

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Stay of Mechanic's Lien Enforcement Pending Arbitration

January 2000

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 **March 15, 2000.**

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 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) 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.

(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.

This recommendation was prepared pursuant to Government Code Section 70219.

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 clarify
21 and improve the procedure for preserving a contractual right to arbitrate and to
22 delete the confusing and obsolete sentence on joinder of claims.

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

24 Before Section 1281.5 was enacted, commencement of a mechanic's lien
25 foreclosure action was sometimes deemed a waiver of the plaintiff's right to
26 arbitrate.² This put the prospective plaintiff in a difficult position, because the
27 limitations period for a mechanic's lien foreclosure action was (and is) very short,³
28 making it impossible for the plaintiff to delay litigation until completion of
29 arbitration, except where arbitration was completed very quickly.⁴ To address this
30 problem, Section 1281.5 makes clear that the filing of a foreclosure action is not a

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

2. 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).

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

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

1 waiver of arbitration if the plaintiff simultaneously files an application for a stay of
2 the action pending arbitration.⁵

3 By itself, however, an application for a stay is not sufficient to stay the action.⁶
4 Although the statute does not say so expressly, it contemplates that the summons,
5 complaint, and application for a stay will be served on the opposing party within a
6 reasonable time after the action is commenced, and a separate motion for a stay
7 will be noticed, filed, served, and resolved as promptly thereafter as is reasonably
8 possible.⁷ This prevents the plaintiff from using the application as a tactic to
9 preserve arbitration rights while exploring the defendant's case through discovery
10 techniques unavailable in arbitration.⁸

11 The proposed legislation would make this procedure explicit while providing an
12 alternative to preparation of a separate application for a stay. To preserve the right
13 to arbitrate, the plaintiff could file an application for a stay along with the
14 foreclosure complaint (as under existing law), or simply allege in the complaint
15 that the dispute is subject to arbitration and the plaintiff intends timely to seek a
16 stay. Regardless of which approach the plaintiff selects, the plaintiff would be
17 required to file a motion for a stay within 30 days after service of the summons
18 and complaint. This would provide clear statutory guidance implementing the
19 existing requirement that arbitrability be promptly resolved.

20 The proposed legislation would further provide that no party is entitled to
21 discovery without leave of court unless and until the claimant expressly waives the
22 right to arbitration, the claimant fails timely to move for a stay, or the court denies
23 the motion for a stay.⁹ This will ensure that discovery processes are not invoked
24 merely as a tactical tool to gather information for use in arbitration.¹⁰

5. 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).

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

7. *Id.* at 1226-27.

8. *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); *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").

9. 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).

10. *See supra* note 6.

1 **Jurisdiction and Joinder of Claims**

2 In a county in which there is a municipal court, Section 1281.5 expressly permits
3 the plaintiff to join with the application for a stay pending arbitration “a claim of
4 lien otherwise within the jurisdiction of the municipal court.”¹¹ This language may
5 generate confusion.

6 It could be interpreted to imply that the application for a stay must be brought in
7 superior court, regardless of whether the underlying lien claim is within the
8 jurisdiction of the municipal court. The statute may thus mean that the lien claim
9 may be joined with the application in superior court, even if it is “otherwise within
10 the jurisdiction of the municipal court.”¹² So construed, the statute would
11 constitute an incongruous and inefficient rule requiring the superior court to
12 consider a stay application even though the underlying controversy and its
13 arbitrability are cognizable in municipal court.¹³

14 A more compelling explanation is that the language is an historical anomaly.
15 When Section 1281.5 was enacted in 1977,¹⁴ municipal courts had jurisdiction of
16 certain mechanic’s lien foreclosure actions, but did not have jurisdiction of any
17 arbitration-related petitions.¹⁵ Thus, a petition to compel arbitration of a
18 construction dispute had to be filed in the superior court, regardless of whether the
19 underlying claim of lien was within the jurisdiction of the municipal court.¹⁶ By
20 expressly authorizing joinder of “a claim of lien otherwise within the jurisdiction
21 of the municipal court,” Section 1281.5 clarified that the lien claim could be

11. As originally enacted, Section 1281.5 stated without qualification that the plaintiff “may join with the application for the stay, pending arbitration, a claim of lien otherwise within the jurisdiction of the municipal court.” 1977 Cal. Stat. ch. 135, § 1. Due to trial court unification, a county may now have a unified superior court, rather than a municipal court. On Commission recommendation, the statute was amended to reflect this development: “*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.” 1998 Cal. Stat. ch. 931, § 122 (emphasis added); see also *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm’n Reports 51, 233-34 (1998).

