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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2025

Time limits on mediation and arbitration

TIME LIMITS CAN HAVE A MATERIAL IMPACT ON VIABLE CASES – FIVE-YEAR "BROUGHT TO TRIAL" AND 30-DAY LIMITATIONS ON PAYMENT OF ARBITRATION FEES

In California, an overwhelming number of civil cases are settled before trial in alternative dispute-resolution forums. It is logical, therefore, that practitioners may concentrate on preparation and not focus on the statutory time limitations for:

Mediation: litigated cases are to be brought to trial within five years of their filing date or face dismissal – mediation does not extend the time to commence trial. (Code Civ. Proc., § 583.310.)

Arbitration: time limits for employment or consumer arbitration require the drafting party to pay arbitration fees and costs within a 30-day period or face waiving their right to arbitrate. (Code Civ. Proc., §§ 1281.97, 1281.98.)

[**Immediately before publication of this article, the California Supreme Court issued its opinion on *Hohenshelt v. Superior Court* (*Golden States Foods Corp.*), S284498. The opinion has implications for Code of Civil Procedure section 1281.98 and several cases cited.**]

The five-year rule

Effective January 1, 1985, Code of Civil Procedure section 583.310 was originally part of a broader reform aimed at reducing delays in civil litigation and mitigating the myriad issues arising from such delays. However, its unintended consequence in complex cases, mass torts, and class actions (that by their nature take longer to litigate) can be to deliver a death blow to otherwise meritorious claims. This impact is exacerbated by a recent string of court decisions that construe the calculation of the five years unforgivingly. A discussion of some of those decisions and their implications for mediation is provided below.

The five-year rule and mediation

Code of Civil Procedure section 583.310 requires that "An action shall be brought to trial within five years after the action is commenced against the defendant." If a trial is not commenced within five years, the action can be dismissed on the court's or defendant's motion. The code provides three exceptions that toll the running of the five-year clock:
(1) The court's jurisdiction is suspended;
(2) Prosecution of the case is stayed; and
(3) Bringing the action to trial is impossible, impracticable or futile.

While it is reasonably straightforward to ascertain when a court's jurisdiction has been suspended, the other two exceptions are potentially more troublesome. The second exception is particularly germane in the context of mediation.

The issue of whether the time it takes to mediate a case extends the five-year time limit has been ruled upon by several courts. The seminal case is *Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081. In *Gaines*, the parties had stipulated to strike a previous trial date and stay the action for 120 days to mediate the case.

By a 5-2 majority, the California Supreme Court concluded that the stay in *Gaines* was partial because it provided for the completion of outstanding discovery and that a tolling period is created only by "a complete stay of the prosecution of the action." A partial stay, the majority opined, will not automatically toll the five-year period unless it results in a circumstance of impossibility, impracticability, or futility. Nor did the order create a circumstance of impracticability because the plaintiff agreed to it, remained in control of the circumstances, and made meaningful progress towards resolving the case during the stay period. Accordingly, the period of the "mediation stay" did not toll the five-year period.

The *Gaines* reasoning was followed in *Warner Bros. Entertainment Inc. v. Superior Court* (2018) 29 Cal.App.5th 243. Although that case did not involve a stay to facilitate mediation per se, it underscored the *Gaines* requirement of a *complete stay* in proceedings to suspend the five-year period.

Some courts looked to Code of Civil Procedure sections 1775 through 1775.15 for guidance in determining the tolling issue in the context of mediation, even though those code sections expressly apply only to court-ordered mediations where the amount in question does not exceed $50,000. The sections allow for tolling of the five-year period for mediations that begin more than four years and six months after the plaintiff has filed the action. However, the California Court of Appeal clarified in *Castillo v. DHL Express (USA)* (2015) 243 Cal.App.4th 1186, that participation in private mediation – as opposed to court-sponsored mediation – does not toll the five-year period.

As the *Castillo* court also noted, the parties can elect to stipulate to a stay in the proceedings while they engage in private mediation. Under section 583.330, the five-year period can be extended by the parties by written stipulation or by oral agreement in court. Recent decisions serve to underscore the importance of expressly stating that any stay agreed be a *complete* stay of the litigation *with the intention of tolling the five-year period and then following through on a complete stay of all activity.*

Outside of the mediation context, the recent trend of decisions on the third exception to section 583.310 (that the requirement to dismiss be waived where bringing the action to trial within five years was impossible, impracticable, or futile to do so) is worthy of consideration. It is important to remember that courts look to the conduct and diligence of the litigants over the *entire life* of the litigation in construing impossibility, impracticability, and futility.

