

Memorandum 2003-2

2003 Legislative Program

Attached to this memorandum is a chart showing the status of bills in the Commission's 2003 legislative program. This memorandum presents additional information concerning a few matters.

We will update this memorandum at the meeting with any further information we have at that time.

COMMISSION RECOMMENDATIONS

AB 167 (Harman) — Probate Code Technical Revisions

The bill as introduced is a placeholder. It contains only revisions to correct erroneous section references in the Probate Code. We will amend the bill to receive any additional revisions the Commission approves at the March 7 Commission meeting. See Memorandum 2003-4.

SB 79 (Senate Judiciary Committee) — Trial Court Restructuring: Part 2

The bill as introduced is a placeholder. It contains only provisions on trial court restructuring chaptered out of the 2002 legislation. We will amend the bill to receive additional provisions after the Commission finalizes its recommendation on the matter. See Memorandum 2003-5, scheduled for consideration at the March 7 Commission meeting.

SB 111 (Knight) — Obsolete Reporting Requirements

The bill as introduced is a placeholder. It contains only provisions approved by the affected agencies. We will amend the bill to receive additional provisions after the Commission finalizes its recommendation on the matter. See Memorandum 2003-3, scheduled for consideration at the March 7 Commission meeting.

SB 113 (Ackerman) — Stay of Mechanic's Lien Enforcement Pending Arbitration

SB 113 (Ackerman) would implement the Commission's proposal to amend Code of Civil Procedure Section 1281.5 to simplify the procedure for obtaining a stay of mechanic's lien enforcement pending arbitration.

As approved in March 2002, the Commission's proposal to amend Section 1281.5 addressed two points: (1) deletion of an obsolete reference to municipal court jurisdiction, and (2) simplification of the procedure for obtaining a stay of mechanic's lien enforcement pending arbitration. *Stay of Mechanic's Lien Enforcement Pending Arbitration*, 31 Cal. L. Revision Comm'n Reports 333 (2002). The statute has since been revised to delete the obsolete reference to municipal court jurisdiction. 2002 Cal. Stat. ch. 784, § 82. The Commission's recommendation needs to be revised to reflect that amendment. **An updated version of the recommendation is attached for the Commission's approval.**

SB 113 has been set for hearing in the Senate Judiciary Committee on March 11, 2003. A consultant for the committee has suggested an amendment of the bill. Specifically, the bill now states that "A party may object to arbitration by filing a motion for relief from the stay." The consultant recommends saying instead that "Any party may file a motion for relief from the stay." This minor wording change is intended to avoid any implication that a motion for stay is the sole avenue to contest arbitration, or any implication that the bill creates a new motion to contest arbitration. **We recommend that the Commission approve this amendment.** If the Commission agrees, we could incorporate the revised wording into the attached report.

Organization of Davis-Stirling Act

The Commission's recommendation to provide an organizational structure for the Davis-Stirling Common Interest Development Act has not yet been introduced as a separate bill. It may be introduced by the Assembly Committee on Housing and Community Development. Meanwhile, its substance is also incorporated in AB 512 (Bates), since the organizational structure is necessary for the Commission's substantive recommendation on procedural fairness in CID rulemaking and decisionmaking.

ALSO OF INTEREST

AB 286 (Dutra) — Double Liability Problem in Home Improvement Contracts

Assemblymember Dutra has reintroduced legislation that would establish a good faith payment defense for homeowners. The reintroduced version covers contracts valued at \$20,000 or less. It is therefore closer to the Commission's original recommendation than the version he authored last session, which covered home improvement contracts valued at \$25,000 or less. (The Commission's recommendation would cover home improvement contracts valued at \$15,000 or less.)

The Commission had decided it would seek enactment of its recommendation as proposed. However, we have not arranged for introduction of the measure for reasons we will elaborate at the Commission meeting.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Status of 2003 Commission Legislative Program

As of February 25, 2003

		AB 167	AB 182	AB 512				SB 79	SB 111	SB 113	SCR 4	
		Introduced	Introduced	Introduced				Introduced	Introduced	Introduced	Introduced	
		Last Amended	Last Amended	Last Amended				Last Amended	Last Amended	Last Amended	Last Amended	
First House	Policy Committee	<i>Mar 18</i>	<i>Mar 4</i>							<i>Mar 11</i>		
	Fiscal Committee	—	—					—				
	Passed House											
Second House	Policy Committee											
	Fiscal Committee	—	—					—				
	Passed House											
Concurrence & Enrollment												
Governor	Received											
	Approved											
Secretary of State	Date											
	Chapter #											

