STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

2001-2002 RECOMMENDATIONS

March 2002

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

CALIFORNIA LAW REVISION COMMISSION

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Evidence of Prejudgment Deposit Appraisal in Eminent Domain

March 2001

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 *Evidence of Prejudgment Deposit Appraisal in Eminent Domain*, 31 Cal. L. Revision Comm'n Reports 109 (2001). This is part of publication #212 [*2001-2002 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

DAVID HUEBNER, Chairperson
JOYCE G. COOK, Vice Chairperson
BION M. GREGORY
SENATOR BILL MORROW
SANFORD M. SKAGGS
ASSEMBLY MEMBER HOWARD WAYNE

March 29, 2001

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

This recommendation would revise the statutes governing evidence of the condemnor's prejudgment deposit appraisal in order to:

(1) Codify case law that evidence of the prejudgment deposit appraisal may be used for purposes of impeaching a witness who prepared the appraisal.
(2) Emphasize that the protections against use of prejudgment deposit appraisal evidence apply equally to the property owner and the condemnor.
(3) Make clear that evidence of the prejudgment deposit may be used in determining the amount of litigation expenses for which a condemnor may be assessed.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

David Huebner
Chairperson

EVIDENCE OF PREJUDGMENT DEPOSIT APPRAISAL IN EMINENT DOMAIN

Introduction

The California Constitution enables the condemnor in an eminent domain proceeding to take immediate possession of the property, even though valuation issues are yet to be tried and just compensation yet to be awarded. "The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."[1] The Legislature has implemented the constitutional authority by enactment of a detailed procedure governing deposit and withdrawal of probable compensation.[2]

As a practical matter, it is routine for the condemnor to use the prejudgment procedure. The condemnor in the ordinary case makes a prejudgment deposit of probable compensation. The deposit is based on the condemnor's appraisal of the property. The deposit enables the condemnor to take immediate possession of the property. The deposit also fixes the valuation date.

The law protects the condemnor from use of the prejudgment deposit appraisal against it at trial.[3] The intent of the law is to encourage the condemnor to make a fully adequate

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1. Cal. Const. art. I, § 19.

2. Code Civ. Proc. §§ 1255.010-1255.480. The statutory scheme was enacted on recommendation of the Law Revision Commission. All further statutory references are to the Code of Civil Procedure.

3. Section 1255.060.

prejudgment deposit, without fear of prejudicing its position at trial.[4]

Issues have arisen concerning several aspects of existing law:

(1) Are the evidentiary rules effective in ensuring adequacy of the deposit, and can they be improved?

(2) Does protection of a valuation witness from impeachment by a prejudgment deposit appraisal unduly impair the property owner's ability to prove fair market value?

(3) Should the statute protect a property owner from use of preliminary appraisal data against the owner at trial to the same extent it protects a condemnor?

Use of Prejudgment Deposit Appraisal to Determine Allowance of Litigation Expenses

It is an unresolved question whether the protection afforded the condemnor from use against it of the prejudgment deposit appraisal realistically acts as an incentive for the condemnor. A more practical incentive is the possibility that the amount of litigation expenses assessed against a condemnor may be influenced by an unduly low deposit.

Existing California law provides that litigation expenses may be awarded to the property owner in an eminent domain proceeding if the final pretrial demand of the property owner was reasonable and the final pretrial offer of the condemnor

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4. The Commission's recommendation on the matter notes that, "This is a salutary rule because it encourages the plaintiff to make adequate deposits." *Recommendation Proposing the Eminent Domain Law*, 13 Cal. L. Revision Comm'n Reports 1007, 1048 (1975).

> [The purpose] is to encourage the plaintiff to make an adequate deposit by protecting the plaintiff from the defendant's use of the evidence upon which the deposit is based in the trial on the issue of compensation. If such evidence could be so used, it is likely that the plaintiff would make an inadequate deposit in order to protect itself against the use at the trial of evidence submitted in connection with the deposit.

See Section 1255.060 Comment.

was unreasonable.[5] In determining the amount of litigation expenses to be awarded, "the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed and served prior to or during the trial."[6] It is not clear whether the condemnor's prejudgment appraisal and deposit are considered to be "other written offers and demands filed and served prior to or during the trial" within the meaning of this provision.

The Commission recommends that the statute be revised to make clear that the prejudgment deposit is to be taken into account in determining the amount of litigation expenses allowed. This will help ensure the adequacy of the deposit.

This clarification will not have a detrimental effect on condemnors generally. The law already requires that the offer under Government Code Section 7267.2 be taken into account in determining the amount of litigation expenses, and the prejudgment deposit is ordinarily based on that amount.

Impeachment of Prejudgment Deposit Appraisal Witness

One protection existing law provides the condemnor is that an appraisal witness may not be impeached at trial by the witness' own earlier prejudgment deposit appraisal.[7]

This provision was construed in *County of Contra Costa v. Pinole Point Properties, Inc*.[8] In that case, the condemnor called as a trial witness the appraiser who had prepared the prejudgment deposit appraisal for the condemnor. The property owner sought to impeach the appraiser's testimony with evidence of the earlier appraisal. The condemnor argued that Code of Civil Procedure Section 1255.060(b) precluded

5. Section 1250.410.
6. Section 1250.410(b).
7. Section 1255.060(b).
8. 27 Cal. App. 4th 1105, 33 Cal. Rptr. 2d 38 (1994).

impeachment of the witness. The court of appeal held that, despite the clear language of the statute, the statute could not have been intended to apply where the condemnor calls its own prejudgment deposit appraiser as a valuation witness at trial. The court held that, "when a condemnor calls an expert witness to testify at trial to valuation of the subject property, section 1255.060, subdivision (b) does *not* proscribe his impeachment by use of an appraisal that the witness theretofore made in connection with the condemnor's deposit for pretrial possession of that property."[9]

The court in *Pinole Point Properties* was concerned that a literal interpretation of the statute might violate the constitutional guarantee of just compensation. The essence of a condemnation action is to determine the fair market value of condemned property, and a rule that prohibits a landowner from questioning a witness about a prior inconsistent opinion interferes with the constitutional right to compensation in a fundamental way.