With a lack of objective criteria, courts have a lot of discretion in determining whether a plaintiff exercised reasonable diligence in prosecuting their

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case. Moreover, recent decisions regarding the interplay between section 583.310's five-year rule and the automatic extension provisions of California's COVID-driven Emergency rule 10(a) illustrate one point quite clearly: If a trial date is set outside the five-year deadline (as potentially extended by rule 10(a), or otherwise) and notwithstanding overcrowded dockets, the onus is on counsel to make sure the outlier date is brought to the court's attention and a date within the deadline is accommodated. Counsel should never rely on the court to keep track of the deadline (*Oswald v. Landmark Builders, Inc.* (2023) 97 Cal.App.5th 240).

The five-year rule and arbitration

What of arbitration and the five-year rule? With respect to judicial arbitration or binding arbitration by court order, the court retains jurisdiction to dismiss litigation for failure to diligently prosecute pursuant to section 583.310. (*Nanfito v. Superior Court* (1991) 2 Cal.App.4th 315.) However, true arbitration is a different animal. A creature of contract, the arbitration agreement itself can specify how long the parties have to bring the claim to resolution through arbitration. Any such agreement would override an argument that the five-year rule might apply. Likewise, if a case originates as a private arbitration without any involvement of the courts, there would be no foothold for section 583.310 to apply.

But if a case is first filed in court and then compelled to arbitration, the situation is a little different. When a court grants a petition to compel arbitration, the court retains only so-called "vestigial jurisdiction" over the matter. Only the arbitrator has the authority to dismiss a claim for a failure to diligently pursue it to a hearing. That said, California appellate courts have held that the five-year rule may yet be of relevance.

Although section 583.310 does not directly apply to arbitration, the courts have imported the concepts and limits of section 583.310 into the test of "reasonable diligence" in bringing a claim to resolution through arbitration. Thus, if a matter is not brought to arbitration within five years, the arbitrator may dismiss the matter for failure to proceed with reasonable diligence. *(Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790*; Young v. Ross-Loos Medical Group, Inc*. (1982) 135 Cal.App.3d 669.)

Violating the 30-day rule regarding arbitration-fee payments

The second significant deadline considered in this article is contained in Code of Civil Procedure sections 1281.97 and 1281.98. Both code sections provide for a 30-day deadline for payment of the arbitrator's fees and costs. Section 1281.97 applies to the initial payment before the arbitration can commence, while section 1281.98 applies to fees and costs becoming due during the pendency of an arbitration. For brevity, we use "section 1281.97" to refer to sections 1281.97 and 1281.98 where the same points are implicated.

While section 583.310 inarguably benefits the defense, section 1281.97 delivers to the plaintiff protection against delays in arbitration with similarly severe consequences to the other side. This section of the California Arbitration Act (CAA), incorporated into the Code of Civil Procedure, applies to employment and consumer cases. It provides that if the party drafting the arbitration agreement (almost always the party compelling the arbitration (i.e., the respondent) fails to pay arbitration fees within 30 days of invoice, one of the remedies available to the plaintiff is to elect to withdraw the claim from arbitration and proceed in court.

Section 1281.97 is a relatively recent addition to the Code of Civil Procedure introduced by the California Legislature in 2019 as part of the state's ongoing battle to prevent or interrupt "forced" arbitration. As such, the 30-day deadline may not be as familiar to practitioners as the five-year rule. However, much like the five-year rule, section 1281.97 has been the subject of a spate of recent decisions that serve to underscore the importance of strict adherence.

Starting with the decision in *Gallo v. Wood Ranch, USA* (2022) 81 Cal.App.5th 621, California courts have demonstrated a strict and unforgiving interpretation of the Legislature's intent in introducing section 1281.97. The *Gallo* court ruled that in the case of a late arbitration fee payment, the employer not only waived its right to compel arbitration and face an award of sanctions for attorney's fees and costs, but also potentially faced further sanctions. Although the court chose not to award further sanctions in *Gallo*, it noted that section 1281.99 (b) allows for evidentiary sanctions, a contempt order, or even terminating sanctions unless the court finds that a late payer "acted with substantial justification or that other circumstances make the imposition of the sanction unjust." Thus, a late-paying defendants can find themselves not only back in court, but also having seriously prejudiced their client's case.

Strict application of the code was followed in *Espinoza v. Superior Court* (2022) 83 Cal.App.5th 761 [holding that section 1281.97 is triggered by the act of late payment itself and does not contain exceptions for inadvertent non-payment, or absence of prejudice to the non-defaulting party], and in *De Leon v. Juanita's Foods* (2022) 85 Cal.App.5th 740.

In the following year, *Doe v. Superior Court* (2023) 95 Cal.App.5th 346, held that for the purposes of payment under the 30-day rule, the relevant date is the date of *receipt* of the fees and not the date the fees were sent – an important fact for practitioners.

