong five year statute, with very few exceptions, places enough pressure on the plaintiff to ensure that the litigation is prosecuted diligently. Absent such pressure, cases tend to drag on. If the standards for tolling the statute are relaxed, plaintiffs' attorneys will feel more at ease leaving their cases untended to. They will be more confident they can persuade a judge to allow the case to go to trial on the merits by tolling the statute, rather than dismiss the action, even if they have been dilatory. It is therefore quite important for attorneys to know they must prosecute their cases diligently at all stages, or risk dismissal.

Thank you for considering the above recommendations. If you need further input with regard to the mandatory dismissal statutes, particularly with regard to the hole in the law with respect to bifurcated cases, please feel free to contact me.

Very truly yours,

Michael K. Zweig

MKZ/pr

EXHIBIT 4

KENNETH JAMES ARNOLD
ATTORNEY AT LAW
369 Harvard Street
San Francisco, California 94134

September 29, 1981

Mr. John E. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: J-600, Tentative Recommendation relating to Dismissal for Lack of Prosecution

Dear Mr. DeMoully:

First, thank you for allowing me the opportunity to comment on your tentative recommendation. Secondly, I am very much in favor of codification of the case law dealing with CCP §§ 581a and 583. Thirdly, while I have read the proposed §§ 583.240-583.430, lack of time prevents my submitting any comments on them. My comments, such as they are, are directed to CCP §§ 581 and 583.110-583.230. Too, I apologize for the disjointed manner in which my thoughts are presented below but hope that, in spite of their lack of organization, they will be of some benefit.

General Comments

1. I find it refreshing that the commission is updating language wherever possible. But why not change all "upon's" to "on's" (the appellate courts more and more are doing so) and get rid of the thereon's (why not, on it); thereof's (why not, of it), therein's (why not, in it), etc., as well as of the such's and said's.

2. Regarding use of "shall" in the proposed sections, it is important to keep in mind that while most of the Codes and the California Rules of Court contain provisions defining "shall" for the purposes of the specific code or for a specific group of court rules as mandatory and "may" as permissive, no such definitional sections are included in any of the standard codes (Civil Code, Code of Civil Procedure, Probate Code, and Penal Code), nor should they be. (I sometimes have the feeling that drafters of legislation believe that "shall" is automatically mandatory regardless of the absence of a definitional code section; witness for example the Legislature's sporadic amendment of the various Penal Code sections to change "must" which was used advisedly by the original drafters to "shall" which is not defined in the code.)

The meaning to be given "shall" in substantially all code sections in which it's been used where there is no definitional provision has had to be litigated for a court adjudication as to whether it was directory, mandatory, or something else, and this is true of CCP §§ 581a and 583. In view of this, I would suggest that in your definitional section you include a provision defining "shall" and "may" (if it should be used) for the purposes of the chapter as being mandatory and permissive, respectively.

3. One of the nagging problems I've experienced with legislation over the past several years is the disquieting amount of duplication. I sometimes feel that each time a group of sections is amended or enacted the author believes he has to start from scratch (it's the only reason I can think of for ignoring the other provisions of the same code) or that particular amendments to often the wrong statute are sought because the sponsor wasn't able to locate the correct statute (witness the 1981 amendment to CCP § 1005, the notice statute, which, apart from changing the time of notice from 10 to 15 days, in effect duplicates the provisions of CCP § 1010, the general statute setting forth the papers that must accompany a notice of motion). The duplication is annoying, it is unnecessary, and it is inevitably costly to the legal profession (law books are supplemented and revised to reflect all these changes even when unnecessary; the cost is prodigious and is passed along to the customer). The commission's proposed statutes do the same thing. For example, in § 583.210(a) it is stated: "For purposes of this subdivision an action is commenced at the time the complaint is filed." What is so unique about the word commencement as used in the section that a special provision defining it is required? How does commencement under 583.210(a) differ from commencement under CCP § 411.10, the general statute applying to all civil actions? Moreover, both sections (assuming the commission's is enacted) are in Part Two of the Code which is entitled "Civil Actions." If it is felt that something must be said, I would suggest that only a cross reference to §411.10 be included.

4. As an aside, I might point out that the term "cause of action" when applied to civil actions is correct, but when applied to special proceedings, the application is, to say the least, strained and has caused much confusion in terminology. The concept of a cause of action has clear meaning vis-a-vis the demurrer statute [CCP § 430.10], for example, and the statutes of limitation, all of which are contained in Part Two of the Code. But since many of the provisions of Part Two are incorporated by statute into various special proceedings, the unfortunate result has been a breakdown in the understanding of the distinction, and the differences between them are many. Confusion has been the result on the part of nearly everyone. The appellate courts frequently refer to the special proceeding in unlawful detainer as an "action" and the Legislature has plopped CCP §§ 415.45 and 415.47, relating to unlawful detainer, smack down into the middle of statutes relating to civil actions and have them erroneously refer to unlawful detainer as an action, and even use the term "a cause of action exists" etc.

I would suggest that the term "cause of action" be abolished and that in its place the term "a cause for relief" or "a cause for judicial relief" which properly cover both civil actions and special proceedings be adopted in its place. After all, it is judicial

relief that is being sought by the particular action or special proceeding (both of which, of course, are judicial remedies [see CCP § 20]. Courts may grant four and only four kinds of judicial relief: (1) damages (i.e., money [see CC §3281]), (2) specific relief, which term includes (3) declaratory relief, and (4) preventive relief. This applies to special proceedings as well as to civil actions. [See, generally, my discussion in Arnold, "Commencing Civil Actions in California," Chapter Two, published by Matthew Bender & Co.]).

Specific Comments

1. § 581(b). In line 2, I would suggest changing "subdivisions (a) and (b)" to "subdivision (a) and this subdivision."

2. §583.110. As already stated, I would include a definition of "shall" and "may." With respect to the definition of "action," how is it intended that an action as used in these provisions differ from an action as defined in CCP §22? Too, since the statute introduces the term "claim for affirmative relief" the term should be defined. Does the definition mean an action is a cause of action or any part of a cause of action, or a particular form of relief (one might, as already indicated, in the same complaint sue for damages, specific relief, declaratory relief, and injunctive relief alternatively or conjunctively on the same set of facts), or is the phrase "claim for affirmative relief" intended to refer to a cross complaint or to a special proceeding, or does the term mean all of these or some combination of them? The problem is not clarified by defining complaint to include cross complaint, petition (why, why, why?), etc., defendant to include a respondent (again why?), or plaintiff to include petitioner (again, why?). If the commission intends by this definition to include special proceedings, why not say so in a separate provision - for example, "This chapter applies to special proceedings [CCP §23] as well as to civl actions [CCP § 22]" or a variant as is done in numerous code sections throughout Part Two of the Code of Civil Procedure? (The term "affirmative relief" does appear in several code sections, notably with respect to a cross complaint.) But compare § 583.120(a) (which is unnecessary anyway since the statutes governing the special proceeding incorporate the provisions of Part Two, incorporate exists).

3. § 583.120. I've commented on subdivision (a), above. Re subdivision (b), I would recommend that it be deleted. This reverse kind of incorporation is bound to result in excessive litigation for a court's determination as to whether a given proceeding "is in the nature of a civil action" [whatever that means] "and is adversary in character" [how could it be in the nature of a civil action and not be adversary?]. Why not leave it to the statutes governing the particular special proceeding to determine whether the sections are to be incorporated? The problem is compounded by adding to subdivision (b) "except to the extent the special proceeding provides a different rule" and "or the application would be inappropriate" [inappropriate in what way? I don't see this kind of imprecise language as a clarification of existing law], since it will require an express provision in the statutes governing the special proceeding to the effect that these sections are not to apply (if that is the legislative intent) or if there is

no such statute and no incorporating statute, another appellate case will be required to determine whether the "application" of these statutes "would be inappropriate" or appropriate. If "inappropriate" is used to mean simply inconsistent with the statutes governing the special proceeding, why not say so in those words as is done in numerous of the statutes of the CCP governing special proceedings and incorporating the provisions of Part Two of the code.

4. § 583.120. I've already commented on subdivision (a). Re subdivision (b), query: Does it (as well as §§ 583.220 and 583.230) comply with the Supreme Court's opinion in Hocharian v Superior Court (1981) 28 C3d 741, 170 CR 790, 621 P2d 829 which disapproved several prior cases, to wit: Crown Coach Corp. v Superior Court (1972) 8 C3d 540, 105 CR 339, 503 P2d 1347; Ippolito v Municipal Court (1977) 67 CA3d 682, 136 CR 795; Hunot v Superior Court (1976) 55 CA3d 660, 127 CR 703; Watson v Superior Court (1972) 24 CA3d 53, 100 CR 684; and Highlands Inn, Inc. v Gurries (1969) 276 CA2d694, 81 CR 273.

