

Legis. Prog.

May 20, 2003

## Memorandum 2003-10

**2003 Legislative Program**

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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 number of the bills.

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**

This bill would implement the Commission's proposed technical cleanup of erroneous section references in the Probate Code. The bill has been amended to include a State Bar Trusts & Estates Section proposal to clarify language in the Statutory Will form (Probate Code Section 6240) relating to appointment of a custodian for a person between the ages of 18 and 25.

**AB 182 (Harman) — Exemptions from Enforcement of Judgments**

Assembly Bill 182 (Harman) implements the Commission's recommendation on *Exemptions from Enforcement of Money Judgments: Second Decennial Review*. The bill adjusts personal property monetary exemptions to account for cost-of-living increases since the last review in 1995. In addition, the bill would create an automatic triennial cost-of-living adjustment, consistent with federal bankruptcy law, to keep pace with inflation without the need for legislation.

Under the bill, the Judicial Council is the entity responsible for implementing the automatic triennial cost-of-living adjustment. It would determine the amounts by rule and publish the adjusted amounts in a Judicial Council Form.

Judicial Council has raised a concern with this provision. The process by which Judicial Council adopts rules and amends its official forms is costly and lengthy. It can take over a year to complete the process, which involves public notice and comment and official action at a Judicial Council meeting. In all

probability, updated figures would not be available to the public for months after the date they were to take effect.

We have developed an alternative approach with Judicial Council staff and the State Bar Insolvency Law Committee. The Judicial Council would be required to publish the exemption amounts, but would not be required to adopt an official rule and form. This is consistent with the approach taken in a similar provision — Civil Code Section 1714.1(c) requires the Judicial Council to make cost-of-living adjustments to another dollar amount and publish the adjusted amount. Judicial Council practice under that section has been to post the current amount to their website and publish it in an appendix to the official forms. Judicial Council staff indicated that they could use the same methods to publish the adjusted exemption amounts. The less formal approach would allow Judicial Council staff to publish the exempt amounts promptly and at little cost.

The list of exemption amounts published by the Judicial Council would be served on the debtor with the notice of levy. This will provide actual notice to both parties of the current exemption amounts.

After consultation with the Commission chair and Assembly Member Harman's staff, the bill was amended to implement the alternative approach. The relevant provisions of the bill and the corresponding Commission Comments now read as follows:

**Code Civ. Proc. § 681.030 (amended). Judicial Council rules**

681.030. (a) The Judicial Council may provide by rule for the practice and procedure in proceedings under this title.

(b) The Judicial Council may prescribe the form of the applications, notices, orders, writs, and other papers to be used under this title. The Judicial Council may prescribe forms in languages other than English. The timely completion and return of a Judicial Council form prescribed in a language other than English has the same force and effect as the timely completion and return of an English language form.

(c) The Judicial Council shall prepare a form containing both *all* of the following:

(1) A list of each of the federal and this state's exemptions from enforcement of a money judgment against a natural person.

(2) A citation to the relevant statute of the United States or this state which creates each of the exemptions.

(3) Information on how to obtain the list of exemption amounts published pursuant to subdivision (d) of Section 703.150.

**Comment.** Paragraph (3) is added to Section 681.030(c) to reflect the automatic triennial cost-of-living adjustment of personal property exemptions from enforcement of money judgments pursuant to Section 703.150.

**Code Civ. Proc. § 700.010 (amended). Notice of levy**

700.010. (a) At the time of levy pursuant to this article or promptly thereafter, the levying officer shall serve a copy of the following on the judgment debtor:

(1) The writ of execution.

(2) A notice of levy.

(3) If the judgment debtor is a natural person, a copy of the form listing exemptions prepared by the Judicial Council pursuant to subdivision (c) of Section 681.030 and the list of exemption amounts published pursuant to subdivision (d) of Section 703.150.

