



## If Calif. Tax Bill Fails, Dueling Cos. May Head Out Of Court

By Erin Coe

*Law360, San Diego (October 24, 2012, 10:19 PM ET)* -- Still reeling from a \$544 million hit to their budget this year, California courts are going to face case backlogs if state voters reject Gov. Jerry Brown's tax hike initiative on Nov. 6, creating a situation that could drive businesses to seek out arbitration and other alternative ways to resolve their legal disputes, experts said Tuesday.

Brown's Proposition 30 seeks to raise income taxes by up to 3 percent on the wealthy — those with incomes over \$250,000 — for seven years and hike the state sales tax by 0.25 percent for four years. If passed, it would bring in revenue for schools and free up funds for the courts and other core public services.

But if the governor's measure fails to win approval, approximately \$6 billion in automatic reductions, known as trigger cuts, would take effect. Although they would primarily penalize schools, the courts' budget could also be at risk of going back on the chopping block, according to experts.

More cuts to the state judicial system would mean greater delays for court cases, especially civil proceedings. This could spur businesses and other litigants to scramble for alternatives such as arbitration, mediation, federal court, trial court in other states and judicial reference proceedings, according to Gregory Call, a Crowell & Moring LLP litigator who represents clients in complex commercial cases.

"Because of court delays, California state courts won't look as favorable, and companies will look to alternatives," he said.

California courts, already operating in a more austere environment since June, when the governor approved a state budget calling for \$544 million in cuts to the judicial branch, have closed courtrooms and slashed their workforce. Even if Proposition 30 makes it through, they face financial challenges on the horizon. But the looming storm clouds will grow even darker if it doesn't, attorneys say.

"It's only going to get worse if Prop 30 doesn't pass," said Brian Kabateck, managing partner at Kabateck Brown Kellner LLP. "If the trigger cuts go through, the courts are going to lose more money."

The Los Angeles County Superior Court, for instance, has closed 56 courtrooms and laid off or demoted hundreds of court workers in order to make \$35 million in cuts. While it has been tapping its reserves, it could have to make \$50 million in additional cuts by next year, according to Richard Burdge Jr., president of the Los Angeles County Bar Association.

"Most of the courts have not fully operationalized the cuts from prior years," he said. "Most of them are paying down their reserves to make it. But next year, they won't have reserves, and those surviving on reserves will have to cut their budgets substantially."

Litigants are beginning to feel the impacts from the courts' reduction in services. They now have to provide their own court reporters for civil cases in many jurisdictions, and motions may go unheard for several months. But most significantly, judges are starting to set trial dates further out, and distant or uncertain trial dates put less pressure on parties to settle, according to experts.

"If there is no trial date, cases are going to drag on," Burdge said.

The delays may make companies and other litigants more reluctant to file cases in the trial courts, and they may seek out alternative forums, according to Call.

The "fewer courts are opened and fewer personnel are there to move cases along, the slower the state court system will be," he said. "Companies may move to options other than state courts."

Cases that aren't heading to trial for several years also bring financial headaches for the lawyers involved, according to Burdge.

"If you're a contingency lawyer and you can't get a case settled, you're not going to make as much money. And if you're a defense lawyer who is just sitting and not working on a case, the same thing is going to happen," he said. "It's not good for the public, and it's not good for the profession."

As a result, corporate lawyers might give additional consideration to including arbitration clauses in business contracts, according to Burdge.

"I've seen a trend over the last half a dozen years of lawyers going away from arbitration because they don't think it's that much faster than court, but some may rethink that arbitration is now the only option," he said.

If Proposition 30 is rejected by voters, it also may incentivize commercial parties to take their real estate, contract and other business disputes to a judicial reference proceeding, which has advantages over arbitration, according to Call. The parties can hire their own superior court judge, and unlike in arbitration, the decisions by a judge in a judicial reference matter can be challenged.

"A judicial reference proceeding allows parties to pick the judge, to be more certain about the timetable to resolve the case, and to preserve the ability to appeal," he said. "As an alternative to the California court system that is becoming less and less favorable, people may opt more for judicial reference."

Cost will be a factor for many, though. Most traditional plaintiffs and even a number of businesses, hesitant to pay thousands of dollars a day for an arbitrator or judge, would be loath to venture to alternative forums, even given the potential for significant delays, Kabateck said.

"Most people trust impartial judges in making decisions and juries in making factual decisions," he said. "I think people are just going to wait five years for a courtroom to decide their dispute."

But litigants who opt to sit and wait for a trial court date are not going to have it easy, according to Burdge.

"If you're a business and you need a dispute resolved to move on, and it's hanging over your head for five or six years, that's not a good thing," he said. "If you've suffered an injury and you need your medical bills paid, waiting five or six years is a huge hardship. Justice delayed is justice denied."

Another risk is that the litigants who can afford out-of-court options could create a private system of justice that is less transparent, Burge noted.

“There are no appeals, no precedent, and people won’t know what’s going on,” he said. “It’s probably not great for a society that depends on a justice system that is consistent from person to person.”

--Editing by Kat Laskowski and Jeremy Barker.

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