#J-600 5/23/83

Memorandum 83-34

Subject: Study J-600 - Dismissal of Civil Actions for Lack of Prosecution (Possible Revisions of Commission Recommendation)

The Commission has issued its recommendation relating to dismissal of civil actions for lack of prosecution. A copy of the recommendation is attached. However, implementing legislation was not introduced this session because the deadline for introducing bills passed before we had an opportunity to find an author for the legislation. Before we seek an author for next session, the Commission should review comments received on the recommendation with the view to possible revision of the recommendation.

We have received letters from three organizations--the Association of Defense Counsel of Northern California (Exhibit 1; the letter actually contains the personal views of Archie S. Robinson, Legislative Committee Chairman, but these views may also be the views of the Association--they will let us know before our meeting), the Association for California Tort Reform (Exhibit 2), and the Association of California Insurance Companies (Exhibit 3). These associations generally support the concept of the comprehensive approach recommended by the Commission, but have a number of problems with the substantive changes included in the recommendation. The specific problems are discussed below.

We have also been in touch with the California Trial Lawyers Association, which will not give us formal comments until a bill has been introduced. However, we understand informally that individual members of the Association support both the concept of the recommendation and the substantive changes proposed. Some of them may attend Commission meetings when the subject is taken up.

We also understand that the State Bar Committee on Administration of Justice has reviewed the recommendation and has comments. However, we have never received their comments through some sort of bureaucratic mix-up on their part. They are still intending to give us comments in time for our meeting. We will supplement this memorandum with these and any other comments, when and if received.

§ 583.210. Time for service of summons

Existing law requires summons to be served within three years after commencement of an action; the Commission's recommendation extends this period to four years. All three of the letters we have received object to this extension. The Commission has previously decided to withdraw this proposal since it is not politically acceptable.

§ 583.250. Mandatory dismissal

Case law states that failure to serve summons within the statutory time periods is not a jurisdictional defect; legislation enacted in 1982 states that the statutes are jurisdictional. The Commission recommended reversal of the 1982 legislation and codification of case law, so that the statutes are not jurisdictional. The basis for this recommendation is the concept that the limitation periods are procedural and do not affect the power of the court; otherwise a judgment of the court would be void and subject to collateral attack at some later time because the time periods were not satisfied.

The Defense Counsel (Exhibit 1) and the Insurance Companies (Exhibit 3) both object to this change. They believe that if the statute is not jurisdictional, the courts are encouraged to devise judge-made exceptions to the statutory rules, as has occurred under existing law.

The staff appreciates the concern expressed, but we do not believe a judgment should be subject to collateral attack if rendered in violation of one of the dismissal sections. The staff proposes to cure this problem by providing that, "The requirements of this article are mandatory and jurisdictional. An act by the court in excess of jurisdiction within the meaning of this section is subject to direct attack in the action but is not subject to collateral attack."

§ 583.310. "Brought to trial" defined

An action must be "brought to trial" within five years after it is commenced. A practice has developed that when the five-year period is about to expire, the case is called, the jury is impanelled or a witness sworn, thereby satisfying the statute, and then the case is continued until a more convenient trial date. In Section 583.310, we have attempted to devise a non-resource consuming procedure for satisfying the "brought to trial" requirement--the case is called and the plaintiff announces "ready".

The Defense Counsel (Exhibit 1) and the Insurance Companies (Exhibit 3) both object to this procedure. Their position is that it is too

permissive and makes it too easy for the plaintiff to avoid the intent of the five-year statute. Their real concern here appears to be not so much that the plaintiff should have to incur expenses in order to satisfy the statute as that it becomes a simple way to nullify the five-year requirement.

In response to this point, the staff suggests that we tighten up the procedure for bringing an action to trial for the purpose of the statute. Instead of simply responding ready, the plaintiff could be required to file a verified declaration that the case is fully prepared and ready to go to trial and, if a continuance is requested, an affidavit stating the reasons that prevent further proceedings at the time set for trial. The statement of reasons would not be subject to challenge either as to facts or sufficiency. This would tighten up the proposed procedure without the resource-wasting requirement that a jury be impanelled and without generating litigation over the affidavit.

§ 583.370. Extension where less than six months remains

The Commission has previously approved a provision for a six-month extension of the five-year trial period in cases where the period is tolled within six months before trial. This was in response to the Moran case involving judicial arbitration proceedings that were concluded only within a few months before the five-year period expired; the action was nonetheless dismissed for failure to satisfy the five-year statute.

