

To Stay Or Not To Stay: Considering The '5-Year Rule'

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In *Martinez v. Landry Restaurants Inc.*, a California state appeals court has held that, in the absence of a federal stay, the time period during which a federal appeal from an order remanding a case to state court is pending should be included when state trial courts calculate the “five-year rule” for bringing a case to trial. This ruling means that in lengthy complex civil cases and class actions, both plaintiff and defense counsel should carefully consider whether to seek a stay of proceedings where the case crosses jurisdictional boundaries.



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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 twist and turns of complex civil litigation, but in the California courts, complex civil cases and class actions often can take that long to litigate. Consequently, while there is mandatory statutory tolling of the five-year rule for certain periods such as when the trial court’s jurisdiction is suspended or the action is stayed, the rule can be unforgiving in application. A plaintiff who is not diligently pursuing trial or 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*, in which a putative wage and hour class action filed in 2007 still had not made its way to trial by 2016. The *Martinez* plaintiffs were individuals who sued on behalf of a putative class of salaried employees who were allegedly misclassified as exempt managerial/executive employees and unlawfully denied overtime pay. As is common in such actions, the parties litigated class certification issues in state court for several years, including writ proceedings to the California court of appeal in 2008, following an order compelling production of employee contact information. Class certification motions were not even litigated until 2010, and by the time the parties were preparing for trial, it was 2016. Multiple pending appellate proceedings caused the plaintiff to slow down the action, as is often the case, because parties want to see how things play out before taking their next steps. But in *Martinez*, the trial court granted a defense motion to dismiss the case with prejudice, and, after accounting for certain mandatory tolling periods, the court of appeal affirmed. Most of the decision in *Martinez* involved a straightforward application of math to periods when the trial court was plainly deprived of jurisdiction.

The twist to *Martinez* came during a period common to many state court class actions — removal, remand and petitions for permission to appeal to the Ninth Circuit. Two years into the litigation, the *Martinez* defendant removed the action to federal court upon learning of apparent grounds to remove under the Class Action Fairness Act,[2] which expands the federal courts’ diversity jurisdiction for certain types of class or mass actions where there is minimal diversity and an amount in controversy in excess of \$5 million. The *Martinez*

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. The parties returned there and plodded along with the case.

Meanwhile, however, the Martinez defendant filed a petition for permission to appeal with the Ninth Circuit under CAFA's unique appeal provisions. Although CAFA provides for an expedited proceeding once a petition for permission to appeal is granted, no such time limits apply to the court of appeals' decision on the petition itself. Consequently, it can take months or even years for a petition for permission to appeal to be ruled upon, especially in the notoriously backlogged Ninth Circuit. The instinct of many defense counsel and their clients often is to seek a stay of the remand order to avoid potentially unnecessary proceedings in the state court, should their petition for permission to appeal be granted and remand reversed. Conversely, the instinct of most plaintiffs and their counsel is to rejoice at the opportunity to return to state court and slow-roll litigation there while the federal petition is pending.

Martinez teaches that another consideration should be given to whether to seek such a stay. In Martinez, the Ninth Circuit granted the petition for permission to appeal months after it was filed. Several more months elapsed before the Ninth Circuit ultimately affirmed the remand order, and fully and finally resolved the jurisdictional question. Although more than six months had passed, the case already had returned to state court because no party had 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, however, 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. Although the plaintiff argued that it was "impracticable" to bring the case to trial while the federal appeal was pending and that the question of jurisdiction was "open," Martinez's holding is not surprising, given that an action can proceed in state court even while such an appeal is pending absent a stay. 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's holding tells us that the five-year rule should be carefully considered by plaintiffs and defendants alike during these complex jurisdictional squabbles. The five-year rule will be statutorily tolled during the time period between the date the case is removed to federal court and the date on which remand is ordered. But it will not be tolled during the time appellate proceedings take place in the federal courts unless the federal courts stay proceedings and retain jurisdiction.

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[1] *Martinez v. Landry Restaurants Inc.*, Cal. Ct. App. Case No. B278513 (Aug. 29, 2018).

[2] CAFA, 28 U.S.C., Section 1332(d)).