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Salas v. Sears, Roebuck & Co.: Diligent Plaintiffs Get Preferential Trial Dates

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Selected Developments in California Law

Salas v. Sears, Roebuck & Co.: Diligent Plaintiffs Get Preferential Trial Dates

A plaintiff facing the five-year statutory deadline for bringing a case to trial[1] may either toll the statute[2] or request that a preferential trial date be set within the five-year period.[3] California Code of Civil Procedure section 36(d) allows a trial court the discretion to grant or deny a plaintiff's motion for preference.[4] California appellate

1. An action which is not brought to trial within five years after it is commenced must be dismissed, either on the motion of any party, or on the court's own motion. CAL. CIV. PROC. CODE §§ 583.310, 583.360 (West Supp. 1987). For purposes of the five-year statute, an action is brought to trial when the jury has been sworn; or in a nonjury trial, when the first witness has been sworn. Hartman v. Santamarina, 30 Cal. 3d 762, 765, 639 P.2d 979, 980, 180 Cal. Rptr. 337, 338 (1982).

2. One way to toll the five-year statute is to show that bringing the case to trial within five years was "impossible, impracticable or futile." CAL. CIV. PROC. CODE § 583.340(c) (West Supp. 1987). *See infra* text accompanying notes 18-25.

3. Statutes describe the kinds of cases which may be entitled to preference in trial setting. *See* CAL. CIV. PROC. CODE §§ 35 (West 1982) (election contests), 36(a), (c) (aged or ill parties), 36(d) (for good cause, and in the interests of justice), 37(a) (West Supp. 1987) (civil suits by felony victims), 460.7(c) (actions for libel or slander committed during the course of a political campaign), 527(a) (injunctive relief cases), 1062.3 (declaratory relief actions), 1141.20 (requests for a de novo trial after an arbitration award), 1170.5 (forcible entry and detainer actions), 1179a (actions to recover possession of real property), 1260.010 (West 1982) (eminent domain proceedings); CAL. PUB. RES. CODE § 21168.3 (West 1986) (actions attacking rulings of state environmental agencies). Various hybrid civil matters are also entitled to priority in trial or hearing. *E.g.*, CAL. CIV. CODE §§ 4701(b)(6) (West Supp. 1987) (family law matters relating to support of a minor), 4600.6(a), (b) (West 1983) (family law matters relating to custody of a minor).

4. Section 36(d) states:

> Notwithstanding any other provision of law, the court may in its discretion grant a motion for preference served with the memorandum to set or the at-issue memorandum and accompanied by a showing of cause which satisfies the court that the interests of justice will be served by granting such a preference.

CAL. CIV. PROC. CODE § 36(d) (West Supp. 1987).

courts, however, are divided on the issue of whether a trial court may deny preference when the five-year statutory deadline for bringing a case to trial is imminent.[5] In *Salas v. Sears, Roebuck & Co.*,[6] the California Supreme Court ruled that a trial court does not have a duty to set a preferential trial date for a party even when the five-year statutory deadline for bringing a case to trial is impending.[7] A court may grant a motion for preference when there is a showing of cause which satisfies the court that the interests of justice will be served by granting the preferential trial date.[8] According to the *Salas* opinion, a trial court should consider the totality of circumstances, including the approach of the five-year statutory deadline, in ruling on motions for trial preference.[9]

Part I of this note examines the legal background of motions for trial preference.[10] Part II sets forth the facts and rationale of *Salas*.[11] Finally, part III discusses the legal ramifications of the opinion in *Salas*.[12]

I. Legal Background

Placing the *Salas* decision in context requires a preliminary discussion of the statutes and case law governing dismissals of causes of action. Involuntary dismissals may be either mandatory[13] or discretionary.[14] Failure to bring an action to trial within five years after the commencement of the suit mandates dismissal.[15] Dismissal may

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5. *See infra* text accompanying notes 25-66.
6. 42 Cal. 3d 342, 721 P.2d 590, 228 Cal. Rptr. 504 (1986).
7. *Id.* at 349, 721 P.2d at 594, 228 Cal. Rptr. at 508.
8. *Id.* at 345-46, 721 P.2d at 592, 228 Cal. Rptr. at 506 (citing Cal. Civ. Proc. Code § 36(d) (West Supp. 1987)).
9. *Id.* at 349, 721 P.2d at 594, 228 Cal. Rptr. at 508.
10. *See infra* text accompanying notes 13-66.
11. *See infra* text accompanying notes 67-102.
12. *See infra* text accompanying notes 103-20.
13. *See* Cal. Civ. Proc. Code § 583.360(a), (b) (West Supp. 1987) (dismissal is mandatory if time limits are not met). For time limits see, e.g., Cal. Civ. Proc. Code §§ 583.210 (West Supp. 1987) (failure to serve defendant within three years), 583.310 (failure to bring to trial within five years), 583.320(a)(1)-(3) (failure to bring to retrial within three years after mistrial, order granting new trial, or reversal on appeal).
14. *See* Cal. Civ. Proc. Code § 583.420 (West Supp. 1987) (dismissal is discretionary if time limits are not met). For time limits see, e.g., Cal. Civ. Proc. Code §§ 583.420(a)(1) (failure to serve defendant within two years), 583.420(a)(2)(A) (failure to bring to trial within three years), 583.420(a)(3) (failure to bring to retrial within two years after mistrial, order granting new trial, or reversal on appeal).
15. *Id.* § 583.310 (West Supp. 1987). *See supra* note 1 for the language of this section. *See also* Cal. Civ. Proc. Code § 583.360 (West Supp. 1987) (dismissal is mandated if an action is not brought to trial within five years). An action is commenced when the original complaint is filed. Stults v. Thompson, 274 Cal. App. 2d 733, 737, 79 Cal. Rptr. 520, 523 (1969); Kowalski v. Cohen, 252 Cal. App. 2d 977, 980, 60 Cal. Rptr. 874, 876 (1967).