Moreover, how can a party move to dismiss for failure to return summons and at the same time move to set aside a default judgment? Or put another way, can a default judgment be entered before a return of service (or a general appearance) is made [see CCP §585 requiring, for entry of default, "proof of the service of summons" (subd. (a)), "if the defendant has been served" (subd. (b)), and "the service was by publication" (subd. (c))]. CCP § 585 is normally complied with by the proof of service which is filed and becomes part of the judgment roll [see CCP § 670]. (A failure to include the proof of service in the judgment roll would render the judgment void on its face subject to direct or collateral attack at any time - a dead limb on the judicial tree - if defendant made no general appearance.) In addition, CCP § 417.30(a) expressly requires that "After a summons has been served on a person, the summons must be returned together with proof of service as provided in Section 417.10 or 417.20, unless the defendant has previously made a general appearance."

Unfortunately for me, I must get on to other things, so will have to terminate this if I'm to get it in the mail on time. Again, I appreciate the opportunity to review the proposed legislation.

Very truly yours,

Kenneth James Arnold

Kenneth James Arnold

Roger Arnebergh
ATTORNEY - CONSULTANT
88 SADDLEBOW ROAD
CANOGA PARK, CALIF. 91307
(213) 887-6200

August 10, 1981

California Law Revision Commission
4000 Middlefield Road, Room D - 2
Palo Alto, California 94306

Dear John: Attention: John H. DeMoully, Executive Secretary

Thanks for sending me drafts of proposed changes in Civil Procedure and Property Law.

I have read the tentative recommendations relating to:

Unexercised Options
Ancient Mortgages and Deeds of Trust
Dormant Mineral Rights
Dismissal for Lack of Prosecution

In my opinion, these tentative recommendations are very well considered and should not only clarify the law but cover areas that heretofore have been only partially covered by statute and case law.

Sincerely yours,

RA:ea

Roger Arnebergh

STATE OF CALIFORNIA
STATE BOARD OF EQUALIZATION
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(P.O. BOX 1799, SACRAMENTO, CALIFORNIA 95808)
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Third District, San Rafael
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Fourth District, Pasadena
KENNETH CORY
Controller, Sacramento
DOUGLAS D. BELL
Executive Secretary

September 16, 1981

John H. DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Proposed Changes in Civil Procedure and Property Law, Press Release, July 15, 1981

Dear Mr. DeMoully:

The staff's review did not disclose any problems which would be created for the Board if the proposals were adopted.

Thank you for the opportunity of reviewing the five tentative recommendations of the Commission.

Very truly yours,

Margaret H. Howard

Margaret H. Howard
Tax Counsel

MHH:ljt

cc: Mr. J. J. Delaney

STATE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY
EDMUND G. BROWN JR., Governor

DEPARTMENT OF TRANSPORTATION
LEGAL DIVISION
1120 N STREET, SACRAMENTO 95814
P.O. BOX 1438, SACRAMENTO 95807
(916) 445-5241

August 19, 1981

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear John:

In re: Tentative Recommendations in Civil Procedure and Real Property Law

We have reviewed the five tentative recommendations.

Since all the recommendations exclude the state from their impact, there would not be a great effect on our practice. It would, however, help in the preparation of suits to clear the record of nonsubstantial claims of record.

We would appreciate it if you could let us know if there is any change in regard to the state exceptions in the recommendations.

Very truly yours,

Charles E. Spencer, Jr.

CHARLES E. SPENCER, Jr.
Attorney

association of california insurance companies

EDWARD LEVY
GENERAL MANAGER

CLAYTON R. JACKSON
GENERAL COUNSEL

GEORGE W. TYE
EXECUTIVE MANAGER

November 9, 1981

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear John:

The following comments are directed to the Commission's proposed changes in civil procedure relative to the dismissal of a civil action for delay in prosecution.

More particularly, we are concerned that your tentative recommendations relating to dismissal for failure to serve and return summons within three years after filing the complaint and dismissal for failure to bring the action to trial within five years after filing the complaint will result not only in additional congestion in the court, something that is hardly desirable given the present state of the trial court backlog but, in addition, will work a fundamental unfairness on defendants who may be faced not only with long delays in presenting their defense but may also have considerable difficulty relating to discovery and preparation of their defense.

This concern arises not only from the proposed amendments to CCP Sections 581(a) and 583(b) but, in addition, to the relatively recent case of Hocharian v Superior Court, 1981, 2 CA 3d 714, which virtually nullified the effect of CCP Section 581(a) by engrafting onto that Section a reasonable diligence test for avoiding the effects of the statute. My understanding is that the case concerning the five year statute is now before the Supreme Court, and one must expect that court to create the same exception to the mandatory nature of present Section 583(b).

It would seem to us that common sense must dictate that there be a reasonable time limit on the bringing of actions and the prosecution of such actions. Surely three years to accomplish discovery and service of a complaint and five years to bring an action to trial are sufficiently long without the necessity of additional motions and time-consuming hearings on the issues of reasonable diligence or prejudice to the defendant as set forth in the Hocharian decision.

The legal community and the Law Revision Commission must realize that the resources of the people which can be fairly dedicated to the operation of our court system are limited and that the squandering of these resources and the types of protracted litigation which would be encouraged by the proposals contained in your draft and contained in the Hocharian decision are most undesirable. It would seem to us that the legal system of this state is undergoing severe questioning from the public because of the seeming inability of this system to reach expeditious resolutions of conflicts. This situation exists not only in the civil field but, as you are aware, in the criminal field. I believe it is incumbent upon the Commission to propose a rule which would speed up the process, not provide further avenues for delay.

I appreciate this opportunity to comment on your proposals.

Sincerely,

Edward Levy
General Manager

EL:nl

EXHIBIT 9

CHAMBERS OF
The Superior Court
LOS ANGELES, CALIFORNIA 90012
PHILIP M. SAETA, JUDGE

TELEPHONE
(213) 974-1234

March 2, 1982

Mr. John H. DeMoully
4000 Middlefield Rd.
Room D-2
Palo Alto, CA 94306

Dear Mr. DeMoully:

Thank you very much for your letter of February 19. I was quite surprised to see that the Commission had taken my suggestion and had advanced it so far. Apparently, the California Judges Association is not on your regular list of people to whom you submit your recommendations. It would be my suggestion that in the future you send your recommendations to CJA, care of Sue Malone, our Executive Director, at Fox Plaza, Suite 416, 1390 Market Street, San Francisco 94102. Mrs. Malone could then determine whether a CJA committee existed which had interest and expertise in the subject matter. I am sending a copy of this letter to her as well as to our president, Judge Earl Cantos of San Diego. If they have different views, I am sure they will have no hesitancy to express them!

I reviewed the tentative recommendation and the comments that you sent me. I think the tentative recommendation is excellent and I have little to add. I basically have only two concerns:

(1) Is the concept of "jurisdiction" laid to rest in this draft; and

(2) Should notice be required even if the court dismisses a matter on its own motion.

On the question of jurisdiction, it was my understanding that some cases had stated that a case tried in violation of the three-year statute resulted in a void judgment that could be set aside at any time. I think Hocharian laid this to rest as an outmoded concept but I wonder if your tentative recommendation makes this explicit. It seems to me ridiculous to go ahead and try a case and then have the judgment declared void because of failure to return a summons within the proper time. A judgment rendered in a case violating the two-year and five-year statutes would not be void.

There is some case law that courts can dismiss actions without notice to the parties. I do not think this is good procedure as many times the parties can have worked out agreements or stipulations that the court knows nothing about and a precipitous dismissal without notice would just create havoc. I would therefore suggest that the words "after notice" be inserted in proposed sections 583.24(b), 583.350 and 583.420.

Thanks again for working on this topic and informing me. I look forward to your further efforts concerning dismissals.

Very truly yours,

Philip M. Saeta

PMS:bk

cc: Mrs. Sue Malone
Judge Earl J. Cantos

EXHIBIT 10

Extracts from Comments of Garrett H. Elmore, Consultant,
on Tentative Recommendation (November 1981)
[With Some Editorial Revisions]

After further study, the writer suggests revisions of the tentative recommendation as follows:

1. Inherent Authority In Cases Not Provided For.

The present text is ambiguous in Article 4 (Discretionary Dismissal For Delay)--§§ 583.410-583.430--in that there are general references to "delay in prosecution" though specific grounds of delay are described in Section 583.420. See also Comment to § 583.410 as to "exclusive authority." Article 4 is based in part on present Section 583(a). The present Section 583(a) has been held inapplicable where the ground is not failure to bring the action to trial. See Rose v. Boydson, 122 Cal. App.3d 92 (1981); see also Blue Chip Enterprises v. Brentwood Sav. & Loan, 71 Cal. App.3d 706 (1977).

