

CALIFORNIA LAW REVISION COMMISSION

Revised TENTATIVE RECOMMENDATION

Stay of Mechanic's Lien Enforcement Pending Arbitration

November 2001

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 February 28, 2002.

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.

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SUMMARY OF *REVISED* TENTATIVE
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) Simplify the procedure for preserving arbitration rights and obtaining a stay pending arbitration, thereby reducing litigation expenses and conserving judicial resources.

This recommendation was prepared pursuant to Resolution Chapter 78 of the Statutes of 2001.

STAY OF MECHANIC’S LIEN ENFORCEMENT
PENDING ARBITRATION

1 A construction dispute may be resolved through a mechanic’s lien foreclosure
2 action, contractual arbitration, or other means. Code of Civil Procedure Section
3 1281.5¹ governs the effect of a mechanic’s lien foreclosure action on contractual
4 arbitration of the underlying dispute. It specifies means of preserving a contractual
5 right to arbitrate, as well as circumstances in which the right is waived:

6 1281.5. (a) Any person who proceeds to record and enforce a claim of lien by
7 commencement of an action pursuant to Title 15 (commencing with Section 3082)
8 of Part 4 of Division 3 of the Civil Code, shall not thereby waive any right of
9 arbitration which that person may have pursuant to a written agreement to
10 arbitrate, if, in filing an action to enforce the claim of lien, the claimant at the
11 same time presents to the court an application that the action be stayed pending
12 the arbitration of any issue, question, or dispute which is claimed to be arbitrable
13 under the agreement and which is relevant to the action to enforce the claim of
14 lien. In a county in which there is a municipal court, the applicant may join with
15 the application for the stay, pending arbitration, a claim of lien otherwise within
16 the jurisdiction of the municipal court.

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

20 The Law Revision Commission recommends revision of this provision to delete
21 the obsolete sentence on joinder of a lien claim otherwise within the jurisdiction of
22 the municipal court, and to simplify the procedure for preserving a contractual
23 right to arbitrate and obtaining a stay pending arbitration.

24 **Jurisdiction and Joinder of Claims**

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

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).

1 **Procedure for Preserving Contractual Right to Arbitrate**

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

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

19 The proposed legislation would simplify the procedure for preserving the right to
20 arbitrate and obtaining a stay. A plaintiff could simply demand a stay in a lien

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. For a proposal to codify this procedure with a few improvements, see *Stay of Mechanic's Lien Enforcement Pending Arbitration*, *supra* note 3, at 312-14, 317-18.

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").

1 foreclosure complaint, and the action would automatically be stayed pending
2 arbitration. No application or motion for a stay would be required.

3 This would reduce litigation expenses and conserve judicial resources, because
4 arbitrability is often uncontested. Under the proposed law, the court would only
5 need to consider the matter if a defendant objects to arbitration and moves to lift
6 the automatic stay.

PROPOSED LEGISLATION

1 **Code Civ. Proc. § 1281.5 (amended). Stay of mechanic’s lien enforcement pending**
2 **arbitration**

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

4 1281.5. (a) Any person who proceeds to record and enforce a claim of lien by
5 commencement of an action pursuant to Title 15 (commencing with Section 3082)
6 of Part 4 of Division 3 of the Civil Code, shall not thereby waive any right of
7 arbitration which that person may have pursuant to a written agreement to
8 arbitrate, if, in filing an action to enforce the claim of lien, the claimant at the same
9 time presents to the court an application demands in the complaint that the action
10 be stayed pending the arbitration of any issue, question, or dispute which is
11 claimed to be arbitrable under the agreement and which is relevant to the action to
12 enforce the claim of lien. ~~In a county in which there is a municipal court, the~~
13 ~~applicant may join with the application for the stay, pending arbitration, a claim of~~
14 ~~lien otherwise within the jurisdiction of the municipal court~~ The action is
15 automatically stayed on filing of the complaint. A party may object to arbitration
16 by filing a motion for relief from the stay.

17 (b) The failure of a defendant to file a petition pursuant to Section 1281.2 at or
18 before the time he or she answers the complaint filed pursuant to subdivision (a)
19 shall constitute a waiver of that party’s the defendant answers a complaint to
20 enforce a claim of lien pursuant to Title 15 (commencing with Section 3082) of
21 Part 4 of Division 3 of the Civil Code waives the defendant’s right to compel
22 arbitration.

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

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

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

30  **Note.** Whether Section 1281.5 applies to an action to enforce a stop notice or bonded stop
31 notice (Civ. Code §§ 3172, 3210), or only to an action to enforce a mechanic’s lien (Civ. Code §
32 3144), appears to be unresolved. See D. Ginn, *State and Local Public Works: Enforcing Stop*
33 *Notices, Bonds, and Prompt Payment Statutes*, in California Mechanics’ Liens and Related
34 Construction Remedies § 4.86, at 254-55 (Cal. Cont. Ed. Bar, 3d ed. 2001); J. Acet, *Arbitration*,
35 in California Construction Contracts and Disputes § 5.59, at 417 (Cal. Cont. Ed. Bar, 3d ed.
36 2000). Commission consultant James Acet considers it likely that the Legislature’s failure to
37 mention stop notices “was a mere oversight.” J. Acet, *supra*, § 5.59, at 417. The Commission
38 solicits comment on whether Section 1281.5 should be amended to make clear that it applies to
39 both types of actions.