

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

## Stay of Mechanic's Lien Enforcement Pending Arbitration

April 2000

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.

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CALIFORNIA LAW REVISION COMMISSION

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April 13, 2000

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:

- (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 is submitted pursuant to Government Code Section 70219.

Respectfully submitted,

Howard Wayne  
*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 1281.5<sup>1</sup> 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 clarify and improve the procedure for preserving a contractual right to arbitrate and to delete the confusing and obsolete sentence on joinder of claims.

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

### **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.<sup>2</sup> 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,<sup>3</sup> making it impossible for the plaintiff to delay litigation until completion of arbitration, except where arbitration was completed very quickly.<sup>4</sup> 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.<sup>5</sup>

By itself, however, an application for a stay is not sufficient to stay the action.<sup>6</sup> 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.<sup>7</sup> This prevents the plaintiff from using the application as a

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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.

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.

tactic to preserve arbitration rights while exploring the defendant's case through discovery techniques unavailable in arbitration.<sup>8</sup>

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 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 further provide that no party is entitled to 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.<sup>9</sup> This will ensure that discovery

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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

processes are not invoked merely as a tactical tool to gather information for use in arbitration.<sup>10</sup>

### **Jurisdiction and Joinder of Claims**

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

It could be interpreted to imply that the application for a stay must be brought in superior court, regardless of whether the underlying lien claim is within the jurisdiction of the municipal court. The statute may thus mean that the lien claim may be joined with the application in superior court, even if it is “otherwise within the jurisdiction of the municipal court.”<sup>12</sup> So construed, the statute would constitute an

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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 8.

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 from Paul N. Crane to Nathaniel Sterling (March 11, 1998) (First Supplement to Memorandum 98-12, Exhibit p. 3, on file with California Law Revision Commission); Letter from Jerome Sapiro, Jr., to David Long (March 9, 1998) (Memorandum 98-25, Exhibit pp. 2-4, on file with Commis-

incongruous and inefficient rule requiring the superior court to consider a stay application even though the underlying controversy and its arbitrability are cognizable in municipal court.<sup>13</sup>

A more compelling explanation is that the language is an historical anomaly. When Section 1281.5 was enacted in 1977,<sup>14</sup> municipal courts had jurisdiction of certain mechanic's lien foreclosure actions, but did not have jurisdiction of any arbitration-related petitions.<sup>15</sup> Thus, a petition to compel arbitration of a construction dispute had to be filed in the superior court, regardless of whether the underlying claim of lien was within the jurisdiction of the municipal court.<sup>16</sup> By expressly authorizing joinder of "a claim of lien otherwise within the jurisdiction of the municipal court," Section 1281.5 clarified that the lien claim could be brought in superior court along with the petition to compel arbitration, instead of being filed in municipal court.<sup>17</sup> When municipal courts were given jurisdiction of arbitration-related petitions concerning municipal court claims,<sup>18</sup> this

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sion). 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).

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).

reference to joinder became unnecessary, but it was not deleted.

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

## 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 ~~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.

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