Section 583.410 and Section 583.420 should be amended to make clear that Article 4 applies only to delay in bringing action to trial or retrial or service and return of summons (the article's title should be similarly narrowed). In Section 583.410(a) "pursuant to this article" should be replaced by wording such as "for failure to serve and return summons or to bring the action to trial." The Comment to subdivision (c) of Section 583.420 should refer to (c) as new with a "cf." cite to the Blue Chip case (exercise of inherent authority).

Again, inherent authority has been exercised where delay in prosecuting a will contest was involved. The analogy to a two-year minimum or three-year mandatory period for service of summons is not helpful in case of a citation in a will contest. The latter delays probate. See Horney v. Superior Court, 83 Cal. App.2d 262 (1948).

A new Article 5, commencing with Section 583.510, should be added to recognize inherent authority in "other cases." In rough text, the new article would read:

Article 5. Inherent Authority Of Court
To Order Dismissal

§ 583.510. Other cases or circumstances

583.510. (a) This chapter does not preclude a dismissal for lack of prosecution pursuant to inherent authority of the court in cases or circumstances not provided for by this chapter.

(b) In determining a motion or proceeding for dismissal pursuant to inherent authority, the court, where appropriate, shall give consideration to the procedures and policy stated in this chapter and to their adoption, as nearly as may be.

Comment. Section 583.510 expressly recognizes the court's inherent authority to order a dismissal for lack of prosecution in cases or matters not controlled by Chapter 1.5. It does not undertake to state the grounds for, or circumstances under which, the inherent power should be exercised leaving this to future judicial decisions, rules or statutes. However, subdivision (b) suggests the procedures and policy contained in Chapter 1.5 may be considered for adoption in some "inherent authority" proceedings.

2. [Omitted]

3. [Omitted]

4. Consideration of A Six-Month Grace Period.

The point has been suggested that vested rights are not involved in any procedural changes that are made in the proposed law, so that increasing the minimum statutory time to move for discretionary dismissal from two to three years or giving the plaintiff longer time to serve and return summons or bring the case to trial does not encounter procedural due process problems. In Wyoming Pac. Oil Co. v. Preston, 50 Cal.2d 736 (1958), an objection that 1945 amendments to Section 581a made certain new time exclusions was disposed of on the ground the amendments were a codification and "clarification" of existing law. In amending present dismissal laws, the Legislature has generally not provided for a "grace" period. But compare CCP § 1141.17 (compulsory judicial arbitration in certain courts and procedure for voluntary judicial arbitration) stating submission to arbitration pursuant to the chapter "shall not toll the running of time periods specified in Section 583 as to actions filed on or after the operative date of the chapter" and also (later) that "submission to arbitration pursuant to court order within six months of the expiration of the statutory period shall toll the running of such period until the filing of the arbitration award." See infra as to proposed treatment of Section 1141.17.

It is recommended that the point as to a "grace period" reflecting a "reasonable opportunity" to respond to changes that may affect "vested" or "important" rights be deferred for the time being. The contents of the final recommendation will serve to indicate form of a statutory provision, if any appears needed.

5. [Omitted]

6. Provisions As To Mandatory Dismissal--Exceptions--Hocharian Case.

In Hocharian v. Superior Court, 28 Cal.3d 714 (1981) (a 4 to 2 decision), the majority, on paper at least, appears to have opened up the three-year "mandatory" dismissal statute (CCP § 581a (a), (b)) for failure to serve and return summons. The decision (majority) reaches the conclusion that Section 581a does not require a plaintiff to complete service and return within three years at all events. In part, it is stated that the Legislature must have been cognizant of the "cost-benefit" balancing inherent in the judicial process. The statute, it is said, requires "reasonable diligence" by plaintiff. The three-year period is not jurisdictional. The decision refers to at least three implied exceptions "to be applied in the court's discretion" to the rule of Section 581a of "mandatory dismissal."

In Hocharian the precise issue was whether the plaintiff could serve an alleged joint tort feasor (another service station operator) as a Doe defendant after the three-year period of Section 581a (an alleged late discovery of such person's acts). The (majority) Hocharian decision set aside the trial court dismissal and outlined the procedure by way of "guideline," as follows:

> If more than 3 years has elapsed, Section 581a in effect operates as a rebuttable presumption that plaintiff has failed to use the "reasonable diligence" required of plaintiff. The presumption may be overcome by plaintiff who bears the burden of proving that plaintiff falls within an implied exception to Section 581a. The implied exception is not limited to causes beyond plaintiff's control. (Wording in certain appellate decisions was disapproved.) Once the plaintiff has proved the use of "reasonable diligence" the trial court must at least consider the issue of prejudice to defendant and keep in mind the "strong public policy" that litigation be disposed of "on the merits." The court may consider such factors as potential ultimate liability of the defendant as against other defendants, the length of delay in service, the difficulty in locating witnesses or evidence, and whether plaintiff had knowledge of the claim from other channels than the information in a deposition taken by a co-plaintiff.

The main dissenting opinion urges that the decision goes beyond prior decisional interpretation of Section 581a (and Section 583); that it

substitutes a vague test for "objective standards" of impossibility, impracticability and futility.

Unless changed by later court decision or by the Legislature, Hocharian seems to establish that the "shall dismiss" provisions of Section 581a do not create a lack of jurisdiction in some circumstances.

On the other hand, Hocharian can be taken to establish a strict test for exceptions to the three-year limit under the "impossible, impractical or futile" test or under the analysis that the three-year statute permits the plaintiff to make a showing of "reasonable diligence."

Of the various drafting options, the one favored by Consultant is the following, recognizing that the Commission, assisted by staff, will determine general approach and "policy":

(1) The "guides" outlined in Hocharian should not be codified, nor should the "reasonable diligence" wording.

In this field, where judicial administration and court functions are involved, the Legislature has been wont to pass stringent laws in general form rather than to attempt detailed statutes. Conversely, the varying paths of and uncertainties in the case law have not been satisfactory, viewed from the point of view of effective administration of justice. It is suggested, however, that no "perfect" solution legislatively can be found. To codify the Hocharian decision would tend to tie the hands of courts in other and potentially different cases, and to make distinctions that would make Hocharian less complicated than it appears to be.

(2) Amend Section 583.230 of the tentative recommendation as follows:

§ 583.230. Computation of time

583.230. In computing the time within which service and return must be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The defendant was not amenable to the process of the court.

(b) The prosecution of the action or a proceeding in the action was stayed or enjoined and the stay or injunction affected service and return.

(c) The validity of the service or return was the subject of litigation by the parties.

(d) A reasonable period determined by the court for the time when service and return, for any other reason was impossible, impracticable, or futile.

Explanation: The above change is one method of recognizing that "impossibility" should not result in an "automatic exclusion" from the three-year period. See comment of Justice Kingsley. It should be followed by

statutory provisions or a "Comment" giving guidance as to the court's determination. The text will depend on emphasis permitted by the "policy" determination to be made. Consultant's individual view is that the court's determination should take into consideration, among other matters, the time when the delay occurred in comparison to time remaining, whether "impossibility" was due in part to causes within or beyond the control of the plaintiff, the probable prejudice to plaintiff and defendant, respectively, from recognizing or not recognizing the alleged "exclusion" and whether the cause of action or claim for relief asserted by plaintiff against the particular defendant has apparent merit. This is not an exact statement. The basic "policy" issue is whether to seek to reverse Hocharian's wording that does not limit the exclusion to causes "beyond the control" of the plaintiff. It is the writer's belief that "beyond the control" wording is not proper and should be taken out of the present Comments.

(3) Tentative text re mandatory dismissal to illustrate an approach to jurisdictional problem:

§ 583.240. Mandatory dismissal

583.240. If service and return are not made in an action within the time prescribed in this article:

(a) The action shall not be further prosecuted and no further proceedings shall be had in the action.

(b) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not.

(c) Notwithstanding subdivision (a) and (b), the court, in the interests of justice, and upon such terms as may be just, may permit or recognize service or return made not later than sixty [ninety] days after the time for service and return would otherwise expire. The burden shall be upon the plaintiff to request and show good cause for such relief either in opposition to a motion to dismiss or, if none is pending, by plaintiff's motion for relief pursuant to this subdivision filed not later than 120 days after the time for service and return would otherwise expire. Written notice of plaintiff's motion shall be served upon the defendant or his attorney in such manner as the court may direct or, if the court does not fix the manner of notice, by first class mail addressed to defendant at his last known address or, if the defendant has appeared specially by an attorney or is represented by an attorney of record, by personal service upon the defendant or such attorney. In ruling on the matter, the court shall consider all relevant factors and, where appropriate, may assess costs, as a condition of permitting such late service or return.

Explanation: These provisions, in rough text, are intended to fill in apparent gaps in the Hocharian case, by placing a time limit on late

"relief" and imposing a burden on a plaintiff. The Comment should note criteria are stated in Hocharian (except as "policy" decisions direct otherwise). However, the above draft refers to costs as a condition. (The foregoing is contrary to earlier "policy" decisions, i.e., decisions without Hocharian before the Commission.)

