Memorandum 90-104

Subject: Study J-501 - Running of Five-Year Dismissal Statute in Arbitration

At the May-June meeting, the Commission asked the staff to consider whether there is inconsistency in the case law on the running of the five-year dismissal statute in arbitration. The Commission was concerned about the conflict over whether in contractual arbitration the five-year dismissal statute begins to run from the filing of the civil complaint (Lockhart-Mummery v. Kaiser Foundation Hospitals, 103 Cal. App. 3d 891, 163 Cal. Rptr. 325 (1980)) or from the order for arbitration (Preston v. Kaiser Foundation Hospitals, 126 Cal. App. 3d 402, 408-409, 178 Cal. Rptr. 882 (1981)). The Commission asked the staff to write a memorandum on the dismissal problem and send it to the California Judges Association and State Bar Section on Litigation for their views.

As discussed below, the conflict between *Lockhart-Mummery* and *Preston* in contractual arbitration has been resolved by 1984 legislation recommended by the Commission. Inconsistencies in the law relating to judicial arbitration is being resolved by appellate cases. The staff concludes that no legislation is needed.

The staff sent this memorandum to the California Judges Association, the State Bar Section on Litigation, and the Administrative Office of the Courts. We have responses from all three, attached as Exhibits 1 through 3. Both the California Judges Association and the Administrative Office of the Courts concur with the staff conclusion that no legislation is needed on the dismissal question. The State Bar Section on Litigation wrote to say that they cannot comment now because of the impact of the U. S. Supreme Court decision in *Keller v. State Bar of California*.

DISTINCTION BETWEEN CONTRACTUAL AND JUDICIAL ARBITRATION

There are separate statutes for contractual arbitration (Code Civ. Proc. §§ 1280-1294.2) and judicial arbitration (*id.* §§ 1141.10-1141.31). These two statutes "are mutually exclusive and independent of each other." *Id.* § 1141.30.

In contractual arbitration, sometimes called "conventional" or "ordinary" arbitration, there need be no civil action filed. The arbitration is governed by the arbitration agreement. Judicial control over contractual arbitration may be invoked only by a special proceeding commenced by petition. 6 B. Witkin, California Procedure *Proceedings Without Trial* § 320, at 613 (3d ed. 1985). In contractual arbitration, there is no right to trial de novo. The court may only confirm, correct, or vacate the arbitration award. Code Civ. Proc. §§ 1285-1286.8, 1287.4. If the award is vacated, the court may order a new arbitration hearing. *Id.* § 1287. An award that is not confirmed or vacated has the same effect as a contract in writing between the parties. *Id.* § 1287.6. Contractual arbitration "has a life of its own outside the judicial system." Byerly v. Sale, 204 Cal. App. 3d 1312, 1316, 251 Cal. Rptr. 749 (1988).

Judicial arbitration, on the other hand, only applies after a civil action is filed and does not depend on consent of the parties. Under the mandatory judicial arbitration statute enacted in 1978, smaller cases (less than $50,000) are to be referred to arbitration. Code Civ. Proc. § 1141.11. The term "judicial arbitration" is somewhat of a misnomer, because the arbitration hearing is not conducted by a judge, and the right to a trial de novo removes the finality of true arbitration. One court has said that "extrajudicial mediation" would be closer to correct. Dodd v. Ford, 153 Cal. App. 3d 426, 432 n.7, 200 Cal Rptr. 256 (1984).

FIVE-YEAR DISMISSAL STATUTE

In 1984, a new statute on dismissal for lack of prosecution was enacted on recommendation of the Commission. The Commission noted the conflict between the policy of speedy adjudication which favors dismissals for lack of diligent prosecution, and the policy of trying cases on their merits which does not favor dismissals. The Commission made clear it preferred that cases be tried on their merits. 17 Cal. L. Revision Comm'n Reports 910-11 (1984).

The five-year dismissal rule is in Code of Civil Procedure Sections 583.310 and 583.360:

> 583.310. An action shall be brought to trial within five years after the action is commenced against the defendant.

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

(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.

DISMISSAL OF CONTRACTUAL ARBITRATION

The dismissal rules apply differently depending on whether arbitration is contractual or judicial. The contractual arbitration statute has its own time limits: A petition to confirm an award must be filed not later than four years after service of the award on the petitioner. Code Civ. Proc. § 1288. A petition to vacate or correct an award must be filed not later than 100 days after service of the award on the petitioner. *Id.*

When contractual arbitration begins under the contract without the filing of a civil action, the five-year dismissal statute cannot apply. It applies only to a "civil action" (although the court may also apply it in a special proceeding). Code Civ. Proc. § 583.120; Byerly v. Sale, *supra,* at 1315-16. Nonetheless, the plaintiff must move the arbitration case forward. Although there is no absolute limit analogous to the five-year dismissal statute, the arbitrator may determine whether the plaintiff has been diligent. If not, the arbitrator may dismiss the arbitration proceeding. Byerly v. Sale, *supra,* at 1316; Young v. Ross-Loos Medical Group, Inc., 135 Cal. App. 3d 669, 672-73, 185 Cal. Rptr. 536 (1982).

