

Memorandum 99-11

Trial Court Unification: Stay of Lien Enforcement Action Pending Arbitration

The Commission's 1998 trial court unification bill amended Section 1281.5 of the Code of Civil Procedure as follows:

1281.5. (a) Any person, who proceeds to record and enforce a claim of lien by commencement of an action pursuant to Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the Civil Code, shall not thereby waive any right of arbitration which that person may have pursuant to a written agreement to arbitrate, if, in filing an action to enforce the claim of lien, the claimant at the same time presents to the court an application that the action be stayed pending the arbitration of any issue, question, or dispute which is claimed to be arbitrable under the agreement and which is relevant to the action to enforce the claim of lien. The In a county in which there is a municipal court, the applicant may join with the application for the stay, pending arbitration, a claim of lien otherwise within the jurisdiction of the municipal court.

(b) The failure of a defendant to file a petition pursuant to Section 1281.2 at or before the time he or she answers the complaint filed pursuant to subdivision (a) shall constitute a waiver of that party's right to compel arbitration.

The Commission's trial court unification report suggested further study of this provision: "It may be appropriate to clarify or simplify the procedure for obtaining a stay in superior court for arbitration of a municipal court lien foreclosure action." Attached is a staff draft of a Tentative Recommendation on *Stay of Lien Enforcement Action Pending Arbitration* proposing revisions to Code of Civil Procedure Section 1281.5.

Jurisdiction

The primary purpose of the attached Tentative Recommendation is to delete the confusing last sentence of Section 1281.5(a) of the Code of Civil Procedure, which says, "In a county in which there is a municipal court, the applicant may join with the application for the stay, pending arbitration, a claim of lien otherwise within the jurisdiction of the municipal court." This sentence might be

read to cast doubt on the authority of the municipal court to order a stay in an action pending before it. In letters we received from the State Bar last year commenting on the trial court unification materials, the Committee on Administration of Justice wrote that the “statute presently does not say that a municipal court cannot grant the stay; rather, in backwards fashion, it implies that an otherwise municipal court lien foreclosure action can (or perhaps must) be filed in superior court to obtain a stay.” The Litigation section wrote that “a lien foreclosure action must be filed in superior court if the plaintiff is going to obtain a stay because the statute does not give the municipal court jurisdiction to grant the stay.” Although the staff does not agree with these conclusions (see the attached Tentative Recommendation), the sentence to be deleted is troublesome.

The attached Tentative Recommendation would rely instead on general rules of civil procedure, under which the plaintiff may join in a lien enforcement action in superior court other lien claims against the same defendant, and seek a stay of all such causes of action, whether or not the separate lien claim would otherwise be less than the jurisdictional limits of the superior court.

Application and Notice of Motion for a Stay

Although Section 1281.5 does not say so expressly, it contemplates that the summons and complaint in the action to enforce the claim of lien, and the application for a stay, will be served on the opposing parties within a reasonable time after the action is commenced, and a separate notice of motion for a stay will be filed and served as promptly thereafter as is reasonably possible. *Kaneko Ford Design v. Citipark, Inc.*, 202 Cal. App. 3d 1220, 1227, 249 Cal. Rptr. 544 (1988). Section 1281.5 should be clarified to spell this out. It should require a notice of motion for a stay to be filed within a specified time period, such as 30 days after service of the summons and complaint. This would avoid litigation over application of the present “reasonable time” requirement of *Kaneko*.

The staff considered requiring the motion for a stay to be calendared by the plaintiff at the time of filing the complaint, and requiring service of the notice of motion for a stay at the same time summons and complaint are served. However, this would be problematic because the plaintiff cannot be certain when summons and complaint will be served, making it impossible to calendar the motion for a stay with confidence.

If a notice of motion for a stay must be filed and served within 30 days after service of the summons and complaint, is there any utility in continuing the

requirement of an “application” to be made at the same time as the filing of the complaint? The State Bar Committee on Administration of Justice suggested replacing the requirement in Section 1281.5 of an application for a stay with an allegation in the complaint that no waiver of arbitration is intended (Exhibit to First Supplement to Memorandum 98-12). CAJ wrote:

[T]he present statutory format is awkward. Construction contracts frequently require arbitration. Contractors and subcontractors must file a timely action to enforce a lien, usually within 120 days after completion. To make it clear that filing a foreclosure action did not preclude the plaintiff from arbitrating, the present statute allows the plaintiff to move for a stay of the action concurrently with filing the action. It would seem that a simple allegation in the complaint electing arbitration should be sufficient to preserve the arbitration rights and seems unnecessary to require the plaintiff to move for a stay on filing the complaint. If neither the court nor the defendant understands that a stay is appropriate, then the plaintiff can later move for a stay.