It should be pointed out that it is difficult to draft wording making service after the time "void." In this area with high court decisions running the way they are, "void" might not be interpreted as expected. Presence of "void" in the statute might lead some persons (including attorneys) to ignore process, to their later detriment if "void" is given a limited interpretation or held to be unconstitutional in certain settings.

The writer reserves comment on other approaches to Hocharian.

7. Provisions Re Mandatory Dismissal.

Amendments tentatively suggested:

§ 583.340. Computation of time

583.340. In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The defendant was not amenable to the process of the court.

(b) The jurisdiction of the court to try the action was suspended.

(c) Prosecution or trial of the action was stayed or enjoined.

(d) A reasonable period determined by the court for the time when bringing the action to trial for any other reason was impossible, impractical or futile. ~~In making a determination pursuant to this subdivision the court shall make a reasonable allowance for the period of delay caused by the special circumstances that hindered the plaintiff in bringing the action to trial within the time prescribed in this article.~~

Explanation: New subdivision (a) consists of wording now in subdivision (f) of Section 583. It was omitted through inadvertence. Case law is now increasing under this provision (found also in Section 581a). The wording in new subdivision (d) (former subdivision (c)) is revised tentatively to conform to pattern of revised Section 583.230 (see supra).

§ 583.350. Mandatory dismissal

583.350. (a) An action shall be dismissed by the court on its own motion or on motion of the defendant if the action is not brought to trial within the time prescribed by this article.

(b) Notwithstanding subdivision (a), the court, in the interests of justice, and upon such terms as may be just, may extend the time within which the action must be brought to trial for such period of time, not exceeding one year [_____] , as may appear appropriate

to permit trial on the merits. The burden shall be upon plaintiff to show good cause for such extension, unless the condition of the court's general civil trial calendar makes necessary a continuance date beyond the date fixed by subdivision (a).

Possible additional provision if a limitation is considered desirable:

This subdivision (b) shall apply only in trial courts designated by the Judicial Council as a trial court having a congested civil trial calendar.

8. Time For Discretionary Dismissal-Reconsideration Of Proposed Wording--Section 583.420.

Consultant recommends that the proposed wording as to the statutory time that must elapse, be replaced by suitable language that will prescribe a two-year "minimum," in instances (subdivisions (a) and (b)) where present law appears to require a two-year wait after commencement of action before a discretionary dismissal may be granted for failure to serve and return summons or to bring the action to trial. The present wording is not clear, i.e., whether the reference is to the maximum time expressed in terms of years or to the maximum time after calculation for "exclusions." If the latter is intended, the wording will require unnecessary work in application.

Again, it is suggested that the increase in Section 583.420(b), namely, one year in case of motion based on failure to bring the action to trial is not necessary, taking all courts statewide into consideration. Moreover, such an increase suggests a slackened pace is appropriate.

Also, in Consultant's view, the new provision in subdivision (a) specifically referring to a discretionary motion for failure to make service and return could safely be changed to eighteen months, a decrease. This change would stress the need for expedition in serving process.

9. Section 583.110. Suggested Change In Definitions.

Mr. Arnold calls attention to the awkwardness of the "definitions" particularly "action." Mr. Sterling notes a simplified treatment is needed. In Consultant's view, the essentials can be covered as follows:

§ 583.110. Definitions

583.110. As used in this chapter, unless the context otherwise requires:

(a) "Action" includes an action commenced by cross-complaint or other pleading asserting a cause of action or claim for relief.

(b) "Complaint" includes cross-complaint or other initial pleading.

(c) "Defendant" includes a cross-defendant or other person against whom an action is brought.

(d) "Plaintiff" includes a cross-complainant or other person by whom an action is brought.

Explanation: The reference in Tentative Draft to "action" including a cause of action or claim for relief is ambiguous. It is not essential to the statute. The editorial matter will require change. The Comment under mandatory and discretional dismissals for failure to "bring to trial" could include a comment that particular facts may warrant only dismissal of a particular cause of action or claim for relief.

10. Section 583.120. Application Of Chapter. Revision Of Wording.

Mr. Arnold calls attention to awkwardness of present wording. Mr. Sterling notes simplification is needed. In Consultant's view the following text (in rough form) is appropriate:

§ 583.120. Application of chapter

583.120. Except as incorporated by reference by statute or rule of the Judicial Council, this chapter does not apply to a special proceeding of a civil nature, unless the court in its discretion pursuant to inherent authority determines to apply a provision of this chapter to the proceeding or a particular matter in the proceeding, as nearly as may be.

Explanation: Cross refer to Consultant's suggested Article 5 (§ 583.510) on inherent authority.

11. Section 583.210. Time For Service And Return (Mandatory).

Subdivision (a) of Section 583.210 is not an unnecessary statement of the time when an action is commenced. The present Tentative Text omits separate provisions for cross-complaints and relies upon the definition of "complaint" to include a cross-complaint. See comment in Tentative Text. Mr. Arnold's suggested deletion is not favored.

Subdivision (b) of Section 583.210 needs smoothing out. The following is suggested:

(b) This section does not apply if the defendant enters in a stipulation in writing , or does other act, that amounts to a general appearance in the action.

The present wording has "qualifier" problems.

12. Suggestion To Require All Phases Of A "Split" Trial To Be Brought To Trial.

Consultant strongly opposes the inclusion of any specific provisions or comment on the contention of Keatinge and Zweig. First, the California law on "bringing an action" to has imbedded in it the "partial trial"

concept. See Hartman v. Santamarina, 30 Cal.3d 762 (1982). Delay beyond the initial trial phase such as a trial that is not completed or is severed for trial of cross-complaint or particular issues is a complex subject. Provisions now in effect relating to retrials present a single manageable subject. The same is not true where an action may be ordered split (many times on defendant's motion) to determine particular issues. When separate issues are raised by cross-complaint, existing case law applies the same rule to a cross-complaint as to a complaint. This law would have to be reviewed, since it would presumably be changed by the proposed "exclusion" or "extension" treatment. But aside from the need for an in-depth study, before any such amendment as proposed is deemed worthy of legislative sponsorship, the problem of delay (on the part of either plaintiff or defendant) after a case is "brought to trial" falls outside the present proposed revision of Section 581a and Section 583. The suggestion to "exclude" the first part of a split trial and make the statute apply to bringing each separate phase to trial within the basic five-year period will materially shorten the time available to plaintiffs and cross-complainants.

13. Suggestion To Place A Definition Of "Brought To Trial In The Statute."

This staff suggestion (Mr. Sterling) in the writer's opinion is unsound unless a definition can be found that will meet with almost universal acceptance. It is doubted one can be found that will not be a focus point of more litigation and activity for dismissal on technical grounds. The provisions of Section 581 as to commencement of trial in the writer's opinion will not fit into existing case law. Any new wording placed in the statute will be a trap for the unwary.

Respectfully submitted,

Garrett H. Elmore

[L.A. No. 31309. Jan. 19, 1981.]

SEROB HOCHARIAN, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
SONYA PEREZ, Real Party in Interest.

SUMMARY

Defendant service station owner, who was served with a summons as Doe VI in a third party cause of action arising out of an automobile accident some nine weeks after the expiration of the three-year summons service period provided for in Code Civ. Proc., § 581a, petitioned the Supreme Court for a writ of mandate after the trial court denied his motion to dismiss. Plaintiff, who was driving her employer's leased car at the time of the accident, which was allegedly caused by faulty brakes, first learned that defendant had once checked the brakes when one of her fellow employees was deposed by another defendant after the three-year period had expired. Although plaintiff's employer, who had intervened in the suit and who allegedly cooperated with plaintiff in its prosecution, was apparently aware of this information for several years, it never informed plaintiff of the service station owner's potential liability.

The Supreme Court issued a peremptory writ of mandate compelling the trial court to hold a hearing on the issue of whether plaintiff had acted with reasonable diligence in prosecuting her case. The court held that Code Civ. Proc., § 581a, operates as a rebuttable presumption that plaintiff failed to use reasonable diligence and that such presumption may be overcome by plaintiff, who bears the burden of proving that he falls within an implied exception to § 581a. Further, in applying the implied exceptions of impossibility, impracticability and futility, the court held that the primary concern must be whether or not unreasonable conduct by plaintiff gave rise to the noncompliance and that the particular factual context or cause of the noncompliance with the statute should not be determinative. However, the court also held that preju-

dice to defendant must at least be considered by the trial court, even if a plaintiff demonstrates reasonable diligence. (Opinion by Bird, C. J., with Tobriner, Mosk and Newman, JJ., concurring. Separate dissenting opinion by Richardson, J., with Clark, J., concurring. Separate dissenting opinion by Clark, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Dismissal and Nonsuit § 15—Involuntary Dismissal—Delay in Service, Return or Entry of Judgment (Code Civ. Proc., § 581a) —Mandatory Dismissal—Jurisdictional Nature of Statute.** —Although Code Civ. Proc., § 581a, under which a summons on a complaint must be served and return made within three years after an action is filed, can be termed mandatory in the sense that a trial court must dismiss if the plaintiff fails to prove reasonable diligence in attempting to serve and return summons, it is not jurisdictional.