be sought by any party, or granted on the court's own motion.[16] The five-year rule is intended to protect against the loss or destruction of evidence, the memory of witnesses becoming dim with the passage of time, and the annoyance to defendants of actions that remain pending indefinitely.[17]

The five-year statute is tolled, however, if bringing the action to trial within five years is impossible, impracticable, or futile.[18] Reasonable diligence by the plaintiff in ensuring the case comes to trial is one factor by which impossibility or impracticability is measured.[19] California appellate courts are, however, divided regarding the length of time for which the plaintiff must have been diligent in order to trigger the impossibility or impracticability exceptions.[20]

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16. CAL. CIV. PROC. CODE § 583.360(a) (West Supp. 1987).

17. Moran v. Superior Court, 35 Cal. 3d 229, 237, 673 P.2d 216, 221, 197 Cal. Rptr. 546, 551 (1983). *See also* General Motors Corp. v. Superior Court, 65 Cal. 2d 88, 91, 416 P.2d 492, 494, 52 Cal. Rptr. 460, 462 (1966). The California Supreme Court has commented that the five-year statute is analogous to statutes of limitation, since both types of statute serve similar purposes. *Id.* at 91, 416 P.2d at 494, 52 Cal. Rptr. at 462.

18. CAL. CIV. PROC. CODE § 583.340(c) (West Supp. 1987) (codifies case law which sanctioned the impossibility or impracticability exceptions to the five-year statute). No exception for impossibility or impracticability existed under the former dismissal statute. 1982 Cal. Stat. ch. 1402, sec. 3, at 5355 (amending CAL. CIV. PROC. CODE § 583). The impracticability exception, however, was recognized by case law. *See* Crown Coach Corp. v. Superior Court, 8 Cal. 3d 540, 546-47, 503 P.2d 1347, 1350-51, 105 Cal. Rptr. 339, 342-43 (1972) (citations to case law which recognized the exception). *See also* Fannin Corp. v. Superior Court, 36 Cal. App. 3d 745, 750, 111 Cal. Rptr. 920, 923 (1974) (whether it is impossible, impracticable, or futile to proceed to trial must be determined in light of the circumstances of each case). Plaintiff has the burden of showing, by clear and convincing evidence, that bringing the case to trial within five years is impossible or impracticable. Hoffman v. State, 171 Cal. App. 3d 1100, 1108, 217 Cal. Rptr. 867, 872 (1985).

19. *Hoffman*, 171 Cal. App. 3d at 1106, 217 Cal. Rptr. at 870. In *Hoffman*, the plaintiff failed to exercise "reasonable diligence." Among other things, the plaintiff failed to monitor the status of the case and failed to respond to communications from opposing counsel. *Id.* at 1106-07, 217 Cal. Rptr. at 871.

20. Several cases have stated that the plaintiff must have been diligent throughout the five-year period to claim later circumstances made bringing the case to trial within the five-year period impossible or impracticable. Cannon v. City of Novato, 167 Cal. App. 3d 216, 223, 213 Cal. Rptr. 132, 136 (1985); Bennett v. Bennett Cement Contractors, Inc., 125 Cal. App. 3d 673, 676, 178 Cal. Rptr. 633, 634 (1981); Moran v. Superior Court, 35 Cal. 3d 229, 239-40, 673 P.2d 216, 223, 197 Cal. Rptr. 546, 553 (1983). In *Cannon*, the appellant's only discovery activities during the first two years of litigation consisted of propounding five identical sets of interrogatories. Depositions were not taken until almost five years after the complaint was filed, and for twenty months appellants filed nothing with the court. The appellate court concluded that since the appellant's own inactivity throughout the five-year period made bringing the case to trial impossible, the trial court acted properly in dismissing the case. *Cannon, supra* at 223, 213 Cal. Rptr. at 136.

On the other hand, at least one case has held the five-year statute tolled by present circumstances preventing trial notwithstanding plaintiff's earlier inactivity. Lazelle v. Lovelady, 171 Cal. App. 3d 34, 42, 217 Cal. Rptr. 145, 150 (1985). In *Lazelle*, the appellant's delay in the early stages of the proceedings was excused by subsequent court congestion which made a courtroom unavailable for 69 days. *Id.*

Normal delays in litigation caused by pleadings, pretrial motions, and waiting for a place on the court calendar do not excuse failure to comply with the five-year limit.[21] If normal delays are encountered, the plaintiff must move for a preferential trial setting to avoid the bar of the five-year statute.[22] A failure to move for preference is deemed to be a lack of reasonable diligence, thus foreclosing the plaintiff from using the impossibility exception to the five-year mandatory dismissal statute.[23] Once the plaintiff moves for preference, the court has discretion to grant or deny the motion.[24] Several California courts have held, however, that a trial court has little or no discretion to deny preference when the expiration of the five-year period is imminent.[25]

In *Weeks v. Roberts*,[26] the California Supreme Court held that if the five-year statute was about to run, the trial judge had little discretion to deny a motion for preferential setting.[27] Thus, the trial judge abused his discretion in refusing to grant a preferential trial