(4) Any affidavit of identity, as defined in Section 680.135, for names of the debtor listed on the writ of execution.

(b) Service under this section shall be made personally or by mail.

**Comment.** Section 700.010 is amended to reflect the automatic triennial cost-of-living adjustment of personal property exemptions from enforcement of money judgments pursuant to Section 703.150.

**Code Civ. Proc. § 703.150 (added). Automatic adjustment of exemption amounts**

SEC. 3. Section 703.150 is added to the Code of Civil Procedure, to read:

703.150 (a) On April 1, 2004, and at each three-year interval ending on April 1 thereafter, the dollar amounts of exemptions provided in subdivision (b) of Section 703.140 in effect immediately before that date shall be adjusted as provided in subdivision (c).

(b) On April 1, 2007, and at each three-year interval ending on April 1 thereafter, the dollar amounts of exemptions provided in Article 3 (commencing with Section 704.010) in effect immediately before that date shall be adjusted as provided in subdivision (c).

(c) The Judicial Council shall determine the amount of the adjustment based on the change in the annual California Consumer Price Index for All Urban Consumers, published by the Department of Industrial Relations, Division of Labor Statistics, for the most recent three-year period ending on December 31 preceding the adjustment, with each adjusted amount rounded to the nearest twenty-five dollars (\$25).

(d) Beginning April 1, 2004, the Judicial Council shall publish a list of the current dollar amounts of exemptions provided in subdivision (b) of Section 703.140 and in Article 3 (commencing

with Section 704.010), together with the date of the next scheduled adjustment.

(e) Adjustments made under subdivision (a) do not apply with respect to cases commenced before the date of the adjustment, subject to any contrary rule applicable under the federal Bankruptcy Code. The applicability of adjustments made under subdivision (b) is governed by Section 703.050.

**Comment.** Section 703.150 provides a new automatic triennial cost-of-living adjustment (COLA) for personal property exemptions applicable to enforcement of judgments and in bankruptcy. Subdivision (a) supersedes former subdivision (c) of Section 703.140, which coordinated the bankruptcy-only exemptions in Section 703.140(b) with triennial adjustments under the federal Bankruptcy Code. The automatic COLA applicable to the bankruptcy-only exemptions in Section 703.140(b) begins in 2004.

Under subdivision (b), the automatic COLA applicable to the Article 3 enforcement of judgments exemptions (Sections 704.010-704.210) is deferred until 2007, because these amounts are adjusted by statute operative January 1, 2004. For an exception to the adjustment provided in subdivision (b), see Section 704.090(b) (inmate trust fund exemption as to crime victim's claim).

The triennial adjustment period under this section is the same as that provided under the Bankruptcy Code. See 11 U.S.C. § 104(b)(1)(A). The \$25 rounding factor in subdivision (c) is also drawn from federal law. See 11 U.S.C. § 104(b)(1)(B).

Subdivision (e) clarifies the application of adjusted exemption amounts. As to bankruptcy, the rule is the same as provided by 11 U.S.C. § 104(c). The rule as to adjusted exemption amounts in state enforcement of judgment proceedings is consistent with the general rule under this title.

See also Sections 681.030(c)(3) (list of exemption amounts published pursuant to subdivision (d) referenced in Judicial Council form), 700.010 (list of exemption amounts published pursuant to subdivision (d) served with notice of levy).

Conforming changes were made to the preliminary part of the Commission's recommendation. The staff recommends that the Commission approve these changes.

#### **AB 512 (Bates) — Procedural Fairness in CID Rulemaking and Decisionmaking**

For discussion of issues on this bill, see Memorandum 2003-23.

**AB 1731 (Assem. Housing & Commun. Dev. Comm.) — Organization of Davis-Stirling CID Act**

The proposal to add chapter and article headings to the Davis-Stirling CID Act for organizational purposes was initially introduced as AB 1732 (Assem. Housing & Commun. Dev. Comm.). However, that bill has become a two-year bill, so the organizational material has been amended into another vehicle — AB 1731 (Assem. Housing & Commun. Dev. Comm.).

