Study J-1304 November 9, 2001

Memorandum 2001-93

Stay of Mechanic's Lien Enforcement Pending Arbitration: New Issues

In April 2000, the Commission approved a recommendation on *Stay of Mechanic's Lien Enforcement Pending Arbitration*, which has since been published. 30 Cal. L. Revision Comm'n Reports 307 (2000). The proposed legislation was later incorporated in Senate Bill 562 (Morrow), which also included two other Commission recommendations. When the bill was pending before the Senate Judiciary Committee last spring, the Chief Counsel suggested that the stay of mechanic's lien proposal be deleted from the bill, because it was more substantive than the remainder of the bill and because it might need reassessment in light of a newly issued court decision. He recommended reintroducing the proposal in 2002. The bill was amended as suggested and enacted into law. It is now time to reexamine the recommendation on *Stay of Mechanic's Lien Enforcement Pending Arbitration*. This memorandum discusses possible revisions to reflect new developments. A proposed redraft is attached for the Commission's consideration.

RECAP OF THE RECOMMENDATION

Code of Civil Procedure Section 1281.5 governs the effect of a mechanic's lien foreclosure action on contractual arbitration of the underlying dispute. It specifies means of preserving a contractual right to arbitrate, as well as circumstances in which such a right is waived. The Commission recommended amending the provision to:

(1) Permit the plaintiff to preserve arbitration rights by including appropriate allegations in the complaint and filing a motion for stay order within 30 days after service of the summons and complaint. This is generally consistent with case law and with existing practice.

(2) Prohibit discovery without leave of court pending determination of the motion for a stay order.

(3) Delete an anomalous sentence that could be read to limit municipal court jurisdiction.

These reforms would be implemented 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~~ does not thereby waive any right of arbitration ~~which~~ ~~that~~ the person may have pursuant to a written agreement to arbitrate, if, in filing an action to enforce the claim of lien, the claimant ~~at~~ does either of the following:

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

(2) At the same time ~~as the filing of the complaint, presents to the court~~ that the complaint is filed, the claimant files an application that the action be stayed pending the arbitration of any issue, question, or dispute ~~which~~ that is claimed to be arbitrable under the agreement and ~~which~~ that is relevant to the action to enforce the claim of lien. ~~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) Within 30 days after service of the summons and complaint, the claimant shall file and serve a motion and notice of motion pursuant to Section 1281.4 to stay the action pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and that is relevant to the action to enforce the claim of lien.

(c) Notwithstanding Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4, if the claimant complies with subdivision (a), no party to the action is entitled to discovery without leave of court, until one of the following occurs:

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

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

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

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

Comment. The first sentence of subdivision (a) of Section 1281.5 is amended to add an alternative to the requirement that an application for a stay be made when the action is filed. In lieu of preparing a separate application for a stay, the lien claimant may include appropriate allegations in the complaint.

Subdivision (a) is also amended to delete the last sentence, which is no longer necessary, because the jurisdiction of the municipal court now includes a petition to compel arbitration of a claim within the court's jurisdiction. Sections 85.1 (original jurisdiction of municipal court), 86(a)(10) (arbitration-related petitions). Compare 1961 Cal. Stat. ch. 461, § 2 (former Section 1292) (petition shall be filed in superior court); 1976 Cal. Stat. ch. 1288, § 5 (former Section 86) (arbitration-related petition not within jurisdiction of municipal court).

Subdivision (b) is added to require the lien claimant to file a motion for a stay order within 30 days after service of the summons and complaint. This is generally consistent with case law, but provides concrete guidance implementing the "reasonable time" requirement recognized by the courts. See Kaneko Ford Design v. Citipark, Inc., 202 Cal. App. 3d 1220, 1227, 249 Cal. Rptr. 544 (1988).

Subdivision (c) is added to prevent litigants from using discovery processes as a tactical tool to prepare for arbitration. *See generally* Christensen v. Dewor Developments, 33 Cal. 3d 778, 784, 661 P.2d 1088, 191 Cal. Rptr. 8 (1983); McMillan Dev. Co. v. Home Buyers Warranty, 68 Cal. App. 4th 896, 909-10, 80 Cal. Rptr. 2d 611 (1998); Davis v. Continental Airlines, Inc., 59 Cal. App. 4th 205, 215, 69 Cal. Rptr. 2d 79 (1997); *Kaneko*, 202 Cal. App. 3d at 1228-29.