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21. Gentry v. Nielson, 123 Cal. App. 3d 27, 36, 176 Cal. Rptr. 385, 390 (1981); *Crown Coach*, 8 Cal. 3d at 548, 503 P.2d at 1351, 105 Cal. Rptr. at 343. *But see* Goers v. Superior Court, 57 Cal. App. 3d 72, 129 Cal. Rptr 29 (1976). "When plaintiff has waited the normal time for a place on the calendar and has been assigned such a place well within the five-year period, his inability thereafter to proceed to trial because of continued court congestion should not be chargeable to the five-year period." *Id.* at 74-75, 129 Cal. Rptr. at 30. Abnormal delays may excuse a failure to comply with the five-year limit, provided that the plaintiff did not cause the delay. Westinghouse Elec. Corp. v. Superior Court, 143 Cal. App. 3d 95, 191 Cal. Rptr. 549 (1982). In upholding the trial court's refusal to dismiss, the *Westinghouse* court cited the impracticability resulting from extensive discovery, the number of the defendant's cross-complaints, and the lack of prejudice from the delay as reasons to toll the statute for impracticability. *Id.* at 106-07, 191 Cal. Rptr. at 556-57.

22. *Crown Coach*, 8 Cal. 3d at 549, 503 P.2d at 1352-53, 105 Cal. Rptr. at 344-45. In *Crown Coach*, despite the plaintiff's allegation that court congestion prevented him from bringing the case to trial within five years, the court held that the plaintiff should have moved for a preferential trial date as soon as the plaintiff realized that he was facing a discretionary dismissal for failure to prosecute within three years. *Id.*

23. *Westinghouse Elec. Corp.*, 143 Cal. App. 3d at 107-08, 191 Cal. Rptr. at 556-57. Under most circumstances, the trial court would abuse its discretion in denying a motion to dismiss when the plaintiff failed to bring a motion for preference. *Id.* Special circumstances, however, may excuse the plaintiff's failure to request preference. In *Westinghouse*, the plaintiff's failure to move for preference was held not to show a lack of diligence since the defendant had yet to complete discovery and could not be ready for trial within the five-year period. Accordingly, even if the motion for preference had been granted, no trial would result since the defendant was not ready and would, therefore, have to stipulate that the time limit of the statute be extended. *Id.* at 108, 191 Cal. Rptr. at 557.

24. Civil Procedure Code § 36(d) provides that "the court may in its discretion grant a motion for preference served with the memorandum to set or the at-issue memorandum and accompanied by a showing of cause which satisfies the court that the interests of justice will be served by granting such preference." CAL. CIV. PROC. CODE § 36(d) (West 1982).

25. *See infra* notes 26-48 and accompanying text (discussion of cases which mandate granting of preference).

26. 68 Cal. 2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968).

27. *Id.* at 806, 442 P.2d at 364, 69 Cal. Rptr. at 307-08.

date when only twenty-eight days remained in the five-year period.[28] Pretrial proceedings were complete and the trial date set in *Weeks*, but the trial date was vacated when plaintiff failed to allow sufficient time for ordinary trial setting.[29] This caused inconvenience to the court in providing a courtroom, and thus triggered the possibility of a discretionary dismissal.[30] Other courts have gone further than *Weeks* by holding that the trial judge has no discretion to deny preference when the end of the five-year period approaches, even in instances when the plaintiff failed to diligently prosecute the case.[31]

In *Campanella v. Takaoka*,[32] the court relied on *Weeks* to hold that a trial judge must set the case for trial before the expiration of the five-year period even though the plaintiff was guilty of unreasonable delay.[33] The plaintiff in *Campanella* failed to file an at-issue memorandum and had completed only minimal discovery in the four years since the complaint had been filed.[34] Thirty days before the five-year statute was to run, the plaintiff sought an early trial date.[35] Ten days before the five-year statute was to run, the trial court heard and denied the motion for preference.[36] The court held that insufficient time remained in the five-year period for the plaintiff to give the defendant the fifteen days trial notice required by statute.[37] The statutory five-year period expired, and the trial judge granted the defendant's motion to dismiss under California Code of Civil Procedure section 583(b).[38] On appeal, the court held that since the trial judge heard the motion for preference only ten days before the five-year statute was to expire, the trial court made it impossible for the

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28. *Id.* at 808, 442 P.2d at 364, 69 Cal. Rptr. at 307. "[A] trial court should not confuse and discredit the law by refusing to set a cause within the five-year period because it believes that a discretionary dismissal [for failure to prosecute within two years] is warranted." *Id.* at 806, 442 P.2d at 364, 69 Cal. Rptr. at 308.

29. *Id.* at 804, 442 P.2d at 362, 69 Cal. Rptr. at 306.

30. *Id.* at 806, 442 P.2d at 363-64, 69 Cal. Rptr. at 307-08.

31. *See infra* notes 32-48 and accompanying text.

32. 160 Cal. App. 3d 504, 206 Cal. Rptr. 745 (1984).

33. *Id.* at 513, 206 Cal. Rptr. at 750.

34. *Id.* at 508-09, 206 Cal. Rptr. at 747.

35. *Id.*

36. *Id. Civil Procedure Code* § 1005 allows a party to make a motion to specially set a case for trial after 15 days notice of the motion to all parties. CAL. CIV. PROC. CODE § 1005 (West Supp. 1987). Although the plaintiff in *Campanella* requested an ex parte order shortening the notice required to be given to all parties, the request was denied and the motion for preference heard with only 10 days left in the 5-year period. *Campanella*, 160 Cal. App. 3d at 511, 206 Cal. Rptr. at 749.

37. *Campanella*, 160 Cal. App. 3d at 511, 206 Cal. Rptr. at 749.