(2a, 2b) **Dismissal and Nonsuit § 19—Involuntary Dismissal—Delay in Service, Return, or Entry of Judgment (Code Civ. Proc., § 581a)—Discretionary Dismissal—Reasonableness of Plaintiff's Conduct.**— In applying the implied exceptions of impossibility, impracticability and futility to the mandatory dismissal provision of Code Civ. Proc., § 581a, to a given factual situation, the critical question is whether a plaintiff used reasonable diligence in prosecuting his or her case. The particular factual context or cause of the noncompliance with the statute should not be determinative; rather, the primary concern must be whether or not unreasonable conduct by plaintiff gave rise to the noncompliance. Thus, in a third party cause of action arising when plaintiff, who was driving a car leased by her employer, was injured in an automobile accident allegedly caused by faulty brakes and in which a service station operator who had on one occasion checked the brakes on the car at issue was served with a summons as Doe VI some nine weeks after the expiration of the three-year summons service period provided for in Code Civ. Proc., § 581a, the trial court erred in denying such defendant's motion to dismiss without any factual finding as to the nature of plaintiff's conduct pursuant to a hearing on the issue of

reasonable diligence. Although plaintiff first learned of defendant's identity in a deposition of one of her fellow employees which took place after the three-year period had expired and although plaintiff alleged that she and her employer, who had intervened in the suit, cooperated with each other in its prosecution, the record was inadequate to allow a determination whether, under the circumstances, it was reasonable to expect plaintiff to have deposed such employee or other employees with knowledge of defendant's potential involvement at an earlier date. (Disapproving, to the extent that they are inconsistent, *Crown Coach Corp.* v. *Superior Court* (1972) 8 Cal.3d 540 [105 Cal.Rptr. 339, 503 P.2d 1347], *Ippolito* v. *Municipal Court* (1977) 67 Cal.App.3d 682 [136 Cal.Rptr. 795], *Hunot* v. *Superior Court* (1976) 55 Cal.App.3d 660 [127 Cal. Rptr. 703], *Watson* v. *Superior Court* (1972) 24 Cal.App.3d 53 [100 Cal.Rptr. 684], and *Highlands Inn, Inc.* v. *Gurries* (1969) 276 Cal.App.2d 694 [81 Cal.Rptr. 273].)

(3) **Dismissal and Nonsuit § 19—Involuntary Dismissal—Delay in Service, Return, or Entry of Judgment (Code Civ. Proc., § 581a) —Discretionary Dismissal—Rebuttable Presumption That Plaintiff Failed to Use Reasonable Diligence.**—Code Civ. Proc., § 581a, which sets forth a three-year period for the service and return of a summons on a complaint and which must be complied with unless plaintiff shows that a greater-than-three-year delay was not due to his or her unreasonable conduct, operates as a rebuttable presumption that plaintiff failed to use reasonable diligence. Such presumption may be overcome by plaintiff, who bears the burden of proving that he falls within an implied exception to § 581a.

[See **Cal.Jur.3d,** Actions, § 250; **Am.Jur.2d,** Dismissal, Discontinuance, and Nonsuit, § 60.]

(4) **Dismissal and Nonsuit § 23—Involuntary Dismissal—Delay in Bringing Action to Trial (Code Civ. Proc., § 583)—Application and Construction of Statutes.**—Under Code Civ. Proc., § 583 (discretionary dismissals), the trial court may consider a myriad of facts not limited to the reasonableness of the plaintiff's conduct, and the burden is on the defendant to show that dismissal is warranted.

(5) **Dismissal and Nonsuit § 19—Involuntary Dismissal—Delay in Service, Return, or Entry of Judgment (Code Civ. Proc., § 581a)**

—**Discretionary Dismissal—Prejudice to Defendant.**—A trial court must at least consider the issue of prejudice to defendant in deciding whether or not to dismiss a suit in which a delay in serving the summons has exceeded the three-year statutory limit (Code Civ. Proc., § 581a), even though plaintiff has demonstrated reasonable diligence at every stage of the lawsuit. The decision whether or not to dismiss must be based on a balancing of the harm to plaintiff if the motion is granted against the prejudice to defendant if he is forced to defend the suit.

COUNSEL

James F. Callopy, Charles W. Pearce and Callopy, Salomone, McNeil & Landres for Petitioner.

No appearance for Respondent.

Bledstein & Lauber and Leslie Ellen Shear for Real Party in Interest.

OPINION

BIRD, C. J.—This court must decide what criteria govern operation of the mandatory dismissal provision of Code of Civil Procedure section 581a, under which a summons on a complaint must be served and return made within three years after an action is filed, in view of the implied exceptions to the statute as recognized in *Wyoming Pacific Oil Co.* v. *Preston* (1958) 50 Cal.2d 736 [329 P.2d 489].

I.

A third party cause of action was filed against General Motors Corporation, Paramount Chemical Corporation, Harold Beasley, dba Arco Service Station, and Does I through XXX on August 30, 1976. The complaint alleged that real party in interest (hereinafter plaintiff), Sonya Perez, was injured in an automobile accident in Whittier, California on September 3, 1975, while driving an automobile which was leased by her employer, Georgia-Pacific Corporation. The accident was alleged to have been caused by faulty brakes. Georgia-Pacific subsequently intervened in the lawsuit and sought recovery of sums paid to

Ms. Perez as a result of a workers' compensation claim arising out of the accident. Plaintiff alleges that she and Georgia-Pacific cooperated with each other in the prosecution of the lawsuit, although the particular details of that cooperation are not part of the record before this court.

On September 14, 1979, General Motors took the deposition of Robert Ermer, an employee of Georgia-Pacific who usually drove the automobile in which Ms. Perez was injured. He was questioned about the maintenance work on the car and testified that defendant Beasley usually serviced the car but that on one occasion the brakes were checked by petitioner, Serob Hocharian, a Texaco service station owner. Hocharian was deposed in October of 1979 and he was served with a summons as Doe VI on November 5, 1979. This was some nine weeks after the expiration of the three-year summons service period provided for in Code of Civil Procedure section 581a.[1]

There is no question that plaintiff had no knowledge of Hocharian or his possible involvement until the Ermer deposition in September of 1979. Georgia-Pacific was apparently aware of this information in early November of 1975 when it contacted Hocharian and his insurance company seeking to recover for damages to the car. However, Georgia-Pacific never informed Ms. Perez about the potential liability of Hocharian.

After receipt of the summons, Hocharian moved to dismiss the action against him because section 581a, subdivision (a), had not been complied with. Plaintiff countered that there was an implied exception to this section, citing *Wyoming Pacific Oil Co.* v. *Preston, supra*, 50 Cal.2d 736, 740-741, and arguing that since the failure was due to plaintiff's inability to learn of petitioner's involvement, it was "impossible" to comply with the statute. The trial court summarily denied

[1]Section 581a, subdivision (a) provides: "No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action."
All further references are to the Code of Civil Procedure unless otherwise indicated.

Hocharian's motion to dismiss and this petition for writ of mandate followed.

II.

The Legislature has mandated that a summons on a complaint must be served and return made within three years after an action is filed or the action must be dismissed. (§ 581a.) In *Wyoming Pacific Oil Co.* v. *Preston, supra*, 50 Cal.2d 736, 741, this court examined several of the "implied exceptions" to the "apparently mandatory" language of section 583, a statute which imposes a five-year period within which an action must be brought to trial. *Wyoming Pacific* held that trial courts have discretion to apply a similar set of exceptions to section 581a. (*Id.*, at pp. 740-741.) However, any discretion had to be "'exercised in accordance with the spirit of the law and with a view of subserving, rather than defeating, the ends of substantial justice.'" (*Id.*, at p. 741.) Thereafter, each case was to be "decided on its own particular facts, and no fixed rule [could] be prescribed to guide the court in its exercise of this discretionary power under all circumstances." (*Ibid.*)

Both sections 581a and 583 impose strict time limits on plaintiffs prosecuting lawsuits. In applying these statutes, the courts recognized that an inflexible interpretation often led to unfair results. Therefore, some courts held that if compliance was impossible for jurisdictional or other reasons, noncompliance would be excused. (See generally *Rose* v. *Knapp* (1951) 38 Cal.2d 114, 117 [237 P.2d 981]; *Christin* v. *Superior Court* (1937) 9 Cal.2d 526, 530 [71 P.2d 205, 112 A.L.R. 1153]; *Kinard* v. *Jordan* (1917) 175 Cal. 13, 15-16 [164 P. 894]; *Estate of Morrison* (1932) 125 Cal.App. 504, 510-511 [14 P.2d 102].) This "impossibility" exception was later extended to cases in which compliance was either "impracticable" or "futile." (See *Christin* v. *Superior Court, supra*, 9 Cal.2d at p. 533; see also *Rose* v. *Knapp, supra*, 38 Cal.2d at p. 117; *City of Pasadena* v. *City of Alhambra* (1949) 33 Cal.2d 908, 916-917 [207 P.2d 17]; *Pacific Greyhound Lines* v. *Superior Court* (1946) 28 Cal.2d 61, 67 [168 P.2d 665].)