The text of the new provision is set out below; it was not included in our printed report. We plan to number the provision as Section 583.360, and renumber former Section 583.360 as 583.370:

> 583.360. If the time within which an action must be brought to trial pursuant to this article is tolled or otherwise extended pursuant to statute with the result that at the end of the period of tolling or extension less than six months remains within which the action must be brought to trial, the action shall not be dismissed pursuant to this article if the action is brought to trial within six months after the end of the period of tolling or extension.
>
> Comment. Section 583.360 provides an extension of time for a plaintiff to bring an action to trial where a period of tolling operates in such a way that at the end of the period the plaintiff would have less than six months to obtain a trial. In this situation the plaintiff has six months within which to bring the action to trial. Section 583.360 is intended to cure problems illustrated by such cases as Moran v. Superior Court, 135 Cal. App.3d 986, ___ Cal. Rptr. ___ (1983) (hearing granted), where tolling pursuant to Section 1141.17 (judicial arbitration) left the plaintiff only a short time to bring the action to trial. Section 583.360 applies

to other situations as well where the statutory period in which to bring the action to trial is extended pursuant to statute. See, e.g., Section 583.360 (computation of time).

The extension of time provided by Section 583.360 does not preclude the action from being brought to trial earlier, nor does it affect the general rule announced in Moran, supra, that the plaintiff has a reasonable period to obtain a trial. Section 583.360 simply provides a "safe harbor" from mandatory dismissal if the plaintiff brings the action to trial within the prescribed period. It does not affect the ability of the plaintiff to show that a longer period may be reasonable under the circumstances of the particular case.

The Supreme Court has granted a hearing in the Moran case, and there is currently pending legislation to deal with the problem of judicial arbitration and the dismissal statute. The staff is monitoring these, and will make appropriate accommodations as they develop.

§ 583.420. Time for discretionary dismissal

Under existing law, an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to trial within two years after it is commenced. The Commission's recommendation limits the exercise of the court's discretion to cases where an action has not been brought to trial within three, rather than two, years. The reason for this change is that two years is unduly short in most cases; as a practical matter, a motion made after two years is unlikely to succeed, and simply increases litigation. A three-year period is more realistic.

The Association for California Tort Reform (Exhibit 2) believes the time for discretionary dismissal for failure to bring to trial should remain at two years. They state that there may be some cases where dismissal after two years would further the interests of justice. "Ridding the court of stagnant cases as early as possible is in the interests of justice." The Commission's consultant, Garrett Elmore agrees that in some courts, dismissal within two years may be appropriate.

On the other hand, some defense counsel have indicated to the staff that limiting the discretionary dismissal motion to three years in most cases would further the interests of justice by limiting litigation to instances where there is a practical possibility of success. Dormant cases on a court's file for an additional year do not impose any real burdens on anyone.

This is a plain policy decision for the Commission. The staff can add nothing to what has already been said about the matter.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

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January 11, 1983

Mr. Nathaniel Sterling
Assistant Executive Secretary
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Dismissal for Lack of Prosecution

Dear Mr. Sterling:

Thank you for your letter of December 27.

The Association of Defense Counsel has for the past several years maintained an active legislative committee, whose reason for being has been to study problems such as dismissal of actions and to make recommendations of the type solicitated in your letter.

Your request has been relayed to members of the legislative committee. It is our hope that a definitive response will be in your hands by March 1.

Some randon observations leep to mind, however, and while they are still fresh I would like to record them.

First, there seems to be no sound public policy behind extending the period within which plaintiff may serve summons from three to four years. Difficulty serving, which rises to the level of "impossible, impracticable or futile", will defeat a motion to dismiss as per Subsection (d) of 583.240.

Second, why strip the dismissal provisions of their ultimate sanction by not making the requirements of 583.360 jurisdictional, as well as mandatory? If the requirements are not made jurisdictional an open invitation is extended to the appellate courts to carve out so-called exceptions to the "mandatory" provisions of the bill. Hocharian v. Superior Court, 28 C3d 714, is not sufficient authority for stopping short of making dismissal jurisdictional.

Hocharian is already disapproved (on other grounds) under Subsection (d) of Section 583.240.

Finally, the "brought to trial" provisions of 583.310, are too lax. If plaintiff's attorney need only answer "ready" to avoid dismissal (and possible malpractice) there is no telling what sort of fiction and games can be hatched to knock the case off calendar (or have a mistrial granted) after threat of dismissal has been eliminated.

These thoughts are merely my own and should not be misconstrued as the committee's. I am sure, too, that the committee will agree with me that your comprehensive approach to the issue of dismissal is well conceived and long overdue.

We look forward to working with you on this project.