38. *Id.* at 509, 206 Cal. Rptr. at 747.

plaintiff to give the defendant the requisite fifteen day trial notice.[39] Since the plaintiff moved for preference within sufficient time to fulfill statutory trial notice requirements, the trial court was in error in denying the motion for preference, despite the plaintiff's lack of diligence.[40]

In *Kotoff v. Efseaff*,[41] the court of appeal held that a full court calendar and the plaintiff's lack of diligence in bringing the case to trial were not valid reasons to deny a motion for preference.[42] The plaintiff had twice failed to file a certificate of readiness for trial, and the superior court clerk dropped the case from the civil active list.[43] Ninety-seven days before the expiration of the five-year statutory period, the court sent the plaintiff a notice of intention to dismiss.[44] The plaintiff moved for a preferential trial date.[45] The trial judge denied the motion, citing the plaintiff's lack of diligence in prosecuting the action as a reason to not disturb the trial calendar.[46] The appellate court reversed, finding error in the denial of preference where ninety-seven days remained in the statutory period, and found it "monstrous to foreclose the plaintiff's day in court because the calendar was already set."[47] Since the trial court's erroneous denial of the motion made the plaintiff's efforts to bring the case to trial within the statutory five-year period impossible, the case could not be dismissed for failure to prosecute within five years.[48]

On the other hand, one California appellate court affirmed the denial of a motion for early trial setting because the plaintiff was not diligent in prosecuting the case.[49] In *Karubian v. Security Pacific*

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39. *Id.* at 511, 206 Cal. Rptr. at 749. By denying the plaintiff's request for an ex parte order, the trial court rendered impossible the plaintiff's compliance with the 15-day *trial* notice requirement imposed by Civil Procedure Code § 594(a). When the motion for preference was heard, less than 15 days remained till the end of the 5-year period. *Campanella*, 160 Cal. App. 3d at 511, 206 Cal. Rptr. at 749.

40. *Campanella*, 160 Cal. App. 3d at 511, 206 Cal. Rptr. at 749.

41. 172 Cal. App. 3d 991, 218 Cal. Rptr. 499 (1985).

42. *Id.* at 998, 218 Cal. Rptr. at 503. So long as a reasonable time before the expiration of the five-year period exists in which to bring the case to trial, preference should be granted. *Id.*

43. *Id.* at 994, 218 Cal. Rptr. at 501.

44. *Id.*

45. *Id.*

46. *Id.* at 995, 218 Cal. Rptr. at 501.

47. *Id.* at 997, 218 Cal. Rptr. at 502.

48. *Id.* Although 97 days remained in the statutory 5-year period, in Los Angeles it generally took 6 months from the time a certificate of readiness for trial was filed for a case to get to trial. *Id.*

49. Karubian v. Security Pac. Nat'l Bank, 152 Cal. App. 3d 134, 139-40, 199 Cal. Rptr. 295, 299 (1984).

National Bank,[50] the plaintiff failed to file an at-issue memorandum and waited until forty days before the five-year period was to expire before moving to specially set the case for trial.[51] The court of appeal affirmed the trial court's decisions to deny preference and to dismiss the case under the five-year statute.[52] In deciding whether to grant preference, the court of appeal held that a trial court is to consider the entire factual picture, not just the impending end of the five-year period.[53] In *Karubian*, the court found that granting preference would have substantially prejudiced the defendants by delaying both the accumulation of evidence and documents and the procurement of depositions.[54] The lack of diligence on the part of the plaintiff, together with the potential for prejudice to the defendant, formed the factual picture which justified a denial of the motion for preference.[55]

The essential conflict among California courts of appeal before the *Salas* decision, therefore, was whether a trial court had discretion to deny a motion for preference in the face of the imminent end of the stautory five-year period for bringing a case to trial. The courts which reversed a denial of preference held that a plaintiff's lack of diligence could not be considered in hearing a motion for preference.[56] These courts argued that lack of diligence could only be considered in deciding whether to grant or deny *discretionary* dismissal for failure to prosecute within three years.[57] In addition, the view requiring granting of priority finds support in the policy favoring a trial on the merits.[58]

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50. *Id.*
51. *Id.* at 136-37, 199 Cal. Rptr. at 297.
52. *Id.* at 140-41, 199 Cal. Rptr. at 300.
53. *Id.* at 140, 199 Cal. Rptr. at 299.
54. *Id.* at 140, 199 Cal. Rptr. at 300.
55. *Id.*
56. Weeks v. Roberts, 68 Cal. 2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968); Campanella v. Takaoka, 160 Cal. App. 3d 504, 206 Cal. Rptr. 745 (1984); Kotoff v. Efseaff, 172 Cal. App. 3d 991, 218 Cal. Rptr. 499 (1985).
57. *Campanella*, 160 Cal. App. 3d at 513, 206 Cal. Rptr. at 750; *Kotoff*, 172 Cal. App. 3d at 996-97, 218 Cal. Rptr. at 502 (only in considering a motion for discretionary dismissal under Civil Procedure Code § 583.410, must the trial court balance various factors including the diligence of the plaintiff and the likelihood of prejudice to the defendant from the delay). *See* CAL. R. CT. 373; *infra* note 118 (factors weighed in deciding on motions for discretionary dismissal).
58. This policy is expressed in statutes pertaining to dismissal. CAL. CIV. PROC. CODE § 583.130 (West Supp. 1987) (legislative declaration of policy). In addition, the California Law Revision Commission has stated that "the policy underlying the dismissal statute, the prevention of unreasonable delays in litigation, is less powerful than the policy which seeks to dispose of litigation on the merits rather than on procedural grounds." Cal. L. Revision Comm'n,