As early as 1920, the appellate courts recognized that "[t]he object intended to be attained by section 581a of the Code of Civil Procedure is, obviously, to compel *reasonable diligence* in the prosecution of an action after it has been commenced, and thus afford the party or parties against whom it is brought an opportunity to present such evidential

support to any defense he or they may have thereto as may be available at the time the action is instituted, but which may be lost or destroyed through the death of witnesses or otherwise before the action is brought to issue by reason of an unreasonably long delay in serving the defendant or defendants with appropriate legal process notifying him or them of the pendency of the action." (*People* v. *Kings County Dev. Co.* (1920) 48 Cal.App. 72, 76 [191 P. 1004], italics added.)

Fifty years later, in *Black Bros. Co.* v. *Superior Court* (1968) 265 Cal.App.2d 501, 505,[2] this concept was reiterated. "It is the policy of the law, as declared by the courts, that when a plaintiff exercises *reasonable diligence* in the prosecution of his action, the action should be tried on the merits. This policy is counter-balanced, however, by the policy declared by the Legislature and the courts that when a plaintiff fails to exercise *reasonable diligence* in the prosecution of his action it may be dismissed by the trial court." (Italics added.)

Thus, the idea of *reasonable diligence* has been the cornerstone of statutory analysis of section 581a. (See *Crown Coach Corp.* v. *Superior Court* (1972) 8 Cal.3d 540, 548 [105 Cal.Rptr. 339, 503 P.2d 1347]; *Wyoming Pacific Oil Co.* v. *Preston, supra*, 50 Cal.2d at p. 740-741; *Ostrus* v. *Price* (1978) 82 Cal.App.3d 518, 521 [146 Cal.Rptr. 922]; *Hunot* v. *Superior Court* (1976) 55 Cal.App.3d 660, 664 [127 Cal. Rptr. 703]; *McKenzie* v. *City of Thousand Oaks* (1973) 36 Cal.App. 3d 426, 429 [111 Cal.Rptr. 584]; *Watson* v. *Superior Court* (1972) 24 Cal.App.3d 53, 58, 59 [100 Cal.Rptr. 684]; *Flamer* v. *Superior Court* (1968) 266 Cal.App.2d 907, 911, 915 [72 Cal.Rptr. 561]; *Daley* v. *County of Butte* (1964) 227 Cal.App.2d 380, 390 [38 Cal.Rptr. 693].) Exceptions to the literal language of time-limit statutes were developed in recognition not only of "objective impossibility in the true sense, but also impracticability due to excessive and unreasonable difficulty or expense." (*Christin* v. *Superior Court, supra*, 9 Cal.2d at p. 533.) As every litigator knows, the prosecution or defense of a lawsuit involves the difficult problem of balancing the effectiveness of any given tactic or procedure against its cost in terms of time and expense. Even the attorney who utilizes every reasonable and cost-effective discovery procedure must acknowledge the possibility that he or she will fail to

[2]Disapproved on unrelated grounds in *Denham* v. *Superior Court* (1970) 2 Cal.3d 557, 563 [86 Cal.Rptr. 65, 468 P.2d 193], and in *Woolfson* v. *Personal Travel Service, Inc.* (1971) 3 Cal.3d 909, 911-912 [92 Cal.Rptr. 286, 479 P.2d 646].

discover the identity of a potential defendant within the statutory three-year period.

Certainly the state has an interest in assuring that lawsuits are prosecuted expeditiously. (*Schultz* v. *Schultz* (1945) 70 Cal.App.2d 293, 297 [161 P.2d 36].) As a result, plaintiffs are required by statutes, such as sections 581a and 583, to use reasonable diligence in bringing lawsuits to trial. However, the Legislature, cognizant of the cost-benefit balancing process inherent in the litigation system, would not have required a plaintiff to be more than reasonably diligent.

(1) (See fn. 3.) In recognition of this fact, the courts have suggested at least three "implied exceptions" to section 581a's rule of mandatory dismissal[3]—impossibility, impracticability, and futility[4]—to be applied in the trial court's discretion. (*Crown Coach Corp.* v. *Superior Court, supra*, 8 Cal.3d at pp. 546-547; *Tresway Aero, Inc.* v. *Superior Court, supra*, 5 Cal.3d at p. 437; *Wyoming Pacific Oil Co.* v. *Preston, supra*, 50 Cal.2d at p. 740; *Watson* v. *Superior Court, supra*, 24 Cal.App.3d at p. 58.) Notwithstanding the wisdom of the *Wyoming Pacific* court's admonition against the formulation of "fixed rules" (50 Cal.2d at p. 741; see p. 719) *ante*, it now appears necessary to articulate some general guidelines for the exercise of this discretion which are consistent with the underlying statutory intent.

[3]The Courts of Appeal have for some time struggled with the question as to whether or not section 581a is both mandatory and jurisdictional. (Cf. *Flamer* v. *Superior Court, supra*, 266 Cal.App.2d at p. 912 with *Semole* v. *Sansoucie* (1972) 28 Cal.App.3d 714, 722 [104 Cal.Rptr. 897]; *Bernstein* v. *Superior Court* (1969) 2 Cal.App.3d 700, 704 [82 Cal.Rptr. 775]; *Highlands Inn, Inc.* v. *Gurries* (1969) 276 Cal.App.2d 694, 697 [81 Cal.Rptr. 273]; *Black Bros. Co.* v. *Superior Court, supra*, 265 Cal.App.2d at p. 505; *Dresser* v. *Superior Court* (1964) 231 Cal.App.2d 68, 73 [41 Cal.Rptr. 473].) The statute can be termed "mandatory" in the sense that a trial court must dismiss if the plaintiff fails to prove reasonable diligence in attempting to serve and return summons. The court in *Flamer, supra*, however, was correct when it suggested that in view of *Wyoming Pacific*, "section 581a can no longer be regarded as jurisdictional." (266 Cal.App.2d at p. 912.)

[4]In *Tresway Aero, Inc.* v. *Superior Court* (1971) 5 Cal.3d 431 [96 Cal.Rptr. 571, 487 P.2d 1211], this court recognized another implied exception to section 581a in holding that a defendant may be estopped from seeking dismissal if his conduct or assertions induce detrimental reliance on the part of the plaintiff who thereby fails to serve and return summons within the three-year period. On the one hand, the estoppel doctrine is unaffected by today's decision since it is addressed primarily to the conduct of the defendant rather than the plaintiff. On the other hand, the concept of reasonableness is equally applicable since, as noted in *Tresway*, plaintiff's reliance must be reasonable for the doctrine of estoppel to apply. (*Id.*, at p. 440.)

(2a) In applying any of these exceptions to a given factual situation, the critical question is whether a plaintiff used reasonable diligence in prosecuting his or her case. The particular factual context or cause of the noncompliance should not be determinative;[5] rather, the primary concern must be the nature of the plaintiff's conduct.[6]

(3), (4) (See fn. 7.) The statute sets forth the three-year limitation period which must be complied with unless plaintiff shows that the greater-than-three-year delay was not due to his or her unreasonable conduct. Thus in effect, the statute operates as a rebuttable presumption: if plaintiff fails to serve and return summons on a defendant within three years of the commencement of the action, plaintiff may be presumed to have failed to use reasonable diligence. This presumption may be overcome by plaintiff, who bears the burden of proving that he falls within an implied exception to section 581a.[7] (*Busching* v. *Superior Court* (1974) 12 Cal.3d 44, 53 [115 Cal.Rptr. 241, 524 P.2d 369]; *Ostrus* v. *Price, supra*, 82 Cal.App.3d at p. 521; *County of Los Angeles* v. *Security Ins. Co.* (1975) 52 Cal.App.3d 808, 816 [125 Cal.Rptr. 701]; *McKenzie* v. *City of Thousand Oaks, supra*, 36 Cal.App.3d at pp. 430-431; *Watson* v. *Superior Court, supra*, 24 Cal.App.3d at

[5]It is somewhat inconsistent to recognize that the implied exceptions to section 581a are not limited to "objective impossibility" (see *Christin* v. *Superior Court, supra*, 9 Cal.2d at p. 533) while at the same time suggesting that application of the exceptions is appropriate only where the cause of the noncompliance is "beyond [the plaintiff's] control." (*Crown Coach Corp.* v. *Superior Court, supra*, 8 Cal.3d at p. 546.) Thus, to the extent that the following cases are inconsistent with the opinion in this case, they are disapproved: *Crown Coach Corp.* v. *Superior Court, supra; Ippolito* v. *Municipal Court* (1977) 67 Cal.App.3d 682 [136 Cal.Rptr. 795]; *Hunot* v. *Superior Court, supra*, 55 Cal.App.3d 660; *Watson* v. *Superior Court, supra*, 24 Cal.App.3d 53; *Highlands Inn, Inc.* v. *Gurries, supra*, 276 Cal.App.2d 694.