Very truly yours,

ARCHIE S. ROBINSON
Chairman, Legislative Committee
Association of Defense Counsel
of Northern California

ASR:lb

cc: Mr. Ed Levy
Mr. Claude Smart
Mr. Anthony Barrett
Mr. Don Walter
Mr. Paul Cyril

Memo 83-34

EXHIBIT 2

Study J-600

ACTR

ASSOCIATION FOR CALIFORNIA TORT REFORM

1130 K Street, Suite 250 ~~1014 Ninth Street~~

Sacramento, California 95814

(916) 448-5100

January 26, 1983

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Dismissal for Lack of Prosecution

Dear Mr. Sterling:

Thank you for sending me the California Law Revision Commission's recommendation respecting involuntary dismissal of actions for lack of prosecution. I circulated the proposal to members of our Board of Directors, and report the following:

Most ACTR members supported the recently enacted legislation providing that failure to discover relevant facts or evidence does not excuse compliance with the three-year service requirement. Calif. Code Civil Procedures Sec. 581 a (f) (2), as enacted by 1982 California Stats. Ch. 600. The CLRC recommendation to enlarge the three year service requirement to four would weaken this recent enactment and further prolong the pendency of litigation. ACTR members generally support the expeditious conclusion of litigation, and favor the imposition of reasonable time incentives on the parties to achieve this goal. "Three years" is felt by our membership to be more reasonable and fair than the "four year" period recommended by the Commission. Accordingly, we urge the Commission to retain the "three year" limitation period in CCP § 581 (a) and make appropriate amendments to proposed CCP § 583.210 (a).

Second, ACTR objects to the proposal which would change from two years to three, the time within which the court, in its discretion, may dismiss an action if not brought to trial. The Commission believes "three years" is "more realistic", but ACTR believes the court should have the discretion to dismiss in two years if, under the circumstances, it furthers the interests of justice. Ridding the court of stagnant cases as early as possible is in the interests of justice.

Thank you for your consideration in sending us the proposal.

Very truly yours,

Fred J. Hiestand

FRED J. HIESTAND

FJH:ea

cc: Burnham Enersen and Ed Levy

Los Angeles Office: 3345 Wilshire Boulevard, Suite 407 Los Angeles, California 90010

EXHIBIT 3

association of california insurance companies

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EDWARD LEVY
GENERAL MANAGER

GEORGE W. TYE
EXECUTIVE MANAGER

February 8, 1983

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear Nat:

The appropriate committee of the Association of California Insurance Companies has reviewed the Commission's recommendations relating to dismissal for lack of prosecution. While we applaud the Commission's attempt to consolidate the various statutes and court decisions relating to this subject, we do have substantial objections to some of the proposals as contained in your recommendations.

First, and perhaps basic to many of our other objections, we believe that the recommendations place too much emphasis on what you have perceived as the strong public policy which seeks to dispose of litigation on the merits rather than on procedural grounds. The enactment of SB 1150 last year (Chapter 600, Statutes of 1982) is a rather clear, and I'm sure you would agree, recent statement of what the public policy of the state is, at least with respect to the three-year statute concerning dismissal for lack of service. For the Law Revision Commission to find contrary public policy even as SB 1150 takes effect strikes me as somewhat presumptuous.

We know of no overriding public policy reasons why the three-year statute on the service of the complaint should be extended to four years. The existing CCP Section 581a provides, for many practical reasons, sufficient latitude for excusing non-service within the three-year period and, in our view, does not overly restrict the court in reviewing the reasons for non-service. However, your proposed draft, by removing the jurisdictional status of the dismissal provisions, would only encourage the courts to further undermine and debase the service limitations. Such a removal of the jurisdictional requirements set forth in SB 1150 would result in the courts carving out additional so-called exceptions to the mandatory provisions of the new act.

Our experience is that failure to discover and make service within three years is, in the overwhelming number of cases, the result of the negligence of plaintiffs' attorneys or due to the fact that they have accepted too many cases which they find they do not have time to properly handle. Extending the period in which to make discovery and serve the complaint would only further encourage attorneys to delay adequate discovery and further congest court calendars. Therefore, we would object to further changes in CCP Section 581a.

With respect to the five-year statute, the Commission's proposals set forth in Section 583.310 are much too permissive. By only requiring a plaintiff's attorney to answer "ready" within the five-year period in order to avoid a dismissal and, of course, his liability for malpractice, plaintiffs' attorneys will only be encouraged to create ingenious excuses to have the cases put off calendar and avoid the threat of a dismissal. Again, this will only result in further clogging the courts' calendars and giving plaintiffs' counsels more reason to delay actual trial until it is convenient for the attorney to proceed.

Thank you for giving us this opportunity to comment on the Commission's recommendations.

Sincerely,

Edward Levy
General Manager

EL:nl