ELIMINATION OF THE MUNICIPAL COURTS

After the Commission approved its recommendation, the last remaining municipal courts were eliminated through trial court unification. Thus, the discussion relating to the sentence on joinder of a claim "otherwise within the jurisdiction of the municipal court" can now be greatly simplified. It is only necessary to state that the sentence is obsolete due to unification of the municipal and superior courts. At a minimum, the recommendation should be revised in this respect.

ARMENDARIZ

The decision that the Chief Counsel drew attention to was *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000), which involved a mandatory employment arbitration agreement (i.e., a contract required by an employer as a condition of employment, in which an employee agrees to arbitrate wrongful termination or employment discrimination claims rather than filing suit in court). The plaintiff employees challenged the application of such an agreement, contending that they could not

be compelled to arbitrate antidiscrimination claims brought under the California Fair Employment and Housing Act ("FEHA"). The plaintiffs also maintained that several aspects of the arbitration agreement were unconscionable and the agreement was unenforceable.

The Supreme Court rejected the notion that FEHA claims could not be arbitrated. The Court reviewed the language and legislative history of FEHA, as well as the Federal Arbitration Act ("FAA") and California Arbitration Act ("CAA"), and concluded that "such claims are in fact arbitrable *if* the arbitration permits an employee to vindicate his or her statutory rights." *Id.* at 90 (emphasis in original). For such vindication to occur, "the arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration." *Id.* at 90-91. The Court further concluded that the arbitration agreement in question was unconscionable and unenforceable because it included "both an unlawful damages provision, and an unconscionably unilateral arbitration clause." *Id.* at 124.

With regard to discovery, the Court commented that "adequate discovery is indispensable for the vindication of FEHA claims." *Id.* at 105. If private arbitration is to be a legitimate forum for private enforcement of public employment law, it must provide a fair and simple method for an employee to secure the necessary information to present a claim. *Id.*

The defendant employer contended that the arbitration agreement met this requirement because it incorporated by reference the rules set forth in the CAA, which provide for adequate discovery. But the Court found it unnecessary to resolve whether the particular rules set forth in the CAA were incorporated as the defendant alleged.

Instead, the Court explained that regardless of whether the plaintiffs were entitled to the full range of discovery afforded by the CAA, they were "at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s) and subject to limited judicial review." *Id.* The Court further explained that "when parties agree to arbitrate statutory claims they also implicitly agree, absent express language to the contrary, to such procedures as are necessary to vindicate that claim." *Id.* Because the defendant employer had impliedly consented to minimally sufficient discovery, the Court concluded that

lack of discovery was not a persuasive ground for denying arbitration of the FEHA claim. *Id.*

Armendariz thus indicates that a minimum amount of discovery must be afforded in arbitration. Whether this principle applies to all claims, or only to FEHA and other statutory claims, is not entirely clear. *See generally Brennan v. Tremco, Inc.*, 25 Cal. 4th 310, 317, 20 P.3d 1086, 105 Cal. Rptr. 2d 790 (2001); *Little v. Auto Stiegler, Inc.*, 92 Cal. App. 4th 329, 336, 112 Cal. Rptr. 2d 56 (2001). The extent to which *Armendariz* survives the United States Supreme Court's decision in *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), which took a broad view of federal preemption under the FAA, is also debatable. *Armendariz* can (but need not necessarily) be viewed as establishing restrictions on arbitration that are preempted by the FAA. See *"Circuit" Breaker: Supreme Court Employment Arbitration Case Leaves Many Questions Unanswered*, S.F. Daily J. p. 5 (April 12, 2001); *cf. Harden v. Roadway Package Systems, Inc.*, 249 F.3d 1137 n.3 (9th Cir. 2001) (*Armendariz* would apply if defendant pursued arbitration based on California law); *see also Blake v. Ecker*, __ Cal. App. 4th __, 2001 WL 1346678 (Nov. 2, 2001). But regardless of exactly how broadly *Armendariz* should be interpreted, the concept of assuring a minimum amount of discovery in arbitration is a commonsense notion rooted in principles of fair play, which is likely to gain broad support.