> If the condemnor elects to present the jury with an expert witness whose opinion previously expressed and sought by that condemnor for purposes of a condemnor's deposit differs from the valuation testimony before the jury, that witness, it would seem, should be subject to the cross-examination expert witnesses customarily receive. Nothing produces the truth for fact finders weighing conflicting expert testimony better than vigorous and full cross-examination of those witnesses.[10]

The Commission has concluded that the statute should be revised to allow expressly for impeachment of an appraiser who later testifies as to a different value. An appraiser who testifies under oath at an eminent domain trial should be held to explain why that valuation differs from the valuation of the

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9. 27 Cal. App. 4th at 1113.

10. *Id.* at 1112.

same property made by the same appraiser earlier in the proceeding. The proposed revision would have the effect of codifying existing case law as expressed in *Pinole Point Properties*.

Protection of Property Owner's Valuation Statements

If the condemnor is protected from use against it of valuation statements that it makes in connection with the prejudgment deposit, does not fairness demand that the property owner be protected to the same extent?[11] Existing law appears to accomplish this result already. Section 1255.060 prohibits reference at trial to the amount deposited "or withdrawn."[12] Likewise, no "other statements" made in connection with a deposit or withdrawal may be considered to be an admission of "any party."[13] An appraiser who has made a valuation statement in connection with a prejudgment deposit may not be called over the objection of "the party" on whose behalf the valuation statement was made.[14] All of these provisions would apply equally to the condemnor and the property owner. The Commission's Comment to Section 1255.060, as revised, emphasizes this point.

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11. For example, where a property owner applies to the court for an increase of the deposit, based on the property owner's own appraisal, the condemnor should not be allowed to use that appraisal against the property owner in the subsequent valuation trial.

12. Section 1255.060(a).

13. Section 1255.060(b).

14. Section 1255.060(c).

PROPOSED LEGISLATION

Code Civ. Proc. § 1250.410 (amended). Pretrial settlement offers

SECTION 1. Section 1250.410 of the Code of Civil Procedure is amended to read:

1250.410. (a) At least 20 days prior to the date of the trial on issues relating to compensation, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff its final demand for compensation in the proceeding. The offer and the demand shall include all compensation required pursuant to this title, including compensation for loss of goodwill, if any, and shall state whether interest and costs are included. ~~Such~~ *These* offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation expenses. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses.

(c) In determining the amount of ~~those~~ litigation expenses *allowed under this section*, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code*, any deposit made by the plaintiff pursuant to Chapter 6 (commencing with Section 1255.010),* and any other written offers and demands filed and served ~~prior to~~ *before* or during the trial.

~~(c)~~

(d) If timely made, the offers and demands as provided in subdivision (a) shall be considered by the court on the issue of determining an entitlement to litigation expenses.

Comment. Section 1250.410 is amended to make clear that the matters considered by the court in determining the amount of litigation expenses that may be allowed include any deposit by the plaintiff of probable compensation in the proceeding. The other changes in Section 1250.410 are technical.

Note. Section 1250.410 was amended by 2001 Cal. Stat. ch. 428, § 2, effective January 1, 2002. The proposed revisions set out above are directed to the amended version of Section 1250.410.

Code Civ. Proc. § 1255.060 (amended). Limitations on use of evidence in connection with deposit

SEC. 2. Section 1255.060 of the Code of Civil Procedure is amended to read:

1255.060. (a) The amount deposited or withdrawn pursuant to this chapter shall not be given in evidence or referred to in the trial of the issue of compensation.

(b) In the trial of the issue of compensation, ~~a witness may not be impeached by reference to any~~ *an* appraisal report, written statement and summary of an appraisal, or other ~~statements~~ *statement* made in connection with a deposit or withdrawal pursuant to this chapter~~, nor shall such a report or statement and summary~~ *shall not* be considered to be an admission of any party.

(c) Upon objection of the party at whose request an appraisal report, written statement and summary of the appraisal, or other statement was made in connection with a deposit or withdrawal pursuant to this chapter, the person who made ~~such~~ *the* report or statement and summary or other statement may not be called at the trial on the issue of compensation by any other party to give an opinion as to compensation. *If the person who prepared the report, statement and summary, or other statement is called at trial to give an opinion as to compensation, the report, statement*

and summary, or other statement may be used for impeachment of the witness.

Comment. Section 1255.060 is amended to allow impeachment of a valuation witness who prepared an appraisal report, written statement and summary of an appraisal, or other statement made in connection with a deposit or withdrawal pursuant to this chapter. This codifies existing law. County of Contra Costa v. Pinole Point Properties, Inc., 27 Cal. App. 4th 1105, 33 Cal. Rptr. 2d 38 (1994).

It should be noted that Section 1255.060 protects an appraisal statement made by or on behalf of a property owner in connection with a deposit or withdrawal under this chapter to the same extent as one made by or on behalf of the condemnor.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Debtor-Creditor Law: Technical Revisions

May 2001

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 *Debtor-Creditor Law: Technical Revisions*, 31 Cal. L. Revision Comm'n Reports 123 (2001). This is part of publication #212 [*2001-2002 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

DAVID HUEBNER, Chairperson
JOYCE G. COOK, Vice Chairperson
BION M. GREGORY
SENATOR BILL MORROW
SANFORD M. SKAGGS
ASSEMBLY MEMBER HOWARD WAYNE

May 18, 2001

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

This recommendation addresses a number of technical issues identified by the Los Angeles County Sheriff's Department concerning procedures under the claim and delivery statute (Code Civ. Proc. § 511.010 *et seq*.) and the Enforcement of Judgments Law (Code Civ. Proc. § 680.010 *et seq*.), both of which were enacted on recommendation of the Law Revision Commission.

The Commission recommends making technical revisions to address the following issues: (1) determination of the amount of the defendant's release undertaking in claim and delivery where the plaintiff has not provided an undertaking, (2) disposition of exemption claims in enforcement of judgments where hearings are taken off calendar, (3) clarification of rules concerning stays pending final determination of exemption claims, and (4) notation of the final day to vacate premises under a writ of possession.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

David Huebner
Chairperson

DEBTOR-CREDITOR LAW: TECHNICAL REVISIONS

The statutes governing prejudgment claim and delivery and the enforcement of judgments were enacted on recommendation of the Law Revision Commission.[1] From time to time, the Commission learns of technical problems in statutes enacted on its recommendation and proposes amendments to address them. A number of technical issues have been identified by levying officers[2] that are addressed in this recommendation.