Contractual arbitration may also begin with the filing of a complaint commencing a civil action. The defendant may invoke the arbitration contract by petitioning the court to order the case to arbitration and to stay the civil action. The court's order staying the civil action tolls the running of the five-year dismissal statute. Code Civ. Proc. § 583.340(b); Byerly v. Sale, *supra.* Section 583.340 provides:

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

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

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

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile.

Section 583.340 was enacted in 1984 as part of the Commission-recommended dismissal legislation. Subdivisions (b) and (c) codified case law. But the case law did not draw a sharp distinction between cases that were stayed and those that were impossible or impracticable to bring to trial. Rather, the running of the five-year dismissal statute was tolled when a case was stayed because the stay made it impossible or impracticable to bring the case to trial. See, e.g., Marcus v. Superior Court, 75 Cal. App. 3d 204, 212-13, 141 Cal. Rptr. 890 (1977). With the enactment of Section 583.340 in 1984, a stay became a separate and independent ground for tolling the dismissal statute.

The pre-1984 cases on application of the five-year dismissal statute to contractual arbitration where the civil action was stayed were concerned with whether it was impossible or impracticable to bring the case to trial. See Khoury v. Comprehensive Health Agency, Inc., 140 Cal. App. 3d 714, 189 Cal. Rptr. 653 (1983); Young v. Ross-Loos Medical Group, Inc., 135 Cal. App. 3d 669, 185 Cal. Rptr. 536 (1982); Preston v. Kaiser Foundation Hospitals, 126 Cal. App. 3d 402, 408-409, 178 Cal. Rptr. 882 (1981); Lockhart-Mummery v. Kaiser Foundation Hospital, 103 Cal. App. 3d 891, 163 Cal. Rptr. 325 (1980); 6 B. Witkin, California Procedure *Proceedings Without Trial* § 157, at 464-66 (3d ed. 1985). Thus the analysis in *Preston* was that, between the filing of the complaint and the order for arbitration, "it would generally not be possible or practical for the plaintiff to bring the matter to arbitration or trial." Although this assumption may be questionable, it led the *Preston* court to conclude that the five-year dismissal statute does not begin to run until the order for arbitration.

If *Preston* were decided today, the analysis would have to be different, although the result -- no dismissal -- would be the same. The five-year dismissal statute could not begin to run from the order for arbitration, because at the same time the court in *Preston* ordered arbitration, it ordered the civil action to be stayed. Under

subdivision (b) of Section 583.340, the stay order tolls the running of the five-year dismissal statute.

In *Lockhart-Mummery,* the court, by Marshall, J., affirmed the trial court's dismissal of the civil action, finding that the plaintiff failed to use reasonable diligence as required by the arbitration agreement. The court also held the five-year dismissal statute applied to contractual arbitration.

If *Lockhart-Mummery* were decided today, the procedure would be different, although the result (dismissal) would probably be the same. Defendant's request for dismissal for plaintiff's failure to use reasonable diligence to move the arbitration forward would be addressed to the arbitrator, not the trial court. See Byerly v. Sale, *supra,* at 1316; Young v. Ross-Loos Medical Group, Inc., *supra,* at 672-73. The trial court could not dismiss, because the stay order suspends the running of the five-year dismissal statute under subdivision (b) of Section 583.340. After probable dismissal by the arbitrator, defendant would petition the trial court for confirmation of the "award" (the dismissal). Code Civ. Proc. § 1285. The trial court's power to overturn the arbitration award is very limited. See *id.* § 1286.2. So the trial court would no doubt affirm the arbitrator's dismissal.

If there is no stay order and the five-year statute runs, the court will dismiss the civil action. There is conflict in the cases whether that also has the effect of dismissing the arbitration. *Byerly* said the trial court has no authority to dismiss contractual arbitration, but noted a contrary case, Preston v. Kaiser Foundation Hospitals, *supra*: "To the extent *Preston* may be cited for the notion that dismissal of a complaint somehow includes termination of a pending arbitration matter, it is unsupported, and unsupportable, in law or logic; and we decline to follow it." So arbitration may proceed even though the civil action has been dismissed. After arbitration, either party may petition for confirmation, correction, or vacation of the award. The court's prior dismissal is, as a matter of law, without prejudice. Byerly v. Sale, *supra,* at 1315. *But cf.* Boutwell v. Kaiser Foundation Health Plan, 206 Cal. App. 3d 1371, 1375, 254 Cal. Rptr. 173 (1988) (affirming dismissal of civil action and declining to decide whether that also dismisses contractual arbitration).