IMPACT OF *ARMENDARIZ* ON THE COMMISSION'S RECOMMENDATION

How does *Armendariz* affect the recommendation on *Stay of Mechanic's Lien Enforcement Pending Arbitration*? It calls into question the proposal to prohibit discovery without leave of court while the court is resolving a motion to stay a foreclosure action pending arbitration. If a certain amount of discovery is permitted regardless of whether a dispute is arbitrated or litigated, does it make sense to prohibit discovery while such a motion is pending?

The staff sees several options for addressing this concern: (1) no prohibition on discovery, (2) prohibit discovery while a stay is being sought, but make clear that this does not restrict the extent to which the parties may conduct discovery in arbitration or litigation once the stay motion is resolved, or (3) prohibit most discovery while a stay is being sought, but allow discovery that would be permitted if the dispute were found to be arbitrable. These options are discussed below.

No Prohibition on Discovery

A simple solution would be to revise the recommendation to delete the proposed prohibition on discovery (proposed Section 1281.5(c)). Parties would thus be free to conduct discovery while the court resolves whether to stay a mechanic's lien foreclosure action pending arbitration.

This approach would be fine, so long as the discovery that occurs would be permissible regardless of whether the dispute is arbitrated or litigated. But that would not necessarily be the case. Rather, there would be potential for abuse. For instance, suppose a party files a mechanic's lien foreclosure action, moves for a stay pending arbitration, and quickly deposes several minor witnesses while the motion is pending. The motion is then granted and the dispute sent to arbitration, where such depositions would not have been permitted. The moving party has thus gained an unfair advantage, using court processes to create a "unique structure combining litigation and arbitration" to the detriment of the opposing party. *Christensen v. Dewor Developments*, 33 Cal. 3d 778, 784, 661 P.2d 1088, 191 Cal. Rptr. 8 (1983). Such prejudicial tactics should not be permitted, but might be difficult to control where a party has timely asserted arbitrability and is simply taking advantage of the delay in resolving that matter.

Retain Prohibition on Discovery, But Clarify Its Effect

Another alternative would be to leave the proposed prohibition on discovery as is, but make clear that it has no impact on how much discovery can be conducted in either arbitration or litigation once the motion for a stay is decided. This could be achieved in the statutory text, in the Comment, or both. For example, a provision along the following lines could be added to proposed Section 1281.5 :

> (e) Nothing in this section restricts or otherwise affects the extent to which a party may conduct discovery in arbitration or litigation after one of the conditions in subdivision (c) occurs.

This might help eliminate any unintended implication that discovery is not permitted in arbitration. It is not a wholly satisfactory solution, because discovery may be most effective when evidence is fresh, witnesses are available, and memories have not faded. Where a particular discovery event would be permitted in both arbitration and litigation, it may be counterproductive to restrict parties from engaging in it until arbitrability is resolved.

Allow Discovery that Would Be Permitted if the Dispute Were Arbitrated

A third option would be to prohibit most discovery while a party seeks a stay pending arbitration, but allow discovery that would be permitted if the dispute were found to be arbitrable. This approach would prevent abuse of court processes yet still allow a certain amount of discovery to go forward without delay. It could be combined with language clarifying the limited effect of the prohibition on discovery, as discussed with regard to the preceding option. **Thus, the proposed amendment of Section 1281.5 could be revised to include language along the following lines**:

