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PERSPECTIVE

5 years to trial and death knell orders

By Patrick Hammon and Kate Chilton

Because the vast majority of litigations are resolved through settlements, mediations, and arbitrations, many lawyers have forgotten that cases not brought to trial within five years of their commencement may be subject to dismissal under Section 583.310 of the California Code of Civil Procedure. Practitioners would be wise to keep this statute in mind, as recent appellate decisions have confirmed that the so-called "five-year rule" is strict and unforgiving.

Until recently, it was unclear how the five-year rule applied following "death knell orders" — pretrial orders in class actions that dismiss or strike class claims but permit individual plaintiffs' claims to proceed. Last month, in *Rel v. Pacific Bell Mobile Services*, the 1st District Court of Appeal resolved any uncertainty with regard to this issue, finding that, while "death knell orders" may qualify as a "final judgment," such orders do not constitute "trials" under the fiveyear rule. Because it is clear that "death knell orders" do not affect the tolling of the five-year rule, *Rel* creates an additional impediment to the successful (and cost-effective) prosecution of class action cases and adds another arrow to defense counsel's quiver.

The Five-Year Rule Generally

According to Section 583.310, "[a] n action shall be brought to trial within five years after the action is commenced against the defendant." The Code sets forth three circumstances in which the running of the clock is paused: (1) when the court's jurisdiction is suspended; (2) when prosecution of the action is stayed or enjoined; and (3) when bringing the action to trial is impossible, impracticable, or futile. CCP Section 583.340.

In 2016, the California Supreme Court interpreted the second and third exceptions in *Gaines v. Fidelity National Title Ins. Co.* — and did so narrowly. There, the court rejected the appellant's argument that a court order staying the proceedings while the parties engaged in mediation constituted a stay that would suspend the running of the rule. Because the parties could still engage in other significant litigation activities, the stay was not "complete" and the second exception, therefore, did not apply. For that same reason, the court found that no impediment existed that would have rendered it impossible, impracticable, or futile to bring the case to trial, and the third exception was equally inapplicable.

This past fall, the 2nd District Court of Appeal applied the holding of *Gaines* in *Warner Bros. Entertainment Inc. v. Superior Court*. In *Warner Bros.*, the trial court entered an order through which all deadlines for responding to pleadings and discovery were stayed for 43 days. The lower court found that the five-year rule was tolled for 43 days, and therefore the case was exempt from dismissal under the rule.

The 5th District Court of Appeal reversed, concluding that the 43-day stay was not a "complete stay" that would suspend the five-year rule because the parties continued engaging in significant litigation activities during the stay. The court found "it impossible to conclude that [such] an order … [could] be considered to have stopped prosecution of the case altogether."

***Rel* and "Death Knell Orders"**

Because individual plaintiffs "may lack the economic incentive to pursue [their] individual claims to a final judgment" after corresponding class claims are struck or dismissed, California courts have recognized a limited exception to the "final judgment rule" in the class action context. In such cases, plaintiffs are permitted to immediately appeal so-called "death knell orders," even though no final judgment has been entered.

Last month, the Court of Appeal in *Rel* strengthened the effects of the five-year rule by holding that such "death knell orders" do not constitute "trials" within the meaning of the rule. In *Rel*, the trial court disposed of the class claims, but left intact the lead plaintiff's individual claims. Shortly thereafter, the five-year period expired, and, upon the defendant's motion, the court dismissed the case. The *Rel* plaintiffs had argued that the "death knell order" in their case amounted to a "trial" within the meaning of the five-year rule, and therefore dismissal was inappropriate because obtaining a substantive (but adverse) ruling on their class claims was tantamount to getting the case to "trial."

The 1st District rejected the plaintiff's argument, explaining that the "death knell" exception was created to solve a very specific problem — namely, the diminished incentive to bring an individual case all the way to a "final judgment" after class claims are dismissed. According to the Court of Appeal, that problem is not implicated by the five-year rule, even after class claims are stricken. Furthermore, the *Rel* court found it inappropriate to create a judicial exception to the rule, when the statutory framework was clear and unambiguous. Thus, the lower court's decision was affirmed — rendering "death knell orders" essentially irrelevant to the computation of time under the five-year rule.

Lessons from *Rel*

For plaintiffs, the obvious takeaway from recent decisions applying the rule would be to get their cases to trial within five years. And for defendants, counsel should vigilantly monitor the running of the five-year rule and hold plaintiffs to account.

But plaintiffs' counsel should also be prepared to bring their cases to trial even after losing class certification motions, in order to avoid the consequences of *Rel*. And, if the economics of doing so are unfavorable, plaintiffs' counsel should seek stipulated extensions to the rule because, while the exception for "complete stays" is interpreted strictly, the exception for stipulated extensions is not. *See Munoz v. City of Tracy* (finding that a stipulation continuing the trial date beyond the five-year deadline "necessarily waive[d] the right to a dismissal of the action under section 583," even though the stipulation did not specifically mention the relevant statutes or the rule).

Class action defense counsel, on the other hand, should note the powerful leverage they now have after obtaining a "death knell order." And they should be wary of entering one of the foregoing stipulations, lest they unintentionally forfeit their right to seek mandatory dismissal under the five-year rule.

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