The organizational material is also included in AB 512 (Bates). However, that bill has substantive issues. See Memorandum 2003-23. The duplicate coverage functions as a safety net in the event AB 512 should fail.

**SB 111 (Knight) — Obsolete Reporting Requirements**

The bill was amended on April 28 to incorporate the Commission's recommended legislation to delete obsolete reporting requirements from the codes. The amendments caused Legislative Counsel to characterize the bill as "fiscal."

Unfortunately, the deadline for a fiscal bill to clear the policy committee in the first house this year passed at about the same time the bill was characterized as fiscal. The net result of this sequence of events is that the bill cannot be heard in the policy committee until January 2004, making it a two-year bill.

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

As introduced, SB 113 would have implemented the Commission's *revised* recommendation on *Stay of Mechanic's Lien Enforcement Pending Arbitration*, 31 Cal. L. Revision Comm'n Reports 333 (2002). Analysis in the Senate Judiciary Committee suggested that the bill would not pass the committee with the automatic stay approach included in the bill. The bill was amended to instead implement reforms from the Commission's *original* recommendation on *Stay of Mechanic's Lien Enforcement Pending Arbitration*, 30 Cal. L. Revision Comm'n Reports 307 (2000). Senator Ackerman's office and Chairperson David Huebner approved these revisions. The bill as amended passed out of Senate Judiciary Committee and was approved by the Senate on the consent calendar.

The revision of Code of Civil Procedure Section 1281.5 currently in the bill is set out below, together with a conforming Comment.

**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 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.

(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. The failure of a claimant to comply with this subdivision is a waiver of the claimant's right to compel arbitration.

(c) 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.** 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 (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) (former subdivision (b)) is amended to make technical changes.

We recommend that the Commission ratify the amendments of the bill and approve the proposed Comment. We would also abandon the previous decision to print an updated version of the *revised* recommendation. There is no reason to update the revised recommendation because the bill no longer incorporates the automatic stay approach. We will include the text of the final amendment to Section 1281.5 and the corresponding Comment in our report on the legislative history of the recommendation.

#### **SCR 4 (Morrow) — Resolution of CLRC Authority**

The Senate Appropriations Committee takes the position that the Commission's annual resolution of authority is properly detained on the suspense file. The theory is that the resolution is the key to the Commission's spending, and the Commission's \$500,000+ budget exceeds the \$150,000 suspense amount. In the past the resolution has been routinely released from the suspense file in due course. With the budget in limbo, when that will occur this year is uncertain.

#### ALSO OF INTEREST

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

AB 286 is Assemblymember Dutra's bill to address the double liability problem in home improvement contracts. The bill passed the Assembly by a vote of 60-11 and is now pending in the Senate. There is still a lot of opposition, but Assemblymember Dutra is trying to work with the opposition to resolve their concerns.

At the March meeting, the Commission considered whether to treat the bill as implementing a Commission recommendation if it were amended to apply to a home improvement contract in an amount of \$15,000 or less. The Commission did not make a decision on that point, but directed the staff to obtain more information regarding the approach used in the bill. In particular, the Commission expressed concern about the lack of a lien cap in the bill — the Commission's proposal would limit the amount of mechanic's liens and stop notices that may be enforced "to the amount remaining unpaid to the original contractor under the contract," but AB 286 includes no comparable limitation on the amount of mechanic's liens and stop notice claims.