DISMISSAL IN JUDICIAL ARBITRATION

After a civil action is filed, the court may refer the case to arbitration under the judicial arbitration statute. Section 1141.17 provides:

> 1141.17. (a) Submission of an action to arbitration pursuant to this chapter shall not suspend the running of the time periods specified in Chapter 1.5 (commencing with Section 583.110) of Title 8 of Part 2, except as provided in this section.
>
> (b) If an action is or remains submitted to arbitration pursuant to this chapter more than four years and six months after the plaintiff has filed the action, then the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a request for a de novo trial is filed under Section 1141.20 shall not be included in computing the five-year period specified in Section 583.310.

Section 1141.17 was amended in 1984 as part of the Commission's dismissal recommendation. Before 1984, the time between arbitration and trial de novo was excluded from the running of the five-year dismissal statute. Moran v. Superior Court, 35 Cal. 3d 229, 673 P.2d 216, 197 Cal. Rptr. 546 (1983). The Comment to Section 1141.17 says the 1984 amendment, which refers to the new dismissal statute, "supersedes the rule stated in Moran v. Superior Court, 35 Cal. 3d 229, 673 P.2d 216, 197 Cal. Rptr. 546 (1983), that the time between the date the arbitration award is filed and the date set for the trial de novo is to be excluded from the calculation of the five-year period."

The Commission's intent to eliminate the tolling period of *Moran* has been frustrated by the post-1984 cases. See Practicing California Judicial Arbitration Supp. § 2.24, at 18-21 (Cal. Cont. Ed. Bar 1990). In Hughes v. Southern California Rapid Transit District, 173 Cal. App. 3d 512, 518 n.6, 219 Cal. Rptr. 82, 84 n.6 (1985), the court held that *Moran* was decided under Section 1141.20, not 1141.17, that Section 1141.17 as amended does not accomplish the goal of superseding *Moran*, and that *Moran* is still viable. The court concluded:

> We also recognize that *Moran* emasculates section 1141.17 as it permits all plaintiffs to avoid dismissal under the five-year statute whenever section 1141.20's request for [trial] de novo is timely filed. However, this inconsistency must be left for the Legislature to correct via remedial legislation.

Should the Commission recommend remedial legislation to repeal the tolling rule of *Moran*? The staff thinks we should not. Tolling serves the policy of trying cases on their merits. In trying to eliminate the tolling rule of *Moran* in 1984, the Commission thought it was sufficient to rely on the tolling provided by subdivision (b) of Section 1147.17, beginning four and a half years after the civil action was filed and ending when the request for trial de novo is filed. If the Commission had succeeded in this, the effect would have been to shorten the overall tolling period, thus departing from the Commission's stated preference for adjudication on the merits. In considering the question anew, the staff does not think there is a clear policy preference for eliminating the tolling rule of *Moran*, thereby shortening the overall tolling period, even though we reached a different conclusion in 1984. The cases under *Moran*, discussed below, seem to reach generally fair and satisfactory results. The staff sees no clear benefit in interfering legislatively with case-by-case resolution of these questions.

Must Plaintiff Use Diligence to Bring Case to Trial De Novo?

There are two inconsistent lines of cases under *Moran* on whether plaintiff must use reasonable diligence to bring a judicial arbitration case to trial de novo when it is requested. Practicing California Judicial Arbitration Supp. § 2.24, at 17-21 (Cal. Cont. Ed. Bar 1990). Under one line of cases, which may no longer be good law, plaintiff has no duty to use diligence to bring the case to trial. Barna v. Passage 350 Canon, 186 Cal. App. 3d 440, 230 Cal. Rptr. 764 (1986); Hughes v. Southern California Rapid Transit District, 173 Cal. App. 3d 512, 219 Cal. Rptr. 82 (1985); Paul E. Iacono Structural Engineer, Inc. v. Rizzo, 162 Cal. App. 3d 803, 208 Cal. Rptr. 787 (1984).

Barna said plaintiff's diligence is relevant under the discretionary dismissal statutes, but not under the mandatory five-year dismissal statute. *Barna* thought tolling was consistent with the policy of the arbitration statute to resolve claims efficiently and equitably.