Undertaking for Writ of Possession Under Claim and Delivery Statute

The claim and delivery statute requires a plaintiff to post an undertaking in an amount at least twice the value of the defendant's interest in the property before the court will issue a writ of possession for personal property.[3] A copy of the undertaking is required to be delivered to the person in possession of the property at the time of levy.[4] The Judicial

1. Claim and delivery: Code Civ. Proc. §§ 511.010-515.030; see *Recommendation Relating to the Claim and Delivery Statute*, 11 Cal. L. Revision Comm'n Reports 301 (1973) (enacted by 1973 Cal. Stat. ch. 526); see also *Recommendation Relating to Turnover Orders Under the Claim and Delivery Law*, 13 Cal. L. Revision Comm'n Reports 2079 (1976) (enacted by 1976 Cal. Stat. ch. 145); *Recommendation Relating to Statutory Bonds and Undertakings*, 16 Cal. L. Revision Comm'n Reports 501 (1982) (enacted by 1982 Cal. Stat. chs. 517, 998).

Enforcement of judgments: Code Civ. Proc. §§ 680.010-724.260; see *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980) (1982 Cal. Stat. chs. 497, 1364).

All further statutory references are to the Code of Civil Procedure.

2. Letter from Sgt. Michael Torres, Los Angeles County Sheriff's Dep't, to California Law Revision Commission, Sept. 28, 1999 (attached to Commission Staff Memorandum 99-58 (Oct. 1, 1999), Exhibit pp. 11-17).

3. Sections 512.060(a)(2), 515.010.

4. Section 514.020(a).

Council form titled "Writ of Possession (Claim and Delivery) (CD-130)" states that a "copy of the plaintiff's undertaking must be attached to the original writ and all copies served." The defendant may obtain redelivery of seized property by posting an undertaking in the amount of the plaintiff's undertaking.[5]

Courts may issue prejudgment writs of possession without requiring the plaintiff to post an undertaking, if the court finds that the defendant has no interest in the property.[6] Conse-

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5. Section 515.020. The defendant may also prevent seizure of the property by filing the undertaking before levy. *Id.*

6. See Torres, *supra* note 2, at Exhibit p. 11.

It is implicit in the statutory language that an undertaking will be filed: "The court shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed with the court an undertaking." Section 515.010. This language derives from the Commission's original claim and delivery proposal, enacted in 1973, which required an undertaking in an amount double the value of the *property*, not just the defendant's interest in it. See 1973 Cal. Stat. ch. 526, § 2 (operative July 1, 1974); *Recommendation Relating to the Claim and Delivery Statute*, 11 Cal. L. Revision Comm'n Reports 301, 336 (1973); for legislative history, see 11 Cal. L. Revision Comm'n Reports 1124, 1190.

The original bond amount was revised in 1982 to provide for a bond "in an amount not less than twice the value of defendant's interest in the property." See 1982 Cal. Stat. ch. 517, § 120; *Recommendation Relating to Statutory Bonds and Undertakings*, 16 Cal. L. Revision Comm'n Reports 501, 508 n.8, 572 (1982). The Commission recommendation explained, "This will avoid the need for and cost of a large initial undertaking in cases where the defendant has a relatively small interest in the property." *Id.* at 508 n.8.

Section 515.010 was last amended, on Commission recommendation, in 1984. See 1984 Cal. Stat. ch. 538, § 12; *Recommendation Relating to Creditors' Remedies*, 17 Cal. L. Revision Comm'n Reports 975, 998-99 (1984). The Comment to the 1984 amendments elaborates on setting undertaking amounts as follows:

> The third sentence is amended to make clear that the plaintiff may give an undertaking in an amount that exceeds twice the value of the defendant's interest. This is not a substantive change. Under Section 515.020 the defendant can obtain the release of the property or prevent its seizure by giving an undertaking in the same amount as the plaintiff's undertaking. Under Section 515.010 the plaintiff may set the amount of the undertaking at a level sufficient to protect the plaintiff's interest in the property should the defendant give a release undertaking pursuant to Section 515.020.

quently, the levying officer is faced with two problems: (1) the plaintiff's undertaking cannot be served on the defendant as required by statute, and (2) the amount and effect of the defendant's undertaking for redelivery is problematic, since the redelivery bond is in an amount "equal to the amount of the plaintiff's undertaking."[7] While this problem is not common, the Commission is informed that it arises at least once every two or three months in Los Angeles County.

The Commission recommends amending the claim and delivery statute to provide for delivering a copy of the court order for issuance of the writ of possession, as well as a copy of the plaintiff's undertaking, if any.[8] This will give appropriate notice to the defendant in cases where the writ of possession has been issued without an undertaking. The Commission considered the alternative of imposing a minimum undertaking amount, such as applies to writs of attachment, but rejected this option as an unnecessary departure from the existing statutory scheme that would impose additional costs on plaintiffs and, ultimately, on defendants.[9]

"Off Calendar" Claim of Exemption Hearing Under Enforcement of Judgments Law

Under the Enforcement of Judgments Law, the court is required to issue an order determining any exemption claims after notice and a hearing.[10] The statute does not address the situation where an exemption hearing is taken "off calendar"

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7. Section 515.020(a).

8. See proposed amendments of Sections 512.060, 514.020, 515.010, 505.020 *infra*. The Judicial Council forms will need to be revised in accordance with these amendments.

9. The Attachment Law provides for a minimum $2,500 undertaking in "limited civil cases" and $7,500 otherwise. Section 489.220. In attachment, however, the parties don't know what will be attached and can't value it ahead of time.

10. Section 703.580.

and not adjudicated by the court.[11] Should property that has been levied upon be applied to the satisfaction of the judgment or returned to the debtor?

A judgment debtor must make an exemption claim within 10 days after notice of levy is served on the debtor.[12] The levying officer promptly serves a copy of the claim on the judgment creditor, informing the creditor that the property will be released unless a notice opposition and notice of motion are received within 10 days.[13] A hearing on the motion is to be held within 20 days from filing the notice of motion, unless continued for good cause, and notice is given the judgment debtor at least 10 days before the hearing.[14] The claim of exemption and notice of opposition constitute the pleadings and the court may make its determination based on these papers, although the court can continue the hearing for production of other evidence.[15] The burden in the hearing is on the claimant.[16] The levying officer holds the property pending a determination,[17] which creates a problem if the exemption claim is not resolved.

The Commission recommends amending the statute to make clear that the property levied upon should be released from levy[18] in cases where there is no determination of the exemp-

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11. See Torres, *supra* note 2, at Exhibit p. 13.

