LOS ANGELES
Daily Journal
www.dailyjournal.com
THURSDAY, APRIL 7, 2016
PERSPECTIVE

'No longer considered published'

By Hon. Steven A. Brick (Ret.)

On July 29, 2015, the California Supreme Court invited comments on proposed revisions to California Rule of Court 8.1105(e). Under the current rule, whenever the Supreme Court grants review of a published decision of the Court of Appeal, the intermediate court's opinion automatically "is no longer considered published." In that status, it must not be cited or relied upon by a court or a party in any other action. Rule 8.115.

Under the proposed revision to Rule 8.1105(e), unless the court otherwise orders, the appellate court's opinion would remain published and would either continue to have "the same binding or precedential effect that it had prior to the grant of review" (Alternative A), or would have "no binding or precedential effect, and may be cited for persuasive value only" (Alternative B). Under either alternative, counsel or a court citing the published intermediate appellate decision "must also note the grant of review and any subsequent action by the Supreme Court." Last summer, the Supreme Court sought comments on whether the rule should be changed at all, and if so, whether Alternative A or Alternative B should be adopted. Its decision on this proposed rule change is expected sometime in the next few months.

The reason why Rule 8.1105(e) should be amended with Alternative A is illustrated by *Gaines v. Fidelity National Title Ins. Co.*, 2016 DJDAR 1909 (Feb. 25, 2016), in which the Supreme Court recently affirmed an intermediate appellate decision. In *Gaines*, the court held that a stay of proceedings entered at the request of a defendant which had not yet appeared did not satisfy the rule announced in *Bruns v. E-Commerce Exchange Inc.,* 51 Cal. 4th 717 (2011). To exclude time from the running of the five-year period to bring an action to trial (CCP Section 583.310) under the exception created by Section 583.340(b), a stay of proceedings must be a total stay. In *Gaines*, the court held that because responses to outstanding discovery were permitted and an agreed upon mediation was to be held in an effort to achieve early resolution, the stay was only "partial" and did not qualify under *Bruns*. The court also held that the trial court did not abuse its discretion in determining that plaintiff had not been sufficiently diligent to qualify for the exclusion of time under Section 583.340(c) when it would have been "impractical, impossible, or futile" to bring the action to trial within five years.

One could disagree with the majority's conclusions and, indeed, Justice Leondra Kruger did in a thoughtful dissent joined by Justice Goodwin Liu. But what is important for consideration of the amendment of Rule 8.1105(e) is that although the court affirmed the Court of Appeal, the latter decision cannot be cited or relied upon by attorneys or courts. And it contains thoughtful analyses that should remain as precedents.

The *Gaines* case was brought by the surviving spouse of a couple which had owned their home, and when she died, by her son. The complaint sought rescission and cancellation of a deed of trust and damages for fraud and other claims arising out of the transfer of the family home to Joshua Tornberg. Acting with his fiancé, who was an employee of the original lender, Countrywide Loans Inc., Tornberg allegedly persuaded the Gaines not to refinance the $554,000 loan on their $1+ million home in 2006, but instead to sell the property to him and take back a lease with a repurchase option. The allegations against Countrywide, Fidelity National Title Insurance Company, the escrow agent which allegedly transferred $90,000 improperly to Tornberg from the escrow account, and various other companies from whom Tornberg "borrowed" money and then promptly defaulted, are complex. The complaint was amended four times and various entities which came to have an interest in the property were added between 2006 and 2011, including Aurora Loan Service LLP in 2008 and Lehman Brothers Holdings Inc. But Lehman, whose role in the transaction did not become known until 2010, could not be added as the defendant which then owned the deed of trust until plaintiff received relief from the automatic stay created by Lehman's 2008 bankruptcy proceeding in New York. Although plaintiff suggested bifurcating the case against the other defendants and trying it in 2010, the trial court made clear that it did not want the case tried twice. Consequently, an August 2012 trial date was set after Lehman filed its answer late in 2011, shortly after the bankruptcy stay was lifted.

However in May 2012, Fidelity moved to dismiss for failure to bring the action to trial within five years. Although Fidelity was the only defendant that moved for dismissal, Aurora and Lehman argued that if the motion was granted then the case should be dismissed as to all defendants. After deciding that the mediation stay in 2008 did not toll the statute under section 583.340(b) and that plaintiff was not sufficiently diligent to qualify for tolling under section 583.340(c) the court dismissed the entire action.

The Court of Appeal affirmed the dismissal with respect to Fidelity, agreeing that under the Supreme Court's decision in *Bruns* the mediation stay was not a total stay and that the trial court had not abused its discretion in finding that plaintiff had not been sufficiently diligent to qualify under Section 583.340(c). But it made two other rulings which were instructive.

On appeal, the non-moving defendants, including Aurora and Lehman, urged that the trial court's dismissal was jurisdictional and that all of the defendants benefitted from that ruling. The Court of Appeal rejected that argument, holding that "Former sec. 583 [now Section 583.310] is not 'jurisdictional' in the sense that if the five-year period has expired as to one defendant, the action must be dismissed as to all defendants, regardless of their circumstances." The court further held that Lehman, which was not brought into the case as Doe 31 until the filing of the fourth amended complaint in 2008 was not entitled to dismissal. The June 2012 trial date against it was within five years of the commencement of the action as to it. In so holding, the court differentiated between Does 1 through 30, which were included in the original complaint, and dismissed, and Does 31 through 50, which were not.

Neither of these holdings is mentioned in the Supreme Court's decision in *Gaines*. Yet under current Rule 8.1105(e), neither may be cited or relied upon even though the Supreme Court affirmed the Court of Appeal. Alternative A would correct this anomaly by allowing the Court of Appeal's holdings to remain published. Since the Supreme Court did not reach these issues, the Court of Appeal's holdings would not be given an imprimatur by the Supreme Court. But they would retain the same precedential value that they would have had if the Supreme Court had not taken the case.

Conclusion

There are many who believe that because electronic research makes unpublished and published decisions readily available, the Supreme Court should do away with the distinction between these two classes of opinions. However, no such proposal is currently under consideration by the court. In contrast, the modest proposal to preserve the precedential value of published Court of Appeal decisions unless the Supreme Court exercises its discretion in a particular case to order it depublished will soon be acted upon. As *Gaines* illustrates, there is much to be gained and nothing to be lost by the Supreme Court adopting Alternative A.

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