Other courts of appeal granted discretion to trial judges to deny preferential trial settings.[59] These courts favored a balancing approach, which weighed the plaintiff's lack of diligence against the entire factual picture, including prejudice to the defendant, in order to determine whether to grant the motion for preference.[60] Arguments supporting the view granting discretion to trial judges to deny preference are expressed in several ways. First, this view is supported by the policy requiring all parties to a civil suit to cooperate in bringing a case to trial.[61] Secondly, proponents of discretion argue that procrastination by dilatory litigants should not be rewarded.[62] In addition, unfairness to diligent litigants already on the trial calendar in displacing them for careless plaintiffs is prevented.[63] Proponents also argue that a trial court should weigh the same factors in assessing motions for preference as it does in ruling on discretionary dismissals.[64] A final argument is that alternative forums for a hearing on the merits are available to the plaintiff.[65] The conflict among California courts of appeal, therefore, set the stage for a decision by the California

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Recommendation Relating to Dismissal for Lack of Prosecution, 16 CAL. L. REV. COMM'N REP. 2211 (1982). Substantial California case law also supports the policy favoring trial on the merits. *See, e.g., Weeks,* 68 Cal. 2d at 806, 442 P.2d at 364, 69 Cal. Rptr. at 308; Herring v. Peterson, 116 Cal. App. 3d 608, 615-16, 172 Cal. Rptr. 240, 244 (1981). Finally, by way of analogy, the Federal Rules of Civil Procedure imply a preference for trial on the merits. FED. R. CIV. P. 40.

59. Karubian v. Security Pac. Nat'l Bank, 152 Cal. App. 3d 134, 199 Cal. Rptr. 295 (1985); Salas v. Sears, Roebuck & Co., 173 Cal. App. 3d 349, 218 Cal. Rptr. 897 (1985), *aff'd,* 42 Cal. 3d 342, 721 P.2d 590, 228 Cal. Rptr. 504 (1986).

60. *Karubian,* 152 Cal. App. 3d at 140, 199 Cal. Rptr. at 299.

61. CAL. CIV. PROC. CODE § 583.130 (West Supp. 1987).

62. Salas v. Sears, Roebuck & Co., 42 Cal. 3d 342, 349, 721 P.2d 590, 594, 228 Cal. Rptr. 504, 508 (1986).

63. *Id.*

64. *Id.* at 346, 721 P.2d at 592, 228 Cal. Rptr. at 506; Wilson v. Sunshine Meat Co., 34 Cal. 3d 554, 561, 669 P.2d 9, 13, 194 Cal. Rptr. 773, 777 (1983). Since both forms of involuntary dismissal are addressed to a "court's sound legal discretion, the motivating factors in the exercise of that discretion would be pertinent to both motions." *Id.*

65. If a case is submitted to judicial arbitration during the last six months of the five-year period, or is submitted earlier and remains in arbitration during any part of the last six months, the five-year period is tolled. CAL. CIV. PROC. CODE § 1141.17 (West Supp. 1987). The tolling provision applies whether the case was ordered to arbitration, CAL. CIV. PROC. CODE § 1141.11 (West Supp. 1987), the parties have stipulated to arbitration, CAL. CIV. PROC. CODE § 1141.12(b)(i) (West Supp. 1987), or the plaintiff has elected arbitration, CAL. CIV. PROC. CODE § 1141.12(b)(ii). R. WEIL & I. BROWN, JR., CIVIL PROCEDURE BEFORE TRIAL § 11:210.1 (Cal. Prac. Guide 1986). *E.g.,* Lazelle v. Lovelady, 171 Cal. App. 3d 34, 217 Cal. Rptr. 145 (1985) (plaintiff elected arbitration five days before the end of the five-year period). *See also* Niesner v. Kusch, 186 Cal. App. 3d 291, 230 Cal. Rptr. 613 (1986) (a plaintiff who anticipates denial of a motion for preference may elect judicial arbitration both to toll the five-year statute, and to gain access to a forum for a hearing of the case on the merits).

Supreme Court. In *Salas v. Sears, Roebuck & Co.*, that court resolved the conflict.[66]

II. The Case

A. The Facts

The plaintiff in *Salas v. Sears, Roebuck & Co.*[67] was injured when he was accidentally shot by a friend who was testing a rifle purchased from the defendant.[68] On September 12, 1979, the plaintiff brought actions against Sears[69] and against the friend.[70] On June 3, 1980, the plaintiff filed an at-issue memorandum in order to have the case placed on the civil active list maintained by the trial court.[71] The case was removed from the civil active list following the plaintiff's failure to give written notice of the trial setting conference to the defendants.[72] Plaintiff did nothing during the succeeding ten months to reinstate the case on the civil active list or set the case for trial.[73] On August 3, 1984, forty days before the expiration of the five-year limit, the plaintiff filed a motion for trial preference.[74] Sears filed a motion in opposition, asking the court to dismiss.[75] The trial court entered a tentative ruling denying plaintiff's motion for preference, on the ground of lack of diligence on the part of the plaintiff.[76] The trial court, however, ordered a second hearing on the motion to be held three days later, inviting the parties to file supplemental papers in support of their respective positions.[77] The plaintiff failed to submit any supplemental declarations or authorities and the court denied the plaintiff's motion for preference.[78] On September 26, 1984, after