The bill has been amended to apply to a home improvement contract in an amount of \$15,000 or less. The staff has discussed the lien cap issue with Assemblyman Dutra's office, and he has expressed interest in amending the bill to include a lien cap. That could be accomplished by revising the language in the bill as follows:

**Civ. Code § 3125 (added). Limitation on owner's liability**

3125. (a) Notwithstanding any other provision of this title, if a home improvement contract is executed in an amount not exceeding fifteen thousand dollars (\$15,000), the owner may setoff ~~set off~~ the amount of good-faith payments to the original contractor against the aggregate amount of enforceable mechanics' liens and stop notice claims, regardless of whether changes in the contract have increased the contract price to an amount exceeding fifteen thousand dollars (\$15,000), subject to the following limitations:

(1) The setoff may not exceed fifteen thousand dollars (\$15,000).

(2) The setoff does not apply to amounts that are due and unpaid by the owner under the home improvement contract.

(b) An owner's receipt of a preliminary 20-day notice does not affect the good-faith nature of a payment by the owner.

(c) Notwithstanding any other provision of this title, the aggregate amount of mechanics' liens and stop notice claims that may be enforced with respect to a contract described in subdivision (a) may not exceed the amount of that contract, as adjusted to account for changes in the contract price.

(d) As used in this section "home improvement contract" has the meaning provided by Section 7151.2 of the Business and Professions Code.

A Comment along the following lines would help to explain the effect of the provision:

**Comment.** Section 3125 provides protection for an owner who, in good faith, pays the prime contractor according to the terms of a home improvement contract. Subject to certain limitations, this section is intended to shield an owner from liability to pay twice for the same labor, services, equipment, or materials, in a case where a subcontractor or supplier does not receive payment that has been made by the owner. The introductory clause of subdivision (a) makes clear that this section is an exception to the "direct lien" rule in Sections 3123 and 3124.

Pursuant to subdivision (a), the protection for a good-faith payment by a homeowner under this section is limited to a home improvement contract executed in an amount not exceeding



\$15,000. Once this requirement is met, the owner's good-faith payment is protected by a setoff of up to \$15,000, even though the total contract amount may go over the \$15,000 qualifying level because of extras or change orders.

Existing rights and procedures under this title remain applicable as to the amount remaining unpaid by the owner. Thus, the owner may not use a setoff against claims to the extent that the owner has not paid the original contractor for labor, services, equipment, or materials performed under the home improvement contract. See subdivision (a)(2).

In no circumstance, however, is an owner who executes a home improvement contract subject to this section liable to a subcontractor or supplier for a claim exceeding the amount that the owner agreed to pay in the contract. The aggregate amount of mechanics' lien and stop notice claims asserted against the owner is limited to the contract amount. See subdivision (c). This is an exception to the general rule that the amount of a contract between an owner and a prime contractor does not limit the amount of a mechanic's lien (see Section 3123).

We recommend that the Commission approve the language and Comment proposed above, and treat AB 286 as implementing a Commission recommendation if it is amended accordingly.

**AB 903 (Steinberg) — Construction Defect Litigation**

As introduced, the bill would have directed a Law Revision Commission study of experience under the new construction defect litigation statute. That provision was in the nature of a spot bill and it has since been amended to eliminate the study.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

# Status of 2003 Commission Legislative Program

As of May 20, 2003

		AB 167	AB 182	AB 512	AB 1731			SB 79	SB 111	SB 113	SCR 4
	Introduced	Jan 23	Jan 27	Feb 18	Mar 5			Jan 22	Feb 3	Feb 3	Jan 21
	Last Amended	Mar 13	Mar 27		May 8			Mar 24	April 28	Mar 6	
First House	Policy Committee	Mar 18	Mar 4	Apr 9	Apr 30			Apr 1	2-Year Bill	May 6	Mar 18
	Fiscal Committee	—	—	*May 6	May 14			Apr 28		—	Suspense
	Passed House	Mar 24	Mar 6	May 19				May 8		May 15	
Second House	Policy Committee	<i>Jun 10</i>									
	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 1731 (Asm. Housing & Commun. Dev. Comm.): Organization of Davis-Stirling CID Act

**KEY**

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

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  
 AB 903 (Steinberg): Construction Defect Litigation