12. Section 703.520(a).

13. Sections 703.540, 703.550.

14. Section 703.570.

15. Section 703.580(a), (c).

16. Section 703.580(b).

17. Section 703.610.

18. For rules governing the manner of releasing property from levy under a writ of execution, see Section 699.060. In general, unless the court orders otherwise, if property was taken into custody, it is returned to the person from whom it was taken; if it was not taken into custody, the release is accomplished by giving a notice of release in the manner of levy.

tion within the statutory time limits.[19] This is consistent with the exemption claim procedure outlined above. Although the exemption claimant has the burden of proof where an exemption is contested, the creditor has the burden of putting the exemption at issue and appropriately should bear the loss, with the property claimed to be exempt released to the debtor, unless the court orders otherwise.

Stay Pending Final Determination of Exemption Claim Under Enforcement of Judgments Law

In the case of a claim of exemption under the Enforcement of Judgments Law, disposition of the property by the levying officer is specifically stayed until the time to appeal has expired.[20] Section 703.610 does not purport to be a complete listing of all circumstances that constitute a "final determination of the exemption" or that require the levying officer to hold the property. The section is subject to other statutory rules, as recognized in the initial clause of subdivision (a), "[e]xcept as otherwise provided by statute." Other exceptions are noted in the Official Comment.[21]

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19. See proposed amendment of Section 703.580 *infra*.

20. See Section 703.610.

21. The Comment to Section 703.610 reads:

> Subdivision (a) of Section 703.610 continues the substance of subdivision (h) and the second sentence of subdivision (j) of former Section 690.50. Although the language in subdivision (j) of former Section 690.50 pertaining to waiver of an appeal has not been specifically continued, subdivision (a) of Section 703.610 continues its substance since an exemption is finally determined if an appeal is waived. Subdivision (a) requires, as did former Section 690.50(h), that the levying officer preserve the status quo by maintaining the levy on the property. For exceptions to the general rule provided in subdivision (a), see Sections 685.100 (release for failure to pay levying officer's costs), 699.060 (release in general), 699.070 (sale to preserve value of property), 720.660 (release pursuant to third person's undertaking). Subdivision (b) continues the substance of subdivision (g) of former Section 690.50, except that orders for the disposition of perishable property are governed by Section 699.70. Subdivision (c) is new. For

The Commission is informed that many levying officers are unaware of the language in the Comment to Section 703.610 concerning the automatic stay.[22] Moreover, courts occasionally order the levying officer to immediately apply or release property levied upon, notwithstanding the statutory language.[23]

The Commission recommends amending Section 703.610 to recognize the effect of court orders and to codify more explicit language concerning the effect of appeals that now appears in the Comment.[24]

Five-Day Notice To Vacate Premises Under Enforcement of Judgments Law

The Enforcement of Judgments Law provisions applicable to unlawful detainer cases require the debtor to vacate the premises not later than five days after service of a writ of possession of real property.[25] The five-day period runs from the date of personal service on an occupant or, if no occupant is present, by posting a copy of the writ on the property and serving a copy on the judgment debtor personally or by mail.[26] There is no statutory requirement to insert the date of service and the last day to vacate the premises on the writ.

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provisions governing enforcement and stays pending appeal, see Sections 916-923.

1982 Creditors' Remedies Legislation, 16 Cal. L. Revision Comm'n Reports 1001, 1397 (1982).

22. See Torres, *supra* note 2, at Exhibit pp. 12-13.

23. *Id.*

24. See proposed amendment of Section 703.610 *infra*.

25. Section 715.020.

26. See Section 715.020(a) (service on occupant), (b) (posting and service on judgment debtor), (c) (five-day period). Subdivision (c) makes clear that the "provisions of Section 684.120 extending time" for mailed service do not apply to the five-day period to vacate the premises. See also Molhol & Weigel, *Unlawful Detainer: Judgment and Posttrial Proceedings*, in 2 Landlord-Tenant Practice § 13.67, at 1143-44 (Cal. Cont. Ed. Bar, 2d ed. 2000).

Levying officers utilize in-house five-day notice to vacate forms that are served with the writ indicating the date of service and the last day to vacate.[27] These in-house forms are not uniform. In addition, the current practice places a burden on levying officers to print and complete a form not mandated by law.

The Commission recommends amending Section 715.010 to provide for insertion of the vacation date. Omission of the date or statement of an incorrect date would not invalidate the service of the writ.

27. See Torres, *supra* note 2, at Exhibit p. 15.

PROPOSED LEGISLATION

Code Civ. Proc. § 512.060 (amended). Issuance of writ of possession

SECTION 1. Section 512.060 of the Code of Civil Procedure is amended to read:

512.060. (a) At the hearing, a writ of possession shall issue if both of the following are found:

(1) The plaintiff has established the probable validity of ~~his~~ *the plaintiff's* claim to possession of the property.

(2) The ~~plaintiff has provided an~~ undertaking ~~as required by~~ *requirements of* Section 515.010 *are satisfied*.

(b) No writ directing the levying officer to enter a private place to take possession of any property shall be issued unless the plaintiff has established that there is probable cause to believe that ~~such~~ *the* property is located there.

Comment. Subdivision (a)(2) of Section 512.060 is amended to recognize that an undertaking is not required in certain cases. See Section 515.010.

Code Civ. Proc. § 514.020 (amended). Service of writ of possession

SEC. 2. Section 514.020 of the Code of Civil Procedure is amended to read:

514.020. (a) At the time of levy, the levying officer shall deliver to the person in possession of the property a copy of the writ of possession ~~with~~, a copy of the plaintiff's undertaking ~~attached~~ *, if any, and a copy of the order for issuance of the writ*.

(b) If no one is in possession of the property at the time of levy, the levying officer shall subsequently serve the writ and attached undertaking on the defendant. If the defendant has appeared in the action, service shall be accomplished in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 ~~of this part~~. If the defendant has not appeared in the action, service shall be accomplished in the

manner provided for the service of summons and complaint by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 ~~of this part~~.

Comment. Subdivision (a) of Section 514.020 is amended to recognize that an undertaking is not required in certain cases. See Section 515.010. A copy of the order for issuance of the writ is included so that the person served will receive the necessary information in cases where there is no undertaking.

The amendments in subdivision (b) are technical, nonsubstantive revisions to eliminate surplus language.