> 1281.5.…
>
> (c) Notwithstanding Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4, if the claimant complies with subdivision (a), no party to the action is entitled to discovery without leave of court, except as provided in subdivision (d), until one of the following occurs:
>
> (1) The claimant expressly waives the right to arbitration.
>
> (2) The court denies the motion for a stay.
>
> (3) The claimant fails to comply with subdivision (b).
>
> (d) Notwithstanding subdivision (c), while a party is seeking a stay pending arbitration, any party may conduct discovery that would be permitted if the dispute were arbitrated. Conducting or participating in this type of discovery does not constitute a waiver of a party's right to contest arbitrability.
>
> (e) Nothing in this section restricts or otherwise affects the extent to which a party may conduct discovery in arbitration or litigation after one of the conditions in subdivision (c) occurs.
>
> ….
>
> **Comment.** … Subdivision (c) is added to prevent litigants from using discovery processes as a tactical tool to prepare for arbitration. *See generally* Christensen v. Dewor Developments, 33 Cal. 3d 778, 784, 661 P.2d 1088, 191 Cal. Rptr. 8 (1983); Berman v. Health Net, 80 Cal. App. 4th 1359, 96 Cal. Rptr. 2d 295 (2000); Guess?, Inc. v. Superior Court, 79 Cal. App. 4th 553, 94 Cal. Rptr. 2d 201 (2000); McMillan Dev. Co. v. Home Buyers Warranty, 68 Cal. App. 4th 896, 909-10, 80 Cal. Rptr. 2d 611 (1998); Davis v. Continental Airlines, Inc., 59 Cal. App. 4th 205, 215, 69 Cal. Rptr. 2d 79 (1997); *Kaneko*, 202 Cal. App. 3d at 1228-29.
>
> Subdivision (d) is added in recognition that a certain amount of discovery may be permitted in arbitration and it is unnecessary to preclude such discovery while arbitrability is being resolved. *See generally* Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 90, 105-06, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000).

> Subdivision (e) is added to make clear that the temporary prohibition on full-fledged discovery mandated by subdivision (c) has no impact on how much discovery can be conducted in either arbitration or litigation once the motion for a stay pending arbitration is decided.

A draft of a revised recommendation incorporating these changes is attached for the Commission's review. If it is acceptable to the Commission (as is or with revisions), the proposed legislation could be introduced early next year.

Respectfully submitted,

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Staff Counsel

#J-1304

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft *Revised* RECOMMENDATION

Stay of Mechanic's Lien Enforcement Pending Arbitration

November 2001

California Law Revision Commission
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SUMMARY OF REVISED RECOMMENDATION

Code of Civil Procedure Section 1281.5 relates to preservation of arbitration rights during mechanic's lien enforcement proceedings. This recommendation would amend the provision to:

(1) Delete an obsolete sentence on joinder of a lien claim within the jurisdiction of the municipal court.

(2) Permit the plaintiff to preserve arbitration rights by including appropriate allegations in the complaint and filing a 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) Prohibit most discovery without leave of court pending determination of the motion for a stay order.

This recommendation was prepared pursuant to 2001 Cal. Stat. res. ch. 78.

STAY OF MECHANIC'S LIEN ENFORCEMENT PENDING ARBITRATION

A construction dispute may be resolved through a mechanic's lien foreclosure action, contractual arbitration, or other means. Code of Civil Procedure Section 1281.5[1] governs the effect of a mechanic's lien foreclosure action on contractual arbitration of the underlying dispute. It specifies means of preserving a contractual right to arbitrate, as well as circumstances in which the right is waived:

> 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. 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 Law Revision Commission recommends revision of this provision to delete the obsolete sentence on joinder of a lien claim otherwise within the jurisdiction of the municipal court, and to clarify and improve the procedure for preserving a contractual right to arbitrate.

Jurisdiction and Joinder of Claims

Section 1281.5 states that in a county with a municipal court, a plaintiff may join with an application for a stay pending arbitration "a claim of lien otherwise within the jurisdiction of the municipal court." This language is obsolete, because municipal courts no longer exist.[2] To prevent confusion and simplify the statute, the obsolete sentence on joinder should be deleted.[3]

Procedure for Preserving Contractual Right to Arbitrate

Before Section 1281.5 was enacted, commencement of a mechanic's lien foreclosure action was sometimes deemed a waiver of the plaintiff's right to

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1. All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

2. The last remaining municipal court was eliminated on February 8, 2001, when the municipal and superior courts in Kings County unified pursuant to Article VI, Section 5(e), of the California Constitution.