The Commission also recommended, and the Legislature directed, further study of the procedure for obtaining a stay of a mechanic’s lien foreclosure action pending arbitration. Gov’t Code § 70219; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm’n Reports 51, 85 (1998). This recommendation is the result of that study.

12. See letter of March 11, 1998, from Paul N. Crane to Nathaniel Sterling (First Supplement to Memorandum 98-12, Exhibit p. 3, on file with California Law Revision Commission); letter of March 9, 1998, from Jerome Sapiro, Jr., to David Long (Memorandum 98-25, Exhibit pp. 2-4, on file with California Law Revision Commission). But see Section 1292.8 (motion to stay action on ground that issue is subject to arbitration shall be made in court where action is pending).

13. For the extent of municipal court jurisdiction of a mechanic’s lien foreclosure action and related petition to compel arbitration, see Sections 85.1, 86(a)(6), (a)(10).

14. 1977 Cal. Stat. ch. 135, § 1.

15. See 1961 Cal. Stat. ch. 461, § 2 (former Section 1292); 1976 Cal. Stat. ch. 1288, § 5 (former Section 86); see also *Recommendation and Study relating to Arbitration*, 3 Cal. L. Revision Comm’n Reports at G-61 (1961).

16. *Titan Enterprises, Inc. v. Armo Constr., Inc.*, 32 Cal. App. 3d 828, 833, 108 Cal. Rptr. 456 (1973) (amount of mechanic’s lien was within jurisdiction of municipal court, whereas petition to compel arbitration must be brought in superior court).

1 brought in superior court along with the petition to compel arbitration, instead of
2 being filed in municipal court.¹⁷ When municipal courts were given jurisdiction of
3 arbitration-related petitions concerning municipal court claims,¹⁸ this reference to
4 joinder became unnecessary, but it was not deleted.

5 To prevent confusion and simplify the statute, the obsolete sentence on joinder
6 should be deleted.

17. In *Titan Enterprises*, 32 Cal. App. 3d at 833, the court questioned, but did not resolve, whether such joinder would be permissible. *Titan Enterprises* was decided shortly before Section 1281.5 was enacted, so it is not surprising that the Legislature addressed the issue in the statute.

18. 1984 Cal. Stat. ch. 1719, § 1.1 (amending former Section 86).

PROPOSED LEGISLATION

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

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

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

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

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

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

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

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

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

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

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

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

1 Subdivision (a) is also amended to delete the last sentence, which is no longer necessary,
2 because the jurisdiction of the municipal court now includes a petition to compel arbitration of a
3 claim within the court's jurisdiction. Sections 85.1 (original jurisdiction of municipal court),
4 86(a)(10) (arbitration-related petitions). Compare 1961 Cal. Stat. ch. 461, § 2 (former Section
5 1292) (petition shall be filed in superior court); 1976 Cal. Stat. ch. 1288, § 5 (former Section 86)
6 (arbitration-related petition not within jurisdiction of municipal court).

7 Subdivision (b) is added to require the lien claimant to file a motion for a stay order within 30
8 days after service of the summons and complaint. This is generally consistent with case law, but
9 provides concrete guidance implementing the "reasonable time" requirement recognized by the
10 courts. See *Kaneko Ford Design v. Citipark, Inc.*, 202 Cal. App. 3d 1220, 1227, 249 Cal. Rptr.
11 544 (1988).

12 Subdivision (c) is added to prevent litigants from using discovery processes as a tactical tool to
13 prepare for arbitration. See generally *Christensen v. Dewor Developments*, 33 Cal. 3d 778, 784,
14 661 P.2d 1088, 191 Cal. Rptr. 8 (1983); *McMillan Dev. Co. v. Home Buyers Warranty*, 68 Cal.
15 App. 4th 896, 909-10, 80 Cal. Rptr. 2d 611 (1998); *Davis v. Continental Airlines, Inc.*, 59 Cal.
16 App. 4th 205, 215, 69 Cal. Rptr. 2d 79 (1997); *Kaneko*, 202 Cal. App. 3d at 1228-29.