66. *See infra* text accompanying notes 82-102.
67. 42 Cal. 3d 342, 721 P.2d 590, 228 Cal. Rptr. 504 (1986).
68. *Id.* at 344, 721 P.2d at 590, 228 Cal. Rptr. at 504.
69. The plaintiff sought damages against Sears on negligence, warranty, and strict liability theories. *Id.* at 344, 721 P.2d at 590-91, 228 Cal. Rptr. at 504-05.
70. The plaintiff sought damages against the friend for negligence. *Id.*
71. *Id.* at 344, 721 P.2d at 591, 228 Cal. Rptr. at 505.
72. *Id.*
73. *Id.*
74. *Id. See supra* note 4 (text of Cal. Civ. Proc. Code § 36(d)).
75. *Salas*, 42 Cal. 3d at 345, 721 P.2d at 591, 228 Cal. Rptr. at 505. Former § 583(a) was the discretionary dismissal statute for failure to prosecute within two years. *See* 1982 Cal. Stat. ch. 1402, sec. 3, at 5355 (amending Cal. Civ. Proc. Code § 583). The current statute extends the time period to three years. Cal. Civ. Proc. Code § 583.420(a)(2)(A) (West Supp. 1987).
76. *Salas*, 42 Cal. 3d at 345, 721 P.2d at 591, 228 Cal. Rptr. at 505.
77. *Id.*
78. *Id.*

the expiration of the five-year statutory period, the trial court granted defendants' motion to dismiss for lack of prosecution.[79] The plaintiff appealed, and the appellate court affirmed.[80] Thereafter the California Supreme Court affirmed the judgment of the court of appeal.[81]

B. The Opinion

The California Supreme Court in *Salas* held that the trial court has discretion to grant or deny a motion for trial preference.[82] The approach of the five-year limit is a crucial, but not the exclusive, consideration in ruling on such a motion.[83] A motion for preference requires the same issues to be balanced as does a motion to dismiss for failure to prosecute within *three* years.[84] The issues to be weighed include the dilatory action of the plaintiff, the condition of the court's calendar, the rights of other litigants, the prejudice to the defendant by an accelerated trial date, and the likelihood of eventual mandatory dismissal for failure to prosecute within five years if the preferential trial date is denied.[85] In adopting the balancing test for deciding motions for trial preference, the California Supreme Court explicitly disapproved earlier appellate court rulings which prohibited a trial court, once the five-year bar was imminent, from considering either the plaintiff's lack of diligence or prejudice to the defendant.[86] The plaintiff in *Salas*, relying on *Weeks v. Roberts*,[87] argued that the trial court had a duty to grant an early trial setting to prevent a mandatory dismissal for failure to prosecute within five years.[88] In *Weeks*, the California Supreme Court declared that twenty-eight days was, as a matter of law, a reasonable time within which to provide

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79. *Id.*

80. Salas v. Sears, Roebuck & Co., 173 Cal. App. 3d 349, 218 Cal. Rptr. 897 (1985), *aff'd*, 42 Cal. 3d 342, 721 P.2d 590, 228 Cal. Rptr. 504 (1986).

81. *Salas*, 42 Cal. 3d at 350, 721 P.2d at 595, 228 Cal. Rptr. at 509.

82. *Id.* at 349, 721 P.2d at 594, 228 Cal. Rptr. at 508.

83. *Id.* at 346, 721 P.2d at 592, 228 Cal. Rptr. at 506.

84. *Id.* at 346, 721 P.2d at 592, 228 Cal. Rptr. at 506 (citing Wilson v. Sunshine Meat & Liquor Co., 34 Cal. 3d 559, 561, 669 P.2d 9, 13, 194 Cal. Rptr. 773, 777 (1983)); CAL. CIV. PROC. CODE § 583.420(a)(2)(A) (West Supp. 1987).

85. *Salas*, 42 Cal. 3d at 347, 721 P.2d at 592, 228 Cal. Rptr. at 506; *see also* CAL. R. CT. 373(e) (enumerating additional factors a trial judge is to consider in ruling on motions for trial preference).

86. *Salas*, 42 Cal. 3d at 346, 721 P.2d at 592, 228 Cal. Rptr. at 506. The court disapproved Campanella v. Takaoka, 160 Cal. App. 3d 504, 206 Cal. Rptr. 745 (1984), and Kotoff v. Efseaff, 172 Cal. App. 3d 991, 218 Cal. Rptr. 499 (1985).

87. 68 Cal. 2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968).

88. *Salas*, 42 Cal. 3d at 345, 721 P.2d at 592, 228 Cal. Rptr. at 506.

a courtroom in order to avoid mandatory dismissal.[89] The *Salas* court distinguished *Weeks* on the facts.[90] In *Salas*, the plaintiff failed either to initiate discovery or to restore the case to the civil active list before moving for a trial preference.[91] In *Weeks*, however, the plaintiff had completed both discovery and pretrial proceedings, and had been granted a preferential trial date within the five-year period when another judge vacated the setting due to a shortage of courtrooms.[92] Accordingly, the California Supreme Court rejected the plaintiff's argument.[93]

The plaintiff, citing dicta in *Weeks*, further argued that a preferred procedure would be to grant preferential dates expressly without prejudice to the defendant's motion to dismiss for failure to prosecute.[94] This procedure, however, was grounded in the limits of former California Code of Civil Procedure section 583(a),[95] which prohibited the trial judge from dismissing on his own motion and, instead, required a defendant to move for dismissal.[96] The *Weeks* dicta, therefore, inhibited a trial judge from denying a preferential setting solely to achieve dismissal on a defendant's motion.[97] Since California Code of Civil Procedure section 583.410(a) now permits a trial judge to dismiss on his or her own motion, the need for a trial judge to grant preference and concurrently preserve a defendant's right to move for dismissal is obviated.[98] According to the California Supreme Court, the plaintiff in *Salas*, therefore, could not rely on the dicta in *Weeks* to support a motion for preference.[99]

California appellate courts had relied on the *Weeks* reasoning in holding that trial judges had a duty to grant a trial preference to plaintiffs faced with the expiration of the five-year statute.[100] In disapproving *Weeks*' two rationales for mandating preference, the court in *Salas* moved towards a more literal interpretation of the statute authorizing preference.[101] Since the statute clearly commends