More recently, California courts have found:

- A three-day delay by the defendant of an initial payment of arbitration fees enabled the plaintiff to proceed with her claim in court (*Keeton v. Tesla, Inc*. (2024) 103 Cal.App.5th 26);
- A six-day delay in payment of a third installment after two timely payments enabled the plaintiff to vacate an arbitration order and proceed in court (*Colon-Perez v. Security Industry Specialists, Inc.* (2025) 108 Cal.App.5th 403);

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- An arbitrator cannot cure a missed or late arbitration fee payment (*Cvejic v. Skyview Capital, LLC* (2023) 92 Cal.App.5th 1073); and,
- An intervening national holiday does not extend the time for the defendant to pay fees (*Suarez v. Superior Court* (2024) 99 Cal.App.5th 32).
- Regarding "reasonable diligence" to bring a case to arbitration, a recent decision has clarified which party must initiate the arbitration based on contractual terms. In *Arzate v. ACE American Ins. Co.* (2025) 108 Cal.App.5th 1191, the American Arbitration Association consumer arbitration provision required the consumer to initiate the arbitration and to pay the initial filing fee. Therefore, the plaintiff's demand that the defendant was required to commence the arbitration pursuant to section 1281.98 was unenforceable.

While the 30-day deadline has been strictly enforced, defendants can still seek opposing counsel's agreement to proceed with arbitration even where there has been late payment. Neither section 1281.97 nor section 1281.98 *mandate* the termination of the arbitration. Section 1281.98 allows the non-breaching party to either proceed at trial or in arbitration with an award of attorney fees.

Federal Arbitration Act (FAA)-based challenges to California's application of the 30-day rule

The FAA does not expressly address late arbitration-fee payments, giving courts the discretion to disregard a late payment or impose some lesser relief to the non-defaulting party than Code of Civil Procedure sections 1281.97 and 1281.98 offer. Challenges to applying the two sections have been dual-pronged: First, they represent a departure from generally applicable contract doctrine in conflict with the "equal footing" provision contained in section 2 of the FAA; and, second, on the ground they discourage arbitration. In *Gallo*, 81 Cal.App.5th 621, the court found section 1281.97 was not preempted by the FAA because section 1281.97 served to "further, rather than frustrate the objectives of the FAA."

In the relatively short life span of sections 1281.97 and 1281.98, numerous appellate courts have interpreted enforceability and whether the FAA preempts the two sections. Of the cases below, no FAA violation was found; only one held FAA preemption. (The issue of FAA preemption is under review before the California Supreme Court.):

- Similar preemption arguments were made in *Keeton v. Tesla, supra*, 103 Cal.App.5th 26, a case involving an arbitration agreement entered into before section 1281.97 came into being. The defense arguments again fell on stony ground. The court reasoned that (i) a state rule is not preempted merely because it is specific to arbitration, and (ii) section 1281.98 aligns with the FAA's goals by ensuring the timely payment of arbitration fees, thereby facilitating the efficient and fair resolution of disputes.
- In *Suarez v. Superior Court, supra*, (2024) 99 Cal.App.5th 32, the Court of Appeal echoed this rationale in a case involving a late payment under section 1281.97.
- In *Hohenshelt v. Superior Court*, (2024) 99 Cal.App.5th 1319, review granted June 12, 2024). The court's majority denied the defendant employer's relief after a late payment caused by confusion over the date an invoice was due, rejecting the notion of FAA preemption. The opinion included what has been described as a "spirited" dissent by Justice John Shepard Wiley, wherein the dissent detailed the U.S. Supreme Court's prior decisions upholding FAA preemption.
- In *Hernandez v. Sohnen Enterprises, Inc.* (2024) 102 Cal.App.5th 222, review granted August 21, 2024, the court noted that the terms of the arbitration agreement at issue expressly stated that the FAA governed the agreement, thus preempting the application of California's 30-day rule.
- Most recently, in *Sanders v. Superior Court* (2025) 110 Cal.App.5th 1304, the court reverted to the dominant trend denying FAA preemption.

Although review was granted in *Hohenshelt* and *Hernandez*, the briefing in *Hernandez* is deferred pending the outcome of *Hohenshelt's*. (Heard on May 21, 2025.) It is anticipated that the *Hohenshelt* decision will provide guidance on the issue of whether the FAA preempts sections 1281.97 and 1281.98, and, if so, under what circumstances.

Conclusion

Time limits in code section 583.310 (the five-year rule) and code sections 1281.97 and 1281.98 (the 30-day rule regarding arbitration fee payments) are statutes that practitioners will frequently encounter and need to be mindful of. Defendants who drafted an arbitration agreement regarding actions by consumers or employees must ensure that arbitration fees and costs are posted and received by the arbitrator in a timely manner. Practitioners should also familiarize themselves with private provider rules governing their arbitration agreement.

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