Code Civ. Proc. § 515.010 (amended). Plaintiff's undertaking

SEC. 3. Section 515.010 of the Code of Civil Procedure is amended to read:

515.010. ~~The~~ *(a) Except as provided in subdivision (b), the* court shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed *an undertaking* with the court ~~an undertaking~~. The undertaking shall provide that the sureties are bound to the defendant for the return of the property to the defendant, if return of the property is ordered, and for the payment to the defendant of any sum recovered against *the* plaintiff. The undertaking shall be in an amount not less than twice the value of *the* defendant's interest in the property or in a greater amount. The value of the defendant's interest in the property is determined by the market value of the property less the amount due and owing on any conditional sales contract or security agreement and all liens and encumbrances on the property, and ~~such~~ *any* other factors ~~as may be~~ necessary to determine the defendant's interest in the property.

(b) If the court finds that the defendant has no interest in the property, the court shall waive the requirement of the plaintiff's undertaking and shall include in the order for issuance of the writ the amount of the defendant's undertaking sufficient to satisfy the requirements of subdivision (b) of Section 515.020.

Comment. Subdivision (b) is added to Section 515.010 to dispense with the plaintiff's undertaking where the defendant has no interest in the property. This provision avoids the idle act of requiring an undertaking in the amount of zero dollars. Where there is no plaintiff's undertaking, the last clause of subdivision (b) makes clear that the court must set an amount of the defendant's undertaking to retain or regain possession under Section 515.020 sufficient to pay costs and damages the plaintiff may sustain by reason of the loss of possession of the property. See Section 515.020(b).

Code Civ. Proc. § 515.020 (amended). Defendant's undertaking

SEC. 4. Section 515.020 of the Code of Civil Procedure is amended to read:

515.020. (a) The defendant may prevent the plaintiff from taking possession of property pursuant to a writ of possession or regain possession of property so taken by filing with the court in which the action was brought an undertaking in an amount equal to the amount of the plaintiff's undertaking ~~required by~~ *pursuant to subdivision (a) of* Section 515.010 *or in the amount determined by the court pursuant to subdivision (b) of Section 515.010*. ~~The~~

(b) The undertaking shall state that, if the plaintiff recovers judgment on the action, the defendant shall pay all costs awarded to the plaintiff and all damages that the plaintiff may sustain by reason of the loss of possession of the property. The damages recoverable by the plaintiff pursuant to this section shall include all damages proximately caused by the plaintiff's failure to gain or retain possession.

~~(b)~~

(c) The defendant's undertaking may be filed at any time before or after levy of the writ of possession. A copy of the undertaking shall be mailed to the levying officer.

~~(c)~~

(d) If an undertaking for redelivery is filed and *the* defendant's undertaking is not objected to, the levying officer shall deliver the property to the defendant, or, if the plaintiff

has previously been given possession of the property, the plaintiff shall deliver ~~such~~ *the* property to the defendant. If an undertaking for redelivery is filed and *the* defendant's undertaking is objected to, the provisions of Section 515.030 apply.

Comment. Subdivision (a) of Section 515.020 is amended to recognize that the amount of the defendant's undertaking may be set by the court pursuant to Section 515.010(b). The section is retabulated to permit easy reference to the contents of the undertaking. See Section 515.010(b).

Code Civ. Proc. § 703.580 (amended). Hearing and order on exemption claim

SEC. 5. Section 703.580 of the Code of Civil Procedure is amended to read:

703.580. (a) The claim of exemption and notice of opposition to the claim of exemption constitute the pleadings, subject to the power of the court to permit amendments in the interest of justice.

(b) At a hearing under this section, the exemption claimant has the burden of proof.

(c) The claim of exemption is deemed controverted by the notice of opposition to the claim of exemption and both shall be received in evidence. If no other evidence is offered, the court, if satisfied that sufficient facts are shown by the claim of exemption (including the financial statement if one is required) and the notice of opposition, may make its determination thereon. If not satisfied, the court shall order the hearing continued for the production of other evidence, oral or documentary.

(d) At the conclusion of the hearing, the court shall determine by order whether or not the property is exempt in whole or in part. Subject to Section 703.600, the order is determinative of the right of the judgment creditor to apply the property to the satisfaction of the judgment. No findings are required in a proceeding under this section.

(e) The court clerk shall promptly transmit a certified copy of the order to the levying officer. Subject to Section 703.610, the levying officer shall, in compliance with the order, release the property or apply the property to the satisfaction of the money judgment.

(f) Unless otherwise ordered by the court, if an exemption is not determined within the time provided by Section 703.570, the property claimed to be exempt shall be released.

Comment. Subdivision (f) is added to Section 703.580 to govern the disposition of property where the matter is not determined within the 20-day statutory time limit, such as where the hearing on the exemption claim has been taken off calendar or for any other reason.

Code Civ. Proc. § 703.610 (amended). Disposition of property during pendency of proceedings

SEC. 6. Section 703.610 of the Code of Civil Procedure is amended to read:

703.610. (a) Except as otherwise provided by statute *or ordered by the court*, the levying officer shall not release, sell, or otherwise dispose of the property for which an exemption is claimed until ~~the final determination of~~ *an appeal is waived, the time to file an appeal has expired, or* the exemption *is finally determined*.

(b) At any time while the exemption proceedings are pending, upon motion of the judgment creditor or a claimant, or upon its own motion, the court may make ~~such~~ *any* orders for disposition of the property ~~as~~ *that* may be proper under the circumstances of the case. ~~Such an~~ *The* order may be modified or vacated by the court at any time during the pendency of the exemption proceedings upon ~~such~~ *any* terms ~~as~~ *that* are just.

(c) If appeal of the determination of a claim of exemption is taken, notice of the appeal shall be given to the levying officer and the levying officer shall hold, release, or dispose of the property in accordance with the provisions governing

enforcement and stay of enforcement of money judgments pending appeal.

Comment. Subdivision (a) of Section 703.610 is amended to recognize other exceptions to the levying officer's duty to hold the property that is subject to an exemption claim.

Code Civ. Proc. § 715.010 (amended). Writ of possession of real property

SEC. 7. Section 715.010 of the Code of Civil Procedure is amended to read:

715.010. (a) A judgment for possession of real property may be enforced by a writ of possession of real property issued pursuant to Section 712.010. The application for the writ shall provide a place to indicate that the writ applies to all tenants, subtenants, if any, ~~name~~ *named* claimants, if any, and any other occupants of the premises.