[6]Most of the cases have involved situations where the plaintiff has encountered some difficulty in serving a *known* defendant. (See, e.g., *Tresway Aero, Inc.* v. *Superior Court, supra*, 5 Cal.3d 431; *Ostrus* v. *Price, supra*, 82 Cal.App.3d 518; *Ippolito* v. *Municipal Court, supra*, 67 Cal.App.3d 682; *Elling Corp.* v. *Superior Court* (1975) 48 Cal.App.3d 89 [123 Cal.Rptr. 734]; *Bernstein* v. *Superior Court, supra*, 2 Cal.App.3d 700; *Smith* v. *Herzer* (1969) 270 Cal.App.2d 747 [76 Cal.Rptr. 77]; *Hill* v. *Superior Court* (1967) 251 Cal.App.2d 746 [59 Cal.Rptr. 768].) This case, on the other hand, concerns a situation where plaintiff did not learn the identity of the defendant until after the three-year period had expired. (Cf. *Watson* v. *Superior Court, supra*, 24 Cal. App.3d 53.) While the specific considerations may be different, the underlying question is the same: whether or not unreasonable conduct on the part of plaintiff gave rise to the noncompliance. Moreover, trial courts, familiar with the balancing process central to negligence determinations, are well equipped to resolve this question.

[7]Justice Clark's dissent suggests that the standards enunciated by the court in today's decision remove "all substantive effect from section 581a" (*post*, p. 728) because

p. 58.) (2b) In the present case, the trial court denied petitioner's motion to dismiss without any factual finding as to the nature of the plaintiff's conduct. Since the record before this court is inadequate to allow such a finding,[8] and in view of the previous lack of any articulated standards to guide the trial court in exercising its discretion, a writ must issue to compel the trial court to hold a hearing on the issue of reasonable diligence.[9]

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they are the same standards as those which apply to discretionary dismissals under section 583, subdivision (a).

In *Sanborn* v. *Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 416-417 [134 Cal.Rptr. 402, 556 P.2d 764], this court stated that "[s]ubdivision (a) [of § 583] places no restrictions on the exercise of the trial court's discretion and it will be disturbed only in cases of manifest abuse. [Citation.]" (Accord *Denham* v. *Superior Court, supra*, 2 Cal.3d at p. 563.) In contrast to this "unrestricted" discretion accorded trial courts under section 583, subdivision (a), the primary purpose of the foregoing discussion of section 581a has been to articulate a consistent set of guidelines for the exercise of the trial court discretion recognized in, but not limited by, *Wyoming Pacific, supra.*

It is important that the distinction between the two sections be made clear. As was noted earlier in this opinion with respect to section 581a, once a defendant shows a greater-than-three-year delay in the service and return of summons, the burden is on the *plaintiff* to show that the delay was not due to his own unreasonable conduct, and the trial court must so find or order dismissal of the action. Under section 583, subdivision (a), the trial court may consider a myriad of factors not limited to the reasonableness of the plaintiff's conduct (see Cal. Rules of Court, rule 203.5), and the burden is on the *defendant* to show that dismissal is warranted. Moreover, as this court held in *Denham* v. *Superior Court, supra*, 2 Cal.3d at page 563, section 583, subdivision (a) imposes "no requirement that the motion to dismiss 'must' be granted unless opposed by an adequate showing of diligence or excuse for delay." Contrary to the implication in Justice Clark's assertion, this is precisely the requirement which today's decision imposes on trial courts hearing section 581a motions.

[8]It is interesting to note that the briefs of petitioner and plaintiff assume opposite conclusions on the reasonable diligence issue without the benefit of a factual finding in the trial court. Petitioner argues that "failure to effectuate timely service upon petitioner was by neglect and lack of diligence on the part of the plaintiff," concluding that "[a] lack of diligence in the prosecution of a lawsuit will preclude the application of [any of the implied exceptions to] C.C.P. § 581a(a)." Plaintiff, on the other hand, asserts that her "conduct was not unreasonable" in view of the fact that she was cooperating with intervener Georgia-Pacific in the prosecution of the lawsuit.

Under normal circumstances, failure by the plaintiff through the use of discovery procedures to ascertain the identity of a potential defendant suggests a lack of reasonable diligence on plaintiff's part. Plaintiff in this case, however, argues that Georgia-Pacific's role as a cooperating intervener compels an opposite conclusion. Since the record is inadequate to allow this court to determine whether, under the circumstances, it would be reasonable to expect the plaintiff to have deposed Robert Ermer or other Georgia-Pacific employees with knowledge of petitioner Hocharian's potential involvement at an earlier date, it is necessary to remand to the trial court for further proceedings.

[9]It should also be noted that the issue of balancing prejudice to the parties, a discussion of which follows, would in itself require an additional hearing by the trial court.

(5) Although the decision to issue the writ adequately disposes of this case, it is appropriate to briefly comment on the issue of prejudice, since it may become a factor in the lower court.

The primary purpose of section 581a is to assure reasonable diligence in the prosecution of lawsuits. This concern is motivated, at least in part, by a desire to insure that defendants faced with a lawsuit have a reasonable opportunity to locate evidence and witnesses in preparing a defense. As this court stated in *Crown Coach Corp.* v. *Superior Court, supra,* 8 Cal.3d at page 546: "The dismissal statutes, like statutes of limitation, 'promote the trial of cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed. . . .' (*General Motors Corp.* v. *Superior Court* (1966) 65 Cal.2d 88, 91 [52 Cal.Rptr. 460, 416 P.2d 492].)" (See also *Ippolito* v. *Municipal Court, supra,* 67 Cal. App.3d at p. 687; *Flamer* v. *Superior Court, supra,* 266 Cal.App.2d at p. 915; *Black Bros. Co.* v. *Superior Court, supra,* 265 Cal.App.2d at pp. 505-506.) Thus, even in a situation where plaintiff has demonstrated reasonable diligence at every stage of the lawsuit, a delay in serving summons may result in substantial prejudice to a defendant. If this delay exceeds the three-year statutory limit, the court must at least consider the issue of prejudice in deciding whether or not to dismiss the defendant from the lawsuit.

Thus, once a plaintiff has proven his use of reasonable diligence, the trial court still has discretion to dismiss as to the defendant pursuant to section 581a. In exercising this discretion, the court must be aware of the fact that it is dealing with two essentially innocent parties—a plaintiff who has demonstrated reasonable diligence and a defendant who has only recently been given notice of the lawsuit. The court must also keep in mind the strong public policy that litigation be disposed of on the merits wherever possible. (*Denham* v. *Superior Court, supra,* 2 Cal.3d at p. 566; accord *Crown Coach Corp.* v. *Superior Court, supra,* 8 Cal.3d at p. 548; *McDonough Power Equipment Co.* v. *Superior Court* (1972) 8 Cal.3d 527, 538 [105 Cal.Rptr. 330, 503 P.2d 1338] (dis. opn. by Peters, J.).)

The decision whether or not to dismiss must be based on a balancing of the harm to the plaintiff if the motion is granted against the prejudice to the defendant if he is forced to defend the suit.[10] As long as the

[10]The court may consider such factors as the potential ultimate liability of the defendant vis-à-vis other defendants, the probability of the defendant being found liable, the length of the delay in service, the difficulty in locating witnesses or evidence, and whether the defendant had actual knowledge of the potential claim through other chan-

court engages in this balancing process, its decision should not be disturbed on appeal absent an abuse of discretion. (See *Denham* v. *Superior Court, supra*, 2 Cal.3d at p. 566.)

III.

Let a peremptory writ of mandate issue to compel the trial court to hold a hearing in accord with the views expressed herein. Each party shall bear its own costs.

Tobriner, J., Mosk, J., and Newman, J., concurred.

RICHARDSON, J.—I respectfully dissent. In my view the trial court erred in denying defendant's motion to dismiss the action on the ground that plaintiff failed to serve summons within the three-year period specified in section 581a, subdivision (a), of the Code of Civil Procedure.

Plaintiff was injured in a motor vehicle accident in September 1975. She filed her action for damages in August 1976, naming the manufacturer and owner of the vehicle, the service station and mechanic who serviced it, and various "Doe" defendants. In September 1979, in the course of a deposition of plaintiff's own coemployee conducted by one of the named defendants, plaintiff learned that defendant Hocharian had serviced the vehicle's brakes prior to the accident. Accordingly, on November 5, 1979, plaintiff served him as a Doe defendant.