3. For additional bases for deleting the sentence on joinder of a lien claim "otherwise within the jurisdiction of the municipal court," see *Stay of Mechanic's Lien Enforcement Pending Arbitration*, 30 Cal. L. Revision Comm'n Reports 307, 314-16 (2000).

arbitrate.[4] This put the prospective plaintiff in a difficult position, because the limitations period for a mechanic's lien foreclosure action was (and is) very short,[5] making it impossible for the plaintiff to delay litigation until completion of arbitration, except where arbitration was completed very quickly.[6] To address this problem, Section 1281.5 makes clear that the filing of a foreclosure action is not a waiver of arbitration if the plaintiff simultaneously files an application for a stay of the action pending arbitration.[7]

By itself, however, an application for a stay is not sufficient to stay the action.[8] Although the statute does not say so expressly, it contemplates that the summons, complaint, and application for a stay will be served on the opposing party within a reasonable time after the action is commenced, and a separate motion for a stay will be noticed, filed, served, and resolved as promptly thereafter as is reasonably possible.[9] This prevents the plaintiff from using the application as a tactic to preserve arbitration rights while exploring the defendant's case through discovery techniques unavailable in arbitration.[10]

The proposed legislation would make this procedure explicit while providing an alternative to preparation of a separate application for a stay. To preserve the right to arbitrate, the plaintiff could file an application for a stay along with the foreclosure complaint (as under existing law), or simply allege in the complaint that the dispute is subject to arbitration and the plaintiff intends timely to seek a stay. Regardless of which approach the plaintiff selects, the plaintiff would be

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4. Compare Titan Enterprises, Inc. v. Armo Constr., Inc., 32 Cal. App. 3d 828, 832, 108 Cal. Rptr. 456 (1973) (foreclosure action was waiver of arbitration) with Homestead Sav. & Loan Ass'n v. Superior Court, 195 Cal. App. 2d 697, 16 Cal. Rptr. 121 (1961) (foreclosure action was not waiver of arbitration); *see also Review of Selected 1977 California Legislation*, 9 Pac. L.J. 281, 386-87 (1978).

5. Civ. Code § 3144 (lien foreclosure action must be commenced within 90 days after recording of lien claim).

6. *Review of Selected 1977 California Legislation*, *supra* note 4, at 387.

7. The application for a stay must be filed at the same time as the complaint, not afterwards. R. Baker, Inc. v. Motel 6, Inc., 180 Cal. App. 3d 928, 931, 225 Cal. Rptr. 849 (1986).

8. Kaneko Ford Design v. Citipark, Inc., 202 Cal. App. 3d 1220, 1226, 249 Cal. Rptr. 544 (1988).

9. *Id*. at 1226-27.

10. *See id.* at 1228-29; *see generally* Christensen v. Dewor Developments, 33 Cal. 3d 778, 784, 661 P.2d 1088, 191 Cal. Rptr. 8 (1983) (courtroom may not be used as "convenient vestibule to arbitration hall" permitting party to create unique structure combining litigation and arbitration); Berman v. Health Net, 80 Cal. App. 4th 1359, 1372, 96 Cal. Rptr. 2d 295 (2000) (discovery not available in arbitration is vice supporting waiver); Guess?, Inc. v. Superior Court, 79 Cal. App. 4th 553, 558, 94 Cal. Rptr. 2d 201 (2000) (waiver occurred where opponent was exposed to substantial expense of pretrial discovery and motions avoidable had arbitrability been timely asserted); Sobremante v. Superior Court, 61 Cal. App. 4th 980, 997, 72 Cal. Rptr. 2d 43 (1998) (benefits of arbitration become illusory "where there is a failure to timely and affirmatively implement the procedure"); Davis v. Continental Airlines, Inc., 59 Cal. App. 4th 205, 215, 69 Cal. Rptr. 2d 79 (1997) (defendants waived arbitration by using court's discovery processes to gain information about plaintiff's case, then seeking to change game to arbitration, where plaintiff would not have similar discovery rights); Zimmerman v. Drexel Burnham Lambert Inc., 205 Cal. App. 3d 153, 159-60, 252 Cal. Rptr. 115 (1988) (delay in requesting arbitration was prejudicial because opponent had to disclose defenses and strategies and "bear the costs of trial preparation, which arbitration is designed to avoid").

required to file a motion for a stay within 30 days after service of the summons and complaint. This would provide clear statutory guidance implementing the existing requirement that arbitrability be promptly resolved.

The proposed legislation would also prohibit most discovery without leave of court unless and until the claimant expressly waives the right to arbitration, the claimant fails timely to move for a stay, or the court denies the motion for a stay.[11] This restriction is intended to ensure that discovery processes are not invoked merely as a tactical tool to gather information for use in arbitration.[12]

A party would not be prohibited from conducting discovery that would be permitted if the dispute were arbitrated.[13] Where a particular discovery event would be permitted in both arbitration and litigation, it may be counterproductive to restrict parties from engaging in it until arbitrability is resolved.[14] The proposed legislation would thus prevent abuse of court processes, yet still allow a certain amount of discovery to proceed without delay.