The purpose of requiring an application for a stay to be filed with the complaint is to indicate plaintiff’s intent to comply with the arbitration provisions and to make clear plaintiff does not intend to waive them. *Review of Selected 1977 California Legislation*, 9 Pac. L.J. 281, 387 (1978). Putting the defendant on notice that no waiver is intended could be accomplished just as well by appropriate allegations in the complaint, as CAJ suggests. The attached Tentative Recommendation permits plaintiff either to file an application for a stay at the same time the complaint is filed or to include appropriate allegations in the complaint. It requires plaintiff to file and serve a notice of motion for a stay within 30 days after service of summons and complaint. If plaintiff files an application for a stay or includes appropriate allegations in the complaint, the Tentative Recommendation prohibits discovery without leave of court unless and until the claimant either expressly waives the right to arbitration or the court denies the motion for a stay. **The staff recommends the Commission approve the Tentative Recommendation for distribution for comment.**

Respectfully submitted,

Robert J. Murphy
Staff Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

TENTATIVE RECOMMENDATION

Stay of Lien Enforcement Action Pending Arbitration

April 1999

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN July 15, 1999.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335 FAX: 650-494-1827

SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation would make three revisions to Code of Civil Procedure Section 1281.5 relating to preservation of arbitration rights during lien enforcement proceedings:

(1) It would delete an anomalous sentence that could be read to limit municipal court jurisdiction.

(2) It would permit the plaintiff to include appropriate allegations in the complaint as an alternative to presenting with the complaint an application for a stay order, and would require the plaintiff to file a notice of motion for a stay order within 30 days after service of the summons and complaint. This is generally consistent with case law and with existing practice.

(3) It would prohibit discovery without leave of court pending determination of the required motion for a stay order.

This recommendation was prepared pursuant to Government Code Section 70219.

1 arbitration-related matters. In 1977, when the section containing this language was
2 enacted,⁷ the superior court generally had jurisdiction over all arbitration-related
3 matters.⁸

4 In 1984, the Code of Civil Procedure was amended to give the municipal court
5 jurisdiction of all arbitration-related petitions if based on the subject matter of a
6 pending action properly filed in municipal court.⁹ No conforming revisions were
7 made by this legislation, so the last sentence of Section 1281.5(a) remained
8 unchanged.

9 The proposed legislation repeals the last sentence of Section 1281.5(a), and
10 relies instead on general rules of civil procedure under which the plaintiff may join
11 in a lien enforcement action in superior court other lien claims against the same
12 defendant (and seek a stay of all such causes of action), whether or not the separate
13 lien claim would otherwise be less than the jurisdictional limits of the superior
14 court.¹⁰

15 **Avoiding Unintended Waiver of Contract Right to Arbitrate**

16 Section 1281.5 prevents the mere filing of a lien action from operating as a
17 waiver of the plaintiff's contractual right to arbitrate. It was enacted to overturn
18 case law to the effect that filing an action to foreclose a mechanic's lien waived a
19 contract provision to arbitrate the dispute.¹¹ Before enactment of Section 1281.5, a
20 lien claimant with a contract right to arbitration faced "an onerous dilemma"
21 because of the short limitations period for filing lien foreclosure actions.¹² Thus
22 Section 1281.5 served the public policy of encouraging arbitration over litigation.
23 By filing an application with the court for a stay of the lien enforcement action
24 under Section 1281.5 at the same time the complaint is filed, the claimant makes
25 clear the claimant has no desire to waive the arbitration provisions of the
26 contract.¹³

27 An application for a stay under Section 1281.5 does not automatically stay the
28 pending action. Although section 1281.5 does not say so expressly, it contemplates
29 that the summons and complaint in the action to enforce the lien and the
30 application for a stay will be served on the opposing parties within a reasonable

7. 1977 Cal. Stat. ch. 135, adding Section 1281.5 to the Code of Civil Procedure. This section was added in legislation sponsored by the State Bar of California. See *Review of Selected 1977 California Legislation*, 9 Pac. L.J. 281, 386 (1978).

8. See Recommendation and Study relating to Arbitration, 3 Cal. L. Revision Comm'n Reports at G-61 (1961). *But see* 1927 Cal. Stat. ch. 225 (under Code of Civil Procedure Section 1284, stay could be granted in the "court in which such suit or proceeding is pending").

9. 1984 Cal. Stat. ch. 1719 (amending Code of Civil Procedure Section 86).

10. See 2 B. Witkin, California Procedure *Jurisdiction* § 38, at 582 (4th ed. 1996); see also Code Civ. Proc. § 86(a)(6) (aggregating large and small lien claims against same property); 2 B. Witkin, California Procedure *Courts* § 253, at 328 (4th ed. 1996).

11. *Review of Selected 1977 California Legislation*, 9 Pac. L.J. 281, 386-88 (1978).

12. *Id.*

13. *Id.* at 386-87.

1 time after the action is commenced, and a separate notice of motion for a stay will
2 be filed and served as promptly thereafter as is reasonably possible.¹⁴ This
3 prevents the plaintiff from using the application as a litigation tactic to preserve
4 arbitration rights while using discovery to explore the defendant's case.

5 The proposed legislation would add an alternative to the requirement that an
6 application for a stay be presented with the complaint, by permitting the plaintiff
7 to include appropriate allegations in the complaint. The proposed legislation would
8 make clear that, to preserve arbitration rights, the plaintiff must, within 30 days
9 after service of the summons and complaint, move the court for an order that the
10 action be stayed. The proposed legislation would provide that no party is entitled
11 to discovery without leave of court unless and until the claimant expressly waives
12 the right to arbitration or the court denies the motion for a stay.