89. *Weeks*, 68 Cal. 2d at 807, 442 P.2d at 364, 69 Cal. Rptr. at 308.
90. *Salas*, 42 Cal. 3d at 347-48, 721 P.2d at 593, 228 Cal. Rptr. at 507.
91. *Id.*
92. *Weeks*, 68 Cal. 2d at 804, 442 P.2d at 362, 69 Cal. Rptr. at 306.
93. *Salas*, 42 Cal. 3d at 348, 721 P.2d at 593, 228 Cal. Rptr. at 507.
94. *Id.*
95. 1982 Cal. Stat. ch. 1402, sec. 3, at 5355 (amending CAL. CIV. PROC. CODE § 583).
96. *Salas*, 42 Cal. 3d at 348, 721 P.2d at 594, 228 Cal. Rptr. at 508.
97. *Id.*
98. *Id.*
99. *Id.*
100. *See supra* notes 33-48 and accompanying text.
101. *See supra* note 4 (statutory language of CAL. CIV. PROC. CODE § 36(d)).

the decision whether to grant or deny preference to a trial judge's sound discretion, the holding in *Salas* complements the statutory language.[102]

III. Legal Ramifications

In view of the policies militating against a mandatory grant of preference,[103] a plaintiff's conduct in bringing a case to trial must be a factor in the totality of circumstances test applied by a trial court in determining whether to grant a motion for trial preference.[104] Read most narrowly, the message of *Salas* is clearly to encourage diligence in the prosecution of suits.[105] Read more broadly, *Salas* may, particularly in view of congested civil dockets,[106] signal an erosion of the policy favoring trial on the merits.[107]

One question left unanswered in *Salas* is whether it is ever too late in the five-year statutory period to request preference. Dicta in *Salas* suggests an advantage to *early* application for preference, since "there will remain ample time for a plaintiff to prepare his case for trial and submit a subsequent motion for trial preference on the basis that the case would otherwise face dismissal."[108] Since timely application for preference is one sign of reasonable diligence by a plaintiff,[109] if the plaintiff foresees delay early in the proceedings and makes an early motion for preference, discretionary dismissal will not be granted; hence, the plaintiff has the option to move for preference a second time prior to the end of the five-year period.[110] However, a plaintiff who does not foresee delays does not apply for early preference. In such a case, where the delay is normal, albeit

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102. *Salas*, 42 Cal. 3d at 348, 721 P.2d at 594, 228 Cal. Rptr. at 508; *see also* note 4 (statutory language of Cal. Civ. Proc. Code § 36(d)).

103. *See supra* notes 61-65.

104. *Salas*, 42 Cal. 3d at 349, 721 P.2d at 594, 228 Cal. Rptr. at 508.

105. *Id.* The procedure for restoring a case to the civil active list depends on the rules set by local superior courts. Some superior courts require a motion to be made, while others reinstate the case automatically or at preset intervals. R. Weil & I. Brown, Jr., Civil Procedure Before Trial § 12:28 (Cal. Pract. Guide 1986).

106. In Sacramento county, once the at-issue memorandum is filed for an action commencing in Superior Court, a plaintiff can expect a trial date 14 months in the future. Conversation with Mr. Bob Borghese, Master Calendar Supervisor, Sacramento County Courthouse (Apr. 6, 1987) (notes on file at *Pacific Law Journal*).

107. *See Salas*, 42 Cal. 3d at 349, 721 P.2d at 594, 228 Cal. Rptr. at 508. The *Salas* court, despite reaffirming the policy against disposing of litigation on procedural grounds, held that the policy would prevail only if plaintiff made some showing of excusable delay. *Id.*

108. *Id.*

109. *See supra* text accompanying note 23.

110. *Salas*, 42 Cal. 3d at 349, 721 P.2d at 594, 228 Cal. Rptr. at 508.

unforeseen, the five-year statute will not be tolled[111] and the plaintiff must rely on a favorable outcome of the balancing test at a late preference hearing to have any chance of a hearing on the merits.[112] Whether a request for preference is a plaintiff's first or second request, language in *Salas* suggests that a motion for preference may be decided on the "eve" of the expiration of the statutory five-year period.[113] The courts of appeal, however, both before and after *Salas*, have suggested that at least twenty-one days must remain in the five-year period.[114] In view of the requirement that all parties have fifteen days' notice of a trial date,[115] it is likely that a motion for preference may be heard no later than fifteen days before the statutory period is to end.[116]

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111. *See supra* text accompanying note 21.

112. *Salas*, 42 Cal. 3d at 349, 721 P.2d at 594, 228 Cal. Rptr. at 508.

113. "A discretionary standard for determining motions under section 36(d), even on the eve of the five-year deadline, is consistent with the legislative intent to promote diligent and orderly prosecution . . . ." *Id.*

114. *See* Dick v. Superior Court, 185 Cal. App. 3d 1159, 230 Cal. Rptr. 297 (1986) (21 days left in the 5-year period). In *Dick*, the appellate court stated that since neither case law nor statute set a mandatory minimum time within which motions for preference had to be brought, the amount of time left in the five-year period was not determinative of the motion. *Id.* at 1167, 230 Cal. Rptr. at 302. *See also* Weeks v. Roberts, 68 Cal. 2d 802, 807, 442 P.2d 361, 364, 69 Cal. Rptr. 305, 308 (1968) (28 days); Vogelsang v. Owl Trucking Co., 40 Cal. App. 3d 1068, 1071, 115 Cal. Rptr. 666, 668 (1974) (46 days).