(b) In addition to the information required by Section 712.020, the writ of possession of real property shall contain the following:

(1) A description of the real property, possession of which is to be delivered to the judgment creditor in satisfaction of the judgment.

(2) A statement that if the real property is not vacated within five days from the date of service of a copy of the writ on the occupant or, if the copy of the writ is posted, within five days from the date a copy of the writ is served on the judgment debtor, the levying officer will remove the occupants from the real property and place the judgment creditor in possession. *The levying officer shall enter on the copy of the writ served pursuant to Section 715.020 the date and manner of service and the last date to vacate the premises. An error or omission in the levying officer's entries does not affect the validity of the service or the writ.*

(3) A statement that any personal property, except a mobilehome, remaining on the real property after the

judgment creditor has been placed in possession will be sold or otherwise disposed of in accordance with Section 1174 of the Code of Civil Procedure unless the judgment debtor or other owner pays the judgment creditor the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the judgment creditor takes possession of the real property.

(4) The date the complaint was filed in the action which resulted in the judgment of possession.

(5) The date or dates on which the court will hear objections to enforcement of a judgment of possession that are filed pursuant to Section 1174.3, unless a summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with Section 415.46.

(6) The daily rental value of the property as of the date the complaint for unlawful detainer was filed unless a summons, complaint, and prejudgment claim of right of possession were served upon the occupants in accordance with Section 415.46.

(7) If a summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with Section 415.46, a statement that the writ applies to all tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises.

(c) At the time the writ of possession is served or posted, the levying officer shall also serve or post a copy of the form for a claim of right to possession, unless a summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with Section 415.46.

Comment. Subdivision (b)(2) of Section 715.010 is amended to provide for notice of the date to vacate, consistent with the substantive rule in Section 715.020(c). If the occupant is served under subdivision (a), the five-day period is counted from the date of delivery. If the writ is posted and personally served on or mailed to the judgment debtor under subdivision (b), the five-day period is counted from the date of personal service or mailing. As provided in Section 715.020(c), the five-day period is not subject to the extension of time rules in Section 684.120.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Municipal Bankruptcy

November 2001

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 *Municipal Bankruptcy*, 31 Cal. L. Revision Comm'n Reports 143 (2001). This is part of publication #212 [*2001-2002 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

JOYCE G. COOK, Chairperson
ASSEMBLY MEMBER HOWARD WAYNE, Vice Chairperson
BION M. GREGORY
DAVID HUEBNER
SENATOR BILL MORROW
SANFORD M. SKAGGS

November 15, 2001

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

The Law Revision Commission recommends a number of revisions to update California statutes authorizing bankruptcy filings by local public entities under Chapter 9 of the federal Bankruptcy Code. Consistent with the approach historically taken in California, the general statute would authorize municipal bankruptcy filings to the full extent permissible under federal law, subject to any special statutory rules applicable to particular entities.

The Commission studied broader substantive reforms, including proposals to require prefiling approval by the Governor or a governmental committee, and to provide for post-filing review by appropriate state authorities. However, there does not appear to be any general agreement on the best approach to reform, or even as to the need for additional protections or controls. Accordingly, the Commission is not recommending any broader substantive reforms at this time.

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

Respectfully submitted,

Joyce G. Cook
Chairperson

MUNICIPAL BANKRUPTCY

BACKGROUND

Municipal bankruptcy law is covered by Chapter 9 of the federal Bankruptcy Code and related provisions.[1] The fundamental purpose is to give municipal debtors a breathing spell through the automatic stay of creditors' collection efforts and to restructure municipal debt through formulation of a repayment plan. Forcing a repayment plan on nonconsenting creditors requires resort to the federal power to impair contractual obligations under the Contract Clause.[2] Unlike private bankruptcy law, however, municipal bankruptcy law must respect the sovereign power of the states over their subdivisions pursuant to the Tenth Amendment. Consequently, states have the power to control municipal access to bankruptcy and the bankruptcy courts have little power to intervene or direct the affairs of a municipal debtor that has filed for bankruptcy.[3]

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1. See 11 U.S.C. § 101 *et seq.*, commonly referred to as the Bankruptcy Code. Chapter 9 (11 U.S.C. §§ 901-946) is entitled "Adjustment of Debts of a Municipality" and comprises the bulk of municipal bankruptcy statutes, but other definitions and provisions in the Bankruptcy Code are also relevant. See, e.g., 11 U.S.C. § 901 (applicability of other sections of title).

Much of the discussion in this recommendation is drawn from a background study prepared by the Commission's consultant, Professor Frederick Tung, University of San Francisco School of Law. See Tung, *California Municipal Bankruptcy Legislation* (March 2000) (attached to Commission Staff Memorandum 2000-38 (April 29, 2000)). The background study is available from the Commission's website at <http://clrc.ca.gov/pub/Printed-Reports/BKST-811-TungMuniBk.pdf>. For a later version, see Tung, *After Orange County: Reforming California Municipal Bankruptcy Law*, 53 Hastings L.J. ___ (forthcoming 2002).

2. U.S. Const. art. I, § 10. See Tung, *supra* note 1, at 4.

3. See Tung, *supra* note 1, at 4-5. The full extent of judicial authority in these cases, and the appropriate policies, are matters of debate, but are beyond the scope of the Commission's study, since they largely involve federal consti-

California Law

The federal municipal bankruptcy procedure dates from May 1934.[4] The California Legislature responded quickly by enacting an uncodified statute (operative September 20, 1934) that authorized taxing districts, as defined in federal law, to file for bankruptcy protection.[5] This act also purported to validate any municipal bankruptcy filings that occurred before it became operative.[6] The 1934 California act was replaced in 1939 with a more general authorization for any "taxing agency or instrumentality of this State" as defined in federal law to file a bankruptcy petition.[7]

The general state statutes authorizing bankruptcy filings by local government were codified in 1949 and have never been amended. Government Code Sections 53760 and 53761 provide as follows:

> 53760. Any taxing agency or instrumentality of this State, as defined in Section 81 of the act of Congress

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tutional issues and the intricacies of the Bankruptcy Code. See, e.g., McConnell & Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. Chi. L. Rev. 425 (1993); Kordana, *Tax Increases in Municipal Bankruptcies*, 83 Va. L. Rev. 1035 (1997).