14. *Kaneko Ford Design v. Citipark, Inc.*, 202 Cal. App. 3d 1220, 1227, 249 Cal. Rptr. 544 (1988) (mechanics' lien foreclosure). See also *Davis v. Continental Airlines, Inc.*, 59 Cal. App. 4th 205, 69 Cal. Rptr. 2d 79 (1997) (sexual harassment); *Brock v. Kaiser Foundation Hospitals*, 10 Cal. App. 4th 1790, 1796, 13 Cal. Rptr. 2d 678, 682 (1992) (medical malpractice). Although the provision in Section 1281.5 for an "application" for a stay appears to duplicate a provision in Section 1281.4 for a motion for a stay, the two provisions serve different purposes. Section 1281.4 is a general section, not limited to lien foreclosure cases. It applies where another court has ordered arbitration or where an application for such an order is pending, and ensures that the order will not be circumvented by allowing the litigation to proceed.

PROPOSED LEGISLATION

1 **Code Civ. Proc. § 1281.5 (amended). Application to stay pending arbitration**

2 1281.5. (a) Any person, who proceeds to record and enforce a claim of lien by
3 commencement of an action pursuant to Title 15 (commencing with Section 3082)
4 of Part 4 of Division 3 of the Civil Code, shall not thereby waive any right of
5 arbitration which that person may have pursuant to a written agreement to
6 arbitrate, if, in filing an action to enforce the claim of lien, the claimant at does
7 either of the following:

8 (1) Includes an allegation in the complaint that the claimant does not intend
9 thereby to waive any right of arbitration, and intends to move the court, within 30
10 days after service of the summons and complaint, for an order to stay further
11 proceedings in the action.

12 (2) At the same time as the filing of the complaint, presents to the court an
13 application that the action be stayed pending the arbitration of any issue, question,
14 or dispute which is claimed to be arbitrable under the agreement and which is
15 relevant to the action to enforce the claim of lien. In a county in which there is a
16 municipal court, the applicant may join with the application for the stay, pending
17 arbitration, a claim of lien otherwise within the jurisdiction of the municipal court.

18 (b) Within 30 days after service of the summons and complaint, the claimant
19 shall file a notice of motion pursuant to Section 1281.4 that the action be stayed
20 pending the arbitration of any issue, question, or dispute that is claimed to be
21 arbitrable under the agreement and that is relevant to the action to enforce the
22 claim of lien.

23 (c) Notwithstanding Article 3 (commencing with Section 2016) of Chapter 3 of
24 Title 3 of Part 4, if the claimant complies with paragraph (1) or (2) of subdivision
25 (a), no party to the action is entitled to discovery without leave of court, unless and
26 until one of the following occurs:

27 (1) The claimant expressly waives the right to arbitration.

28 (2) The court denies the motion for a stay.

29 (3) The claimant fails to comply with subdivision (b).

30 (d) The failure of a defendant to file a petition pursuant to Section 1281.2 at or
31 before the time ~~he or she~~ the defendant answers the complaint filed pursuant to
32 subdivision (a) shall constitute a waiver of that party's right to compel arbitration.

33 **Comment.** The first sentence of subdivision (a) of Section 1281.5 is amended to add an
34 alternative to the requirement that an application for a stay be made when the action is filed. It
35 permits the lien claimant to include appropriate allegations in the complaint.

36 Subdivision (a) is also amended to delete the last sentence. The deletion permits general rules
37 of civil procedure to govern. Thus if an action to enforce a lien is pending in superior court and is
38 properly within the jurisdiction of that court, the plaintiff may join a cause of action to enforce a
39 different lien against the same defendant (and seek a stay of all such causes of action), whether or
40 not the separate lien claim would otherwise be less than the jurisdictional limits of the superior
41 court. See 2 B. Witkin, California Procedure *Jurisdiction* § 38, at 582 (4th ed. 1996); see also

1 Section 86(a)(6) (aggregating large and small lien claims against same property); 2 B. Witkin,
2 California Procedure *Courts* § 253, at 328 (4th ed. 1996).

3 Subdivision (b) is added to require the lien claimant to file a notice of motion for an order
4 staying the action pending arbitration within 30 days after service of the summons and complaint.
5 This replaces the “reasonable time” requirement of case law. See, e.g., *Kaneko Ford Design v.*
6 *Citipark, Inc.*, 202 Cal. App. 3d 1220, 1227, 249 Cal. Rptr. 544 (1988).

7 Subdivision (c) is added to forestall discovery until the required motion for a stay is resolved.
8 But for subdivision (c), the claimant could serve interrogatories as early as 10 days after service
9 of summons and complaint without leave of court. Section 2030(b). The claimant could take
10 depositions as early as 20 days after service of summons and complaint without leave of court.
11 Section 2025(b)(2). The defendant could serve interrogatories or take depositions at any time.
12 Sections 2030(b), 2025(b)(1).