115. CAL. CIV. PROC. CODE § 594(a) (West Supp. 1987).

116. Although statutes specify the notice a defendant is entitled to, for a hearing on plaintiff's motion to set a preferential trial date, an ex parte order shortening the time for service and hearing of the motion may be granted. Griffis v. S.S. Kresge Co., 150 Cal. App. 3d 491, 498, 197 Cal. Rptr. 771, 775 (1984) (a plaintiff may "reasonably expect" to receive an ex parte order shortening time in which to bring a motion to specially set a case for trial). A trial court must, nonetheless, comply with California Civil Procedure Code § 594(a) which provides that an issue of fact may not be tried in the absence of an adverse party unless it is shown to the satisfaction of the court that the adverse party had 15 days notice of the date set for trial. CAL. CIV. PROC. CODE § 594(a) (West Supp. 1987). Compliance with California Civil Procedure Code § 594(a) is mandatory. Irvine Nat'l Bank v. Han, 130 Cal. App. 3d 693, 697, 181 Cal. Rptr. 864, 866 (1982). The 15-day time limit may *not* be shortened except by waiver or consent of the parties. Minkin v. Levander, 186 Cal. App. 3d 64, 70, 230 Cal. Rptr. 592, 595 (1986) (citing Bird v. McGuire, 216 Cal. App. 2d 702, 713, 31 Cal. Rptr. 386, 396 (1963)). Accordingly, even though the motion to specially set may be heard with less than 15-days' notice, a *trial* date cannot be set by a trial court less than 15 days from the date the motion was heard. *Id.* The interplay of the 5-year dismissal statute and the 15-day notice provision of Civil Procedure Code § 594(a) becomes clear. If a plaintiff's request for preference is heard with less than 15 days remaining in the 5-year period, the 15-day trial notice provision must, nevertheless, be met and the 5-year deadline will expire during the notice period. A plaintiff who wishes to press his claim is left with just two alternatives: to assert the impossibility exception in order to toll the 5-year dismissal statute, or to secure the defendant's consent to waiving the 15-day trial notice requirement. In *Minkin*, the plaintiff's motion for preference was heard 10 days before the expiration of the 5-year statute. The trial judge rejected the plaintiff's claim that despite the mandatory provisions of Civil Procedure Code § 594(a) a trial date be set within 10 days. The appellate court, citing *Salas*, affirmed. Given the plaintiff's "procrastination" in pursuing his claim, neither the impossibility exception nor the *Salas* balancing test could save his claim. *Minkin*, 186 Cal. App. 3d at 72, 230 Cal. Rptr. at 597.

A second question left unanswered in *Salas* is whether additional factors will be considered in deciding a plaintiff's motion to specially set a case for trial. The five factors on which *Salas* focused[117] were derived from rule 373(e) of the California Rules of Court.[118] The rule, however, enumerates six factors plus "any other circumstance" relevant to a fair determination of the issue.[119] Given the rationale for using the same general test for motions for preference as is used for motions for discretionary dismissals,[120] it seems likely that future decisions will use all the factors, as circumstances may warrant.

CONCLUSION

In *Salas v. Sears, Roebuck & Co.*, the California Supreme Court held that a trial court must look to the totality of the circumstances when deciding whether to grant a motion for preference.[121] The impending expiration of the five-year period within which a plaintiff is required to bring a case to trial is not conclusive, but is only one of the factors to be balanced in the determination.[122] Prior to *Salas*, the lower courts were divided on the issue of whether a trial court had a duty to grant a motion for preference when the five-year statutory deadline for bringing a case to trial was imminent.[123] The California Supreme Court held, in *Salas*, that despite the approaching expiration of the five-year statute, a trial court retained discretion

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117. *See supra* text accompanying note 85.

118. California Rules of Court 373(e) provides the following:

> In ruling on the motion the court shall consider all matters relevant to a proper determination of the motion, including the court's file in the case and the affidavits and declarations and supporting data submitted by the parties and, where applicable, the availability of the moving party and other essential parties for service of process; the diligence in seeking to effect service of process; the extent to which the parties engaged in any settlement negotiations or discussions; the diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party; the nature and complexity of the case; the law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case, the nature of any extensions of time or other delay attributable to either party, the condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial; whether the interests of justice are best served by dismissal or trial of the case; and any other fact or circumstance relevant to a fair determination of the issue. The court shall be guided by the policies set forth in section 583.130 of the Code of Civil Procedure.

CAL. R. CT. 373(e) (West Supp. 1987).

119. *Id.*

120. *See supra* note 64 and accompanying text.

121. *See supra* text accompanying notes 85.

122. *See supra* text accompanying note 83.

123. *See supra* text accompanying notes 32-65.

and was to consider the plaintiff's conduct in bringing the case to trial as one among many factors in deciding the motion for preference.[124]

Two questions were left undecided in *Salas*,[125] however both appear amenable to resolution. First, despite the suggestion in *Salas* that motions for preference could be heard on the eve of the expiration of the five-year period,[126] the language of California Code of Civil Procedure section 594(a) mandates fifteen days notice to adverse parties of the date set for trial.[127] Accordingly, a motion to specially set a case for trial within the statutory limit must be granted, if at all, at least fifteen days before the five-year period expires. Second, although the court in *Salas* balanced five factors in deciding on a motion for preference,[128] it appears likely that the additional factors enumerated in Rule 373(e)[129] could be used, as circumstances warrant.

Maria G. Narayan

124. *See supra* note 85 and accompanying text.
125. *See supra* text accompanying notes 108-20.
126. *See supra* note 113 and accompanying text.
127. *See supra* note 116 and accompanying text.
128. *See supra* text accompanying note 85.
129. *See supra* note 118 and accompanying text.