

TUESDAY, DECEMBER 27, 2011

LITIGATION

## Budget cuts: the continuing impact in state courts

By Gregory D. Call

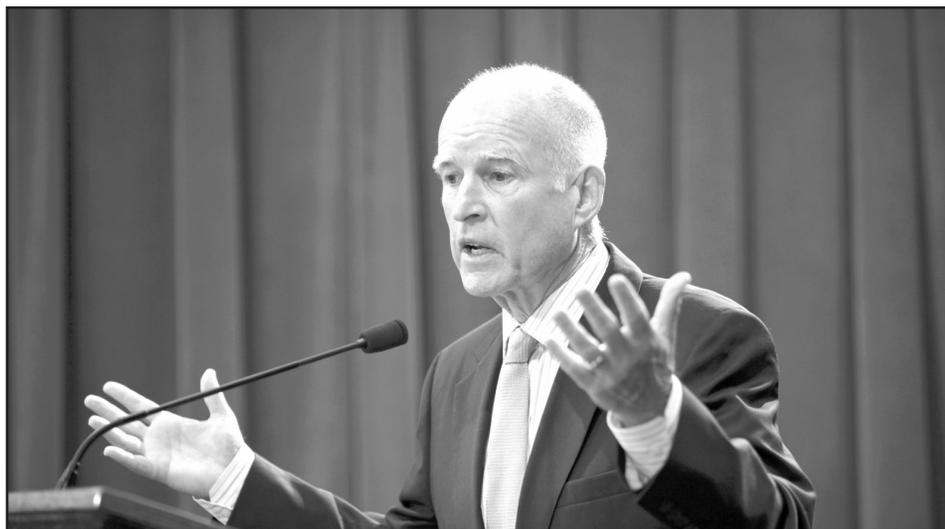
As 2012 begins, one certainty is that Gov. Jerry Brown and the California Legislature will once again wrestle with balancing the state budget. It is virtually assured that our courts will have less money to spend and more cases to deal with until the state has more revenue to spend.

The courts have already seen furloughs, closures, salary reductions, laid off workers, and unfilled appointments. San Francisco County Superior Court Judge Katherine Feinstein has warned, “the civil justice system in San Francisco is collapsing.” Even the popular press has taken up the call with *USA Today* warning of the need to protect the third branch of government and not treat the courts as just another agency. The concern is obvious: cuts threaten the access to justice.

Over the last 25 years, the courts have made great strides in making justice more accessible. The courts have made interpreters more available, provided resources for self-represented litigants, increased the number of judges, and made the system more efficient through a variety of reforms — perhaps the most significant being the consolidation of superior and municipal courts.

Among the issues successfully addressed by the courts was delay of civil trials. In the mid-1980s, it was commonplace for civil litigants to wait more than five years to get a trial date.

First through a series of experiments, and then with the passage of the Trial Delay Reduction Act in 1990, California set out to resolve all civil cases within 12 to 18 months of filing. It was an ambitious goal and one that was largely met. A few years after implementation of the fast track rules required by the Trial Delay Reduction Act, superior courts reported that case backlogs were being reduced and the number of cases being resolved in under 12 or 18 months had increased significantly.



Gov. Jerry Brown speaks about shortfalls in the state budget during a news conference at the Capitol in Sacramento on Dec. 13. Associates Press

The success stemmed from a three-pronged approach. The first prong was active case management by the court. Status conferences were held soon after a case was filed and judges actively managed cases. The second prong was setting trial dates within 12 to 18 months of the filing

Over the last 25 years, the courts have made great strides in making justice more accessible. So what will happen assuming budget cuts continue?

of a complaint. While not all cases had trial dates set on that timetable, most cases did. The third prong was making Alternative Dispute Resolution (ADR) options available and requiring that the parties engage in ADR. Courts set up

ADR processes and also offered parties the option of using outside mediators. The ADR business for civil cases in California has boomed since 1990.

The success of these efforts to make justice quicker and more available in civil cases is reflected not only in statistics, but also in the fact that state court became the preferred venue for filing a civil case. While in some cases the motivation to file in state

court stemmed from favorable California substantive legal rules, procedural limits on summary judgment/adjudication or the ability to prevail without a unanimous jury, a major reason was because a civil plaintiff could get a trial date.

Around my office there is a saying: “The best friend of a plaintiff is a trial date.” In a case in which the plaintiff is leveraging the threat of liability and not merely the fees that will need to be incurred to defend a case, a trial date, or at least the prospect of a trial date, is a key to getting to a settlement. With a trial date, both the plaintiff and the defendant know the matter will either be resolved by trial or they are going to have to work out a deal.

So what will happen to our state courts assuming budget cuts continue? Certainly things will vary across the counties. For



Gregory D. Call is a partner and head of office for Crowell & Moring LLP in San Francisco. He is a member of the firm's Litigation Group and has an active trial practice representing both plaintiffs and defendants in complex commercial cases.

all trial courts, we are likely to see shorter hours and fewer staff personnel, causing cases to move slower as it takes longer to get to trial. We are a long way from the days before the Trial Delay Reduction Act, but 2012 will see the courts facing further challenges as they try to deal with their caseload. To defendants seeking to delay the resolution, and plaintiffs seeking to leverage transaction costs and not the threat of liability, there may be advantages in trial court delays. For most parties, delay will mean greater out-of-pocket costs and continued uncertainty regarding the outcome of their dispute.

And what conversations will civil litigators be having with their clients regarding these budget challenges? There will be conversations about the alternatives. For plaintiffs contemplating filing a lawsuit, they will want to know where else they can file a complaint. Is federal court an option? Will the matter move quickly in federal court? What are the advantages and disadvantages of federal versus state court? Are

there other state courts where the action can be filed? Will the matter move more quickly in some other state court system? What are the advantages and disadvantages of a state court other than one in California? Both plaintiffs and defendants will also want to discuss opting out of the court system and engaging in arbitration. Parties will want to discuss what the advantages are to arbitrating and whether an agreement can be reached to arbitrate.

Conversations about where disputes should be resolved will also come up in discussions about venue and dispute resolution in contracts. Again, parties will want to know about the possibilities and relative merits of different venues. Should the contract include a dispute venue other than California? Should the contract include an arbitration clause? If so, what should it say?

One option to discuss is the use of "temporary judges." Pursuant to California Rule of Court 2.810, courts can and do appoint temporary judges to deal with discovery issues, family law matters, small claims

and a variety of other matters. And pursuant to California Rule of Court 2.830, courts can also utilize temporary judges selected by the parties. The Rules of Court govern issues such as taking an oath, preparation of a stipulation, compensation, required disclosures, and the handling of court records. Such temporary judges can act as state court trial judges ruling on motions and conducting trials. Their decisions are subject to appeal pursuant to the rules of other trial court decisions. In fact, many superior courts have adopted local rules encouraging the use of temporary judges. This option offers a way to avoid the delays that budget cutbacks threaten, while offering the opportunity to participate in the state court system.

In 2012, as headlines discuss California's continuing budget challenges and the impacts on courts, clients will need sound analysis regarding the alternatives for dealing with their disputes. We will need to be prepared to have those discussions with our clients.