4. Municipal bankruptcy law grew out of the financial crises of the 1930s. The original Chapter IX was created by an Act of May 24, 1934. After being held unconstitutional, Chapter IX was revised in 1938 and survived constitutional challenge. It was made a permanent part of the Bankruptcy Act in 1946. The revised law was little used until the mid-1970s. In 1976, further statutory revisions were made in response to New York City's fiscal difficulties. Finally, in 1994, additional substantive revisions were made concerning the requirement for state authorization of municipal resort to bankruptcy protection.

5. See 1934 Cal. Stat. ch 4 (1st Ex. Sess.). At least one municipal bankruptcy authorization for refunding bonded indebtedness was enacted *before* Chapter IX was added to the federal Bankruptcy Act of 1898 in 1934. See 1933 Cal. Stat. ch. 596, § 2 (authorization to "file a petition under any bankruptcy law of the United States now or hereafter enacted"). This provision is the antecedent of Government Code Section 43739, which is proposed to be repealed. See proposed repeal of Gov't Code § 43739 Comment *infra*.

6. 1934 Cal. Stat. ch 4, § 7a (1st Ex. Sess.).

7. See 1939 Cal. Stat. ch. 72 (operative April 21, 1939).

> entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended, may file the petition mentioned in Section 83 of the act and prosecute to completion all proceedings permitted by Sections 81, 82, 83, and 84 of the act.
>
> 53761. The State consents to the adoption of Sections 81, 82, 83, and 84 by Congress and consents to their application to the taxing agencies and instrumentalities of this State.

These references to sections in the federal Bankruptcy Act have been obsolete since enactment of the Bankruptcy Code in 1978.[8]

The Government Code terminology has also not been revised for compliance with the 1994 amendments to federal law requiring that a "municipality" be "specifically authorized" by state law to petition for debt adjustment under Chapter 9. Section 109(c) of the Bankruptcy Code provides, in relevant part:

> (c) An entity may be a debtor under chapter 9 of this title if and only if such entity —
>
> (1) is a municipality; [and]
>
> (2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter ….[9]

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8. Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549. The superseded Bankruptcy Act provisions, referred to in Government Code Sections 53760 and 53761, were codified as follows: 11 U.S.C.A. § 401 (repealed); 11 U.S.C.A. § 403 (repealed; see now 11 U.S.C.A. § 903); 11 U.S.C.A. §§ 401-403 (repealed; see now 11 U.S.C.A. §§ 101 *et seq.,* 901, 902 *et seq.,* 903, 904, 921(b)).

9. The remaining subparagraphs of 11 U.S.C. Section 107(c) provide the following additional prerequisites to municipal bankruptcy:

> (3) is insolvent;

Bankruptcy Code Section 101(40) defines "municipality" as a "political subdivision or public agency or instrumentality of a State." The effect of this definition is that the federal courts will determine whether a local governmental entity is a "municipality." This was one of the issues faced by the court in the Orange County Investment Pool case — perhaps the determinative issue. In *In re County of Orange*,[10] the court decided that OCIP's Chapter 9 petition could not be sustained because OCIP was not a "municipality" or an "instrumentality of a State," nor was it otherwise "specifically authorized" by the language of Government Code Section 53760 and the incorporated parts of the old Bankruptcy Act.[11]

Recent Reform Attempts

Although the general authorization in Section 53760 has remained unaltered since 1949, a number of revisions were

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(4) desires to effect a plan to adjust such debts; *and*

(5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

[Emphasis added.]

10. 183 B.R. 594 (Bankr. C.D. Cal. 1995).

11. See *id*. at 600-06. The court did not discuss the issue of whether Government Code Section 53760 was obsolete or imposed additional restrictions that might prevent OCIP's filing, but instead concluded that OCIP did not meet the requisite standards of old or new law. It is unknown whether the incongruity between the obsolete state authorization language and the new terms of the Bankruptcy Code might have any effect on the ability to file under Chapter 9. The OCIP court assumed that the municipality and state instrumentality language of the Bankruptcy Code could be applied, but found that OCIP did not qualify.

proposed in the aftermath of the Orange County financial collapse. Four bills during the 1995-96 session would have modernized Section 53760 in the course of enacting broader substantive reforms:

- Two bills would have granted the broadest authority permissible under federal law by adopting the federal definition of "municipality" in Section 101(40) — SB 1274 (Killea) and AB 2xx (2d Extraordinary Session) (Caldera). Neither bill made it out of committee.
- A third bill — AB 29xx (2d Extraordinary Session) (Archie-Hudson) — provided authority for a municipality as defined by federal law to file "with specific statutory approval of the Legislature" and required the plan for adjustment of debts under Bankruptcy Code Section 941 to be "submitted to the appropriate policy committees of the Legislature prior to being submitted to the United States Bankruptcy Code." This bill also died.
- A fourth bill — SB 349 (Kopp) — passed the Legislature, but was vetoed. Like the other bills, SB 349 modernized the obsolete references and adopted the "municipality" language of the federal statute. The bill would have established a "Local Agency Bankruptcy Committee," consisting of the Controller, Treasurer, and Director of Finance, to determine whether to permit a municipality to file a Chapter 9 petition. It also contained provisions concerning appointment of a trustee by the Governor and time periods for taking various actions. Governor Wilson's veto message (Sept. 30, 1996) stated that the bill "would inappropriately vest responsibility for local fiscal affairs at the state level, creating an instrument of state government to usurp the authority of local officials to decide the wisdom of a bankruptcy filing" and "could raise questions of the liability of the state to creditors of the public agency if eligibility for bankruptcy is denied."

No bills have been introduced to amend Section 53760 since the 1995-96 legislative session.[12]

Revision of General Authorization

With the proliferation of local government agencies — as many as 7,000 of them who might claim municipality or instrumentality status[13] — it is important to give some con-

12. A number of special statutes addressing the problems raised by the Orange County Investment Pool failure were enacted, even though the general bankruptcy authorization rules remained unamended. For provisions specific to Orange County, see, e.g., Educ. Code §§ 42238.21, 84753; Gov't Code §§ 20487, 29141.1, 29530.5, 30400-30406, 53584.1, 53585.1; Health & Safety Code § 33670.9; Rev. & Tax. Code § 96.16; Sts. & Hy. Code § 2128. The Commission has not reviewed these provisions.

13. See Cal. Const. Revision Comm'n, *Final Report and Recommendations to the Governor and the Legislature* 71-72 (1996). The Constitution Revision Commission reports that there are 470 cities, 1,062 school districts and county offices of education, and 5,000 special districts. "There are about 55 types of activities performed by special districts ranging from operating airports to managing zoos. Approximately 2,200 are 'independent' districts. That is, they have elected or appointed boards and are independent of the cities or counties in which they provide services." *Id*. at 72.