Bill List: AB 167 (Harman): Probate Code Technical Revisions
 AB 182 (Harman): Exemptions from Enforcement of Money Judgments
 AB 512 (Bates): Procedural Fairness in CID Rulemaking and Decisionmaking
 AB ___ (___): Organization of Davis-Stirling CID Act

SB 79 (Sen. Jud. Comm.): Trial Court Restructuring: Part 2
 SB 111 (Knight): Obsolete Reporting Requirements
 SB 113 (Ackerman): Stay of Mechanic's Liens Enforcement Pending Arbitration

SCR 4 (Morrow): Resolution of CLRC Authority

Also of Interest:

AB 286 (Dutra): Double Liability Problem in Home Improvement Contracts

KEY

Italics: Future or speculative
 "—": Not applicable
 *: Double referral, not fiscal
 [date]: Deadline

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Preprint REVISED RECOMMENDATION

Stay of Mechanic's Lien Enforcement
Pending Arbitration

March 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Stay of Mechanic's Lien Enforcement Pending Arbitration*, __ Cal. L. Revision Comm'n Reports __ (2003). This is part of publication #__.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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March 7, 2003

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

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 simplify the procedure for preserving arbitration rights and obtaining a stay pending arbitration, thereby reducing litigation expenses and conserving judicial resources.

This recommendation is submitted pursuant to Resolution Chapter 166 of the Statutes of 2002.

Respectfully submitted,

David Huebner
Chairperson

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 1281.5¹ 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.

(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.²

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

2. Section 1281.5 was amended in 2002 to delete a reference to municipal court jurisdiction, which was obsolete due to trial court unification. 2002 Cal. Stat. ch. 784, § 82. That amendment was part of a major project in which the Commission, at the direction of the Legislature, revised the codes to reflect trial court restructuring. 2002 Cal. Stat. ch. 784 (SB 1316 (Senate Committee on Judiciary)); see Gov't Code § 71674; *Statutes Made Obsolete by Trial Court Restructuring: Part 1*, 32 Cal. L. Revision Comm'n Reports 1 (2002). Further work along those lines is ongoing.

As approved in March 2002, the Commission's proposal to revise Section 1281.5 addressed both the obsolete reference to municipal court jurisdiction and

The Law Revision Commission recommends revision of this statute to simplify the procedure for preserving a contractual right to arbitrate and obtaining a stay pending arbitration.

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 arbitrate.³ 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,⁴ making it impossible for the plaintiff to delay litigation until completion of arbitration, except where arbitration was completed very quickly.⁵ 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.⁶

By itself, however, an application for a stay is not sufficient to stay the action.⁷ Although the statute does not say so

the unduly complicated procedure for obtaining a stay pending arbitration. *Stay of Mechanic's Lien Enforcement Pending Arbitration*, 31 Cal. L. Revision Comm'n Reports 333 (2001). This is an updated version of the proposal, revised to reflect the subsequent deletion of the obsolete reference to municipal court jurisdiction.

3. 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).

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

5. *Review of Selected 1977 California Legislation*, *supra* note 2, at 387.

6. 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).

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

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.⁸ 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.⁹

The proposed legislation would simplify the procedure for preserving the right to arbitrate and obtaining a stay. A plaintiff could simply demand a stay in a lien foreclosure complaint, and the action would automatically be stayed pending arbitration. No application or motion for a stay would be required.

This would reduce litigation expenses and conserve judicial resources, because arbitrability is often uncontested. Under

8. *Id.* at 1226-27. For a proposal to codify this procedure with a few improvements, see *Stay of Mechanic's Lien Enforcement Pending Arbitration*, 30 Cal. L. Revision Comm'n Reports 307, 312-14, 317-18 (2000).

9. See *Kaneko*, 202 Cal. App. 3d 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").

the proposed law, the court would only need to consider the matter if a defendant objects to arbitration and moves to lift the automatic stay.

PROPOSED LEGISLATION

Code Civ. Proc. § 1281.5 (amended). Stay of mechanic's lien enforcement 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 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~~ *demand*s in the complaint 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 action is automatically stayed on filing of the complaint. A party may object to arbitration by filing a motion for relief from the stay.*

(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 *the defendant answers a complaint to enforce a claim of lien pursuant to Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the Civil Code waives the defendant's* right to compel arbitration.

Comment. Subdivision (a) of Section 1281.5 is amended to simplify the procedure for obtaining a stay of a mechanic's lien foreclosure action pending arbitration of the underlying dispute pursuant to a written agreement to arbitrate.

Subdivision (b) is amended to make technical, nonsubstantive changes.