In pertinent part, section 581a, subdivision (a), provides that "*No action . . . shall be further prosecuted . . . unless the summons* on the complaint *is served and return made within three years* after the commencement of said action . . . ." (Italics added.) The Legislature added an important qualification to the foregoing rule in subdivision (d) of the same section: "The time during which the defendant was *not amenable to the process of the court* shall not be included in computing the time period specified in this section." (Italics added.) Although the clear implication of these provisions is that mere delay in locating or identifying an otherwise amenable defendant does not extend the three-year period, the majority's new "reasonable diligence" rule accomplishes precisely such a result. The majority's holding is not only unprecedented and in-

nels. (See generally *Anderson* v. *Air West, Inc.* (9th Cir. 1976) 542 F.2d 522, 526; *Pearson* v. *Dennison* (9th Cir. 1965) 353 F.2d 24, 28-29.)

deed *contrary* to prior law, it also contravenes the very policy underlying section 581a to assure that defendants receive timely notice of the institution of an action against them.

Despite the seemingly mandatory language of section 581a, subdivision (a), certain nonstatutory exceptions to its directive have been recognized. (See *Busching* v. *Superior Court* (1974) 12 Cal.3d 44, 53 [115 Cal.Rptr. 241, 524 P.2d 369]; *Wyoming Pacific Oil Co.* v. *Preston* (1958) 50 Cal.2d 736, 740-741 [329 P.2d 489].) Until today's decision, however, these exceptions were carefully limited to two restricted categories, excusing plaintiff's delay where (1) defendant is *estopped* to complain (*Tresway Aero., Inc.* v. *Superior Court* (1971) 5 Cal.3d 431, 441-442 [96 Cal.Rptr. 571, 487 P.2d 1211]), or (2) there are circumstances *beyond plaintiff's control* which made it "impracticable, impossible, or futile" to comply with section 581a (*Ippolito* v. *Municipal Court* (1977) 67 Cal.App.3d 682, 687 [136 Cal.Rptr. 795]; *Highlands Inn, Inc.* v. *Gurries* (1969) 276 Cal.App.2d 694, 698 [81 Cal.Rptr. 273]). Plaintiff, here, concedes that there is no basis for finding that defendant should be estopped from relying on section 581a. Similarly, plaintiff must acknowledge that timely service upon defendant Hocharian was wholly *within her control*, for defendant was amenable to process throughout the entire period in question.

The majority excuses compliance with section 581a if plaintiff exercised "reasonable diligence" in prosecuting her action, and if defendant was not unduly prejudiced by the delay. As I will seek to demonstrate, such a judicially declared broad exception to the statutory three-year requirement finds no support in the cases.

In *Wyoming Pacific, supra*, we held that despite the mandatory language of section 581a, "discretion has entered into the application of this provision so as to prevent it from being used to compel the dismissal of actions where the plaintiff has not had a reasonable opportunity to proceed to trial. [Citation.] [¶] [T]he trial court is vested with discretion . . . comparable to the discretion with which it is vested in applying the exceptions to section 583 [specifying a five-year period in which to bring one's case to trial]." (50 Cal.2d at pp. 740-741.) Significantly, the cases interpreting section 583 have agreed that an exception exists "where it would be impossible, impracticable or futile *due to causes beyond a party's control* to bring an action to trial during the five-year period. [Citations.]" (*Crown Coach Corp.* v. *Superior Court* (1972) 8

Cal.3d 540, 546 [105 Cal.Rptr. 339, 503 P.2d 1347], italics added; accord, *Christin* v. *Superior Court* (1937) 9 Cal.2d 526, 532 [71 P.2d 205, 112 A.L.R. 1153]; *Hunot* v. *Superior Court* (1976) 55 Cal.App.3d 660, 664 [127 Cal.Rptr. 703].)

I have found no case which has excused compliance with either section 581a or 583 based upon circumstances which are *within* plaintiff's control, such as the failure to discover relevant facts or evidence. As stated in a recent section 583 case, "it has never been held or even hinted that time stands still while the parties are going through the necessary motions of getting a case ready for trial. [¶] On the contrary, it is quite firmly established that 'the time consumed by the delay caused by ordinary incidents of proceedings like disposition of demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar or securing a jury trial are not within the contemplation of the implied exceptions for exclusion from a computation of the applicable period....' [Citations.]" (*Standard Oil Co.* v. *Superior Court* (1976) 61 Cal.App.3d 852, 857 [132 Cal.Rptr. 761]; accord, *Crown Coach Corp.* v. *Superior Court, supra*, 8 Cal.3d 540, 548.) Similarly, time does not "stand still" until, during the course of discovery, plaintiff stumbles across evidence which discloses the identities of legally vulnerable persons who previously had been sued as Doe defendants. The failure to discover such evidence, even when a party exercises reasonable diligence, should not excuse a delay beyond the statutory three-year period.

Section 581a is aimed at assuring that a defendant receives timely notice of the commencement of an action, so that he may, in turn, undertake discovery, preserve evidence, and locate witnesses. (*Ippolito* v. *Municipal Court, supra*, 67 Cal.App.3d 682, 687.) Insofar as the "Doe defendant procedure" is concerned, the California system has received academic criticism, for "it indiscriminately lets any plaintiff add as much as 3 years to any applicable statute of limitations. For example, the California statute of limitations for breach of a written contract is 4 years. This would seem to provide ample time for a plaintiff to identify all potential defendants. A defendant who first learns of the suit almost 3 years after the expiration of such a lengthy period is justified in complaining that a procedural gimmick is being used to deprive him of the protections that a reasonable, set period of limitations is supposed to provide." (Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger Than Truth* (1977) 30 Stan.L.Rev. 51, 101-102, fns. omitted.)

Under the present majority's holding, the period within which service of summons may be made on a Doe defendant may be extended even further than the unusually lengthy prenotification period envisaged by Professor Hogan. Thus, as construed by the majority, the time sequences in the foregoing example could well be four years (for the underlying action) plus three years (§ 581a), *plus an undetermined, indefinite prolonged period* within which the plaintiff may attempt to show that his or her diligence has been "reasonable" and that the defendant has not been unduly "prejudiced" by the delay. The introduction of such rubberized, elastic standards into what is essentially a limitations statute (now *judicially* transformed by the majority into a mere presumption), results in neither fairness nor certainty in civil procedure. The unsettling consequence doubtless will leave innumerable civil actions entirely open-ended subject to the vagaries of a case-by-case inquiry as to the "reasonableness" of plaintiff's conduct and the "prejudice" to defendant. Such a consequence does not serve the timely and orderly resolution of civil disputes.

For all the foregoing reasons, I would reverse the trial court's order denying defendant's motion to dismiss.

Clark, J., concurred.

CLARK, J., Dissenting—I join the view ably expressed by Justice Richardson that today's majority decision is contrary to prior law and contravenes the policy underlying Code of Civil Procedure section 581a. But the majority decision goes even further. By requiring an "unreasonable conduct" test, (*ante*, p. 720), it removes all substantive effect from section 581a.

Code of Civil Procedure section 583, subdivision (a) provides for dismissal of actions not brought to trial within two years. When a plaintiff is guilty of *unreasonable conduct* in failing to bring the case to trial, dismissal under the two year statute is appropriate. (Cal. Rules of Court, rule 203.5; *Sanborn* v. *Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 418-419 [134 Cal.Rptr. 402, 556 P.2d 764]; *Denham* v. *Superior Court* (1970) 2 Cal.3d 557, 564 [86 Cal.Rptr. 65, 468 P.2d 193]; *Corlett* v. *Gordon* (1980) 106 Cal.App.3d 1005, 1013 et seq. [165 Cal.Rptr. 524]; *Brown* v. *Pacific Tel. & Tel. Co.* (1980) 105 Cal.App.3d 482, 487 et seq. [164 Cal.Rptr. 445]; *Lopez* v. *Larson* (1979) 91 Cal.App.3d 383, 396 et seq. [153 Cal.Rptr. 912]; *Moore* v. *El Camino Hosp. Dist.*

(1978) 78 Cal.App.3d 661, 663 [144 Cal.Rptr. 314]; *City of Los Angeles* v. *Gleneagle Dev. Co.* (1976) 62 Cal.App.3d 543 [133 Cal.Rptr. 212].)

Obviously, a case cannot be brought to trial before the defendant has been served or has appeared, and because the majority has now adopted the same test for section 581a as is applied under section 583, subdivision (a), there is no longer any need for section 581a. In any case where there is an unreasonable delay in serving process for three years, dismissal is available under section 583, subdivision (a). While a difference may exist in appellate court review of orders under the two provisions, the test before the trial court is now the same. The majority opinion effectively forges the two sections into one.

Petitioner's application for a rehearing was denied, March 2, 1981. Clark, J., and Richardson, J., were of the opinion that the application should be granted.