But the cases from the other line are far more numerous. Under these cases, plaintiff must use reasonable diligence to move the case forward after arbitration, and must advise the court of the approaching

five-year limit. Plaintiff's failure to do so will prevent tolling, and will result in dismissal if the five-year statute has run. Baccus v. Superior Court, 207 Cal. App. 3d 1526, 255 Cal. Rptr. 781 (1989); Santa Monica Hospital Medical Center v. Superior Court, 203 Cal. App. 3d 1026, 250 Cal. Rptr. 384 (1988); Berry v. Weitzman, 203 Cal. App. 3d 351, 249 Cal. Rptr. 816 (1988); Taylor v. Hayes, 199 Cal. App. 3d 1407, 245 Cal. Rptr. 613 (1988); Sizemore v. Tri-City Lincoln Mercury, Inc., 190 Cal. App. 3d 84, 235 Cal Rptr. 243 (1987); Hill v. Bingham, 181 Cal. App. 3d 1, 11, 225 Cal. Rptr. 905 (1986); Cannon v. City of Novato, 167 Cal. App. 3d 216, 213 Cal. Rptr. 132 (1985). See also Ward v. Levin, 161 Cal. App. 3d 1026, 208 Cal. Rptr. 312 (1984).

The rationale for requiring plaintiff to use diligence was stated in *Hill*:

> *Moran* did not intend to permit a plaintiff to abdicate a continuing responsibility for prosecuting the case merely because a timely request for trial de novo was filed. Absurdities would otherwise result. Hypothetically, in the event a request for trial de novo were filed and the superior court clerk were to misplace the request, with no action then being taken by the court for two years, or for 20, surely a plaintiff could not maintain the time was tolled for the entire period.
>
> In coming to its holding, the *Moran* court recognized the superior court was notified by [the plaintiff] of the time constraints she was under. . . . We conclude it is implicit that for the sua sponte duty [of the court to set the case for trial] to arise, not only must there be a timely request for trial de novo, but also the plaintiff must bring to the court's attention the time frame of the case. A contrary conclusion would completely shift responsibility for keeping track of all applicable dates and for moving cases forward from plaintiffs to an already overburdened court system.

The no-diligence rule of the first line of cases may no longer be good law: *Santa Monica Hospital* observed that in both *Barna* and *Ward* the plaintiffs actually used reasonable diligence even though the cases did not rely on that, and that in *Hill* (requiring diligence) Division Three has effectively overruled the no-diligence rule of *Hughes,* also a Division Three case. 203 Cal. App. 3d at 1032 n.3, 1033 n.4.

Should the Commission try to resolve any doubt whether plaintiff must use reasonable diligence to move the case to trial after arbitration to get the benefit of tolling? The staff thinks not. The

no-diligence rule has been repudiated by the most recent cases. And to recommend codifying either line of cases would require the Commission to reverse its 1984 recommendation to repeal the tolling rule of *Moran*. Without tolling, the question of what the plaintiff's duty is after arbitration does not arise.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Memo 90-104 EXHIBIT 1 Study J-501

CHIEF JUSTICE
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CHAIRPERSON

JUDICIAL COUNCIL OF CALIFORNIA

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June 21, 1990

Robert J. Murphy III
Staff Counsel
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Dear Mr. Murphy:

Thank you for your letter of June 13 inviting our views on your staff's analysis and conclusions on the question whether legislation is needed to address problems regarding the five-year dismissal statute in contractual and judicial arbitration.

Our staff has reviewed your memorandum, and we believe it to be a well-reasoned analysis of the questions presented. Your conclusions appear to be sound.

Thank you for giving us the opportunity to comment.

Very truly yours,

Donald B. Day

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July 17, 1990

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Attn: Richard J. Murphy III, Staff Counsel

Dear Mr. Murphey:

Your staff memorandum was referred to the California Judges Association Civil Law and Procedure Committee for review and comment.

It was the general consensus of the membership of that committee that no legislation was needed.

I hope this information will be of value to you.

Very truly yours,

Donald E. Smallwood
Judge of the Superior Court
Chairperson-Civil Law & Proc Committee

cc: Constance Dove

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June 29, 1990

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Re: Running of 5-Year Dismissal Statute in Arbitration

Dear Mr. Murphy:

This letter is in response to the materials you sent to Janet Carver, Litigation Section, State Bar of California concerning the proposed legislation concerning the five-year dismissal statute in contractual and judicial arbitration.

The State Bar is in the process of analyzing the impact of the U.S. Supreme Court's decision in Keller v. State Bar of California on legislative activities of the Bar and its sections. While this analysis is taking place, the legislative activity of sections, including the Litigation Section, has been temporarily suspended.

If, and when the suspension is lifted, we will contact you with our comments on this proposed legislation.

We appreciate your efforts to include the input from our section.

Very truly yours,

Helen S. Beardsworth

HELEN S. BEARDSWORTH
Executive Committee Member

cc: Cedric Chao
Janet Carver
Michael Whelan