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11. Without this restriction, the claimant could serve interrogatories as early as 10 days after service of summons and complaint. Section 2030(b). The claimant could take depositions as early as 20 days after service of summons and complaint. Section 2025(b)(2). The defendant could serve interrogatories or take depositions at any time. Sections 2025(b)(1), 2030(b).

12. See *supra* note 10.

13. Conducting or participating in this type of discovery would not constitute a waiver of a party's right to contest arbitrability.

14. For guidance on the availability of discovery in arbitration, see Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 90, 105-06, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000).

PROPOSED LEGISLATION

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

SECTION 1. Section 1281.5 of the Code of Civil Procedure is amended to read:

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~~ does not thereby waive any right of arbitration ~~which that~~ the person may have pursuant to a written agreement to arbitrate, if, in filing an action to enforce the claim of lien, the claimant ~~at~~ does either of the following:

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

(2) At the same time ~~as the filing of the complaint, presents to the court~~ that the complaint is filed, the claimant files an application that the action be stayed pending the arbitration of any issue, question, or dispute ~~which~~ that is claimed to be arbitrable under the agreement and ~~which~~ that is relevant to the action to enforce the claim of lien. ~~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) Within 30 days after service of the summons and complaint, the claimant shall file and serve a motion and notice of motion pursuant to Section 1281.4 to stay the action pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and that is relevant to the action to enforce the claim of lien.

(c) Notwithstanding Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4, if the claimant complies with subdivision (a), no party to the action is entitled to discovery without leave of court, except as provided in subdivision (d), until one of the following occurs:

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

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

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

(d) Notwithstanding subdivision (c), while a party is seeking a stay pending arbitration, and party may conduct discovery that would be permitted if the dispute were arbitrated. Conducting or participating in this type of discovery does not constitute a waiver of a party's right to contest arbitrability.

(e) Nothing in this section restricts or otherwise affects the extent to which a party may conduct discovery in arbitration or litigation after one of the conditions in subdivision (c) occurs.

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

Comment. The first sentence of subdivision (a) of Section 1281.5 is amended to add an alternative to the requirement that an application for a stay be made when the action is filed. In lieu of preparing a separate application for a stay, the lien claimant may include appropriate allegations in the complaint.

Subdivision (a) is also amended to delete the last sentence, which is obsolete due to unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

Subdivision (b) is added to require the lien claimant to file a motion for a stay order within 30 days after service of the summons and complaint. This is generally consistent with case law, but provides concrete guidance implementing the "reasonable time" requirement recognized by the courts. See Kaneko Ford Design v. Citipark, Inc., 202 Cal. App. 3d 1220, 1227, 249 Cal. Rptr. 544 (1988).

Subdivision (c) is added to prevent litigants from using discovery processes as a tactical tool to prepare for arbitration. *See generally* Christensen v. Dewor Developments, 33 Cal. 3d 778, 784, 661 P.2d 1088, 191 Cal. Rptr. 8 (1983); Berman v. Health Net, 80 Cal. App. 4th 1359, 96 Cal. Rptr. 2d 295 (2000); Guess?, Inc. v. Superior Court, 79 Cal. App. 4th 553, 94 Cal. Rptr. 2d 201 (2000); McMillan Dev. Co. v. Home Buyers Warranty, 68 Cal. App. 4th 896, 909-10, 80 Cal. Rptr. 2d 611 (1998); Davis v. Continental Airlines, Inc., 59 Cal. App. 4th 205, 215, 69 Cal. Rptr. 2d 79 (1997); *Kaneko*, 202 Cal. App. 3d at 1228-29.

Subdivision (d) is added in recognition that a certain amount of discovery may be permitted in arbitration and it is unnecessary to preclude such discovery while arbitrability is being resolved. *See generally* Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 90, 105-06, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000).

Subdivision (e) is added to make clear that the temporary prohibition on full-fledged discovery mandated by subdivision (c) has no impact on how much discovery can be conducted in either arbitration or litigation once the motion for a stay pending arbitration is decided.