

Alert | Appellate



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California Court of Appeal Rules Time During Which Federal Appeal from Remand Order is Pending Properly Included in Five-Year Rule Absent Federal Stay

California law provides that a plaintiff must bring a lawsuit to trial within five years of filing, on penalty of dismissal with prejudice. This penalty is commonly known as the “five-year rule.” Five years may seem an eternity to clients suffering through the ins and outs of complex civil litigation, but in the California courts, complex civil cases easily can take that long to litigate. Consequently, a plaintiff who does not have an eye on the clock at all times risks complete loss. And a defendant whose instinct may be to seek a stay of proceedings during complicated inter-jurisdictional appellate proceedings may want to consider the impact of such a stay on the five-year clock.

Witness *Martinez v. Landry’s Restaurants, Inc.*, Cal. Ct. App. Case No. B278513 (August 29, 2018), in which a putative wage and hour class action filed in 2007 still had not made its way to trial by 2016. The trial court granted the defendant’s motion to dismiss the case with prejudice for failure to bring the matter to trial within five years, and the California Court of Appeal affirmed. The Court of Appeal accounted for certain mandatory tolling periods, such as those periods during which a direct appeal depriving the trial court of jurisdiction was pending, as well as the period during which the case had been removed to the federal courts. Such tolling is mandatory under the statute because periods during which the trial court cannot act clearly should not be included in the five-year calculation.

The twist to *Martinez*, however, came during a period common to many state court class actions – removal, remand, and petitions for permission to appeal to the Ninth Circuit. During the lengthy litigation, the *Martinez* defendant removed the action to federal court upon learning of apparent grounds to remove under the Class Action Fairness Act (28 U.S.C., section 1332(d)). The plaintiff, in turn, successfully moved the federal district court to remand the action to state court. As is almost universally the case, the federal district court then promptly closed the case and returned it to the state court. Meanwhile, however, the *Martinez* defendant filed a petition for permission to appeal with the United States Court of Appeals for the Ninth Circuit, which the Ninth Circuit granted months later. Ultimately, the Ninth Circuit affirmed the remand order, and the question of federal jurisdiction was fully and finally resolved several months after that. What did *not* happen in *Martinez* is that no party asked the federal courts to stay the order of remand pending the petition for permission to appeal or the appeal itself. Instead, the parties returned to state court and plodded along with proceedings there.

Much to the dismay of the *Martinez* plaintiffs, the California Court of Appeal held that the time during which the federal appeal was pending was properly included in the five-year calculation absent a stay by the federal court. This holding is not surprising, given that an action can proceed in state court even while such an appeal is pending, and the *Martinez* plaintiff had every opportunity to proceed with discovery and other litigation in its case, even while the Ninth Circuit appeal was pending. But the five-year rule is not often in the minds of plaintiffs or defendants during such periods of complex appellate proceedings crossing federal and state jurisdictions. *Martinez* teaches that it should be. While a defendant might instinctually seek a stay in state court or federal court, doing so could provide the plaintiff with more days in its five-year saga. And, while a plaintiff may relish the thought of returning to state court and litigating immediately, it should be aware that it is on the clock when it does so.

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