The scope of activities carried on by special districts can be estimated by the following list of entities from the 1st Validating Act of 2001 (2001 Cal. Stat. ch. 10, § 2 (SB 161)):

> Air pollution control districts of any kind, air quality management districts, airport districts, assessment districts, benefit assessment districts, and special assessment districts of any public body, bridge and highway districts, California water districts, citrus pest control districts, city maintenance districts, community college districts, community development commissions, community facilities districts, community redevelopment agencies, community rehabilitation districts, community services districts, conservancy districts, cotton pest abatement districts, county boards of education, county drainage districts, county flood control and water districts, county free library systems, county maintenance districts, county sanitation districts, county service areas, county transportation commissions, county water agencies, county water authorities, county water districts, county waterworks districts, … agencies acting pursuant to Part 3 (commencing with Section 11100) of Division 6 of the Water Code, distribution districts of any public body, drainage districts, fire protection districts, flood control and water conservation districts, flood control districts, garbage and refuse disposal districts, garbage disposal districts, geologic hazard abatement districts, harbor districts, harbor

sideration to providing limitations on the authority to file for debt adjustment. One commentator asks: "Should a 'citrus pest control district' or a 'storm drainage district' be permitted to seek Chapter 9 relief?"[14] Conditions have changed dramatically since 1934 — there are significantly more

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improvement districts, harbor, recreation, and conservation districts, health care authorities, highway districts, highway interchange districts, highway lighting districts, housing authorities, improvement districts or improvement areas of any public body, industrial development authorities, infrastructure financing districts, integrated financing districts, irrigation districts, joint highway districts, levee districts, library districts, library districts in unincorporated towns and villages, local agency formation commissions, local health care districts, local health districts, local hospital districts, local transportation authorities or commissions, maintenance districts, memorial districts, metropolitan transportation commissions, metropolitan water districts, mosquito abatement or vector control districts, municipal improvement districts, municipal utility districts, municipal water districts, nonprofit corporations, nonprofit public benefit corporations, open-space maintenance districts, parking authorities, parking districts, permanent road divisions, pest abatement districts, police protection districts, port districts, project areas of community redevelopment agencies, protection districts, public cemetery districts, public utility districts, rapid transit districts, reclamation districts, recreation and park districts, regional justice facility financing agencies, regional park and open-space districts, regional planning districts, regional transportation commissions, resort improvement districts, resource conservation districts, river port districts, road maintenance districts, sanitary districts, school districts of any kind or class, school facilities improvement districts, separation of grade districts, service authorities for freeway emergencies, sewer districts, sewer maintenance districts, small craft harbor districts, special municipal tax districts, stone and pome fruit pest control districts, storm drain maintenance districts, storm drainage districts, storm drainage maintenance districts, storm water districts, toll tunnel authorities, traffic authorities, transit development boards, transit districts, unified and union school districts' public libraries, vehicle parking districts, water agencies, water authorities, water conservation districts, water districts, water replenishment districts, water storage districts, wine grape pest and disease control districts, zones, improvement zones, or service zones of any public body.

14. Memorandum from Henry C. Kevane to Randall Henry, Office of Senator Quentin L. Kopp 2 (May 31, 1996) (attached to Commission Staff Memorandum 97-19 (March 22, 1997)) [hereinafter Kevane Memorandum].

special districts now than existed 65 years ago, although the number of counties remains the same and the number of cities presumably has not grown significantly. Historically, special districts have comprised the bulk of the Chapter 9 filers.[15]

If the goal is to preserve California's historically broad grant of municipal bankruptcy authority,[16] the simplest approach would be to incorporate the word "municipality" as used in federal law and thereby adopt the broadest possible class of permissible filers. Any exceptions can be made by statute as the Legislature and Governor agree is appropriate under the circumstances, as was done in the Orange County situation.

Another option would be for the state to take control of the definitional issue by defining which public entities can file under Chapter 9, rather than leaving the issue to case-by-case determination by bankruptcy courts.[17] State law cannot expand the scope of federal bankruptcy law, but even if the purpose of listing types of entities is not to restrict access, a state catalog could be "a persuasive starting point for defining the scope of ["municipality"] in California. Moreover, the use of a state law definition would reduce the risk that certain

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15. See Tung, *supra* note 1, at 22.

16. California is classed as one of the specific authorization states, even with its obsolete statutory language, and is generally considered as meeting the requirement of 11 U.S.C. Section 109(c)(2). See, e.g., Kordana, *Tax Increases in Municipal Bankruptcies*, 83 Va. L. Rev. 1035, 1044 & n.49 (1997); Kupetz, *Municipal Debt Adjustment Under the Bankruptcy Code*, 27 Urb. Law. 531, 539-40 & n.24 (1995); Young, *Keeping a Municipal Foot in the Chapter 9 Door: Eligibility Requirements for Municipal Bankruptcies*, 23 Cal. Bankr. J. 309, 314-16 (1997); Comment (Freyberg), *Municipal Bankruptcy and Express State Authorization To Be a Chapter 9 Debtor: Current State Approaches to Municipal Insolvency and What Will States Do Now?*, 23 Ohio N.U. L. Rev 1001, 1008 n.66 (1997).

17. See Kevane Memorandum, *supra* note 14, at 3-5.

entities might be permitted or precluded from filing based on shifting federal interpretations of the term 'municipality.'"[18]

Professor Tung notes that this approach "has some promise but also some limitations,"[19] and he cautions that "only the federal definition matters. That definition cannot be expanded by state legislation, any more than any federal statute is subject to modification by a state legislature." He suggests:

> A list approach may be more effective. It would not redefine terms contained in the federal statute, but would merely provide a reference for the bankruptcy judge in her attempts to construe the terms "political subdivision" and "public agency or instrumentality" from federal law and decide whether a particular state-created entity qualifies. For example, some manifestation by the state that it considers a county-created investment pool to be a state agency or instrumentality might be persuasive.[20]

In drafting amendments to preserve the broadest grant of authority for municipal bankruptcy, the Commission has decided to favor simplicity and to avoid additional detail that might detract from implementing this goal. Municipal bankruptcies are relatively rare in recent years and most candidates for bankruptcy fall within well-understood categories. An attempt to list all local public entities in a statute might simply state the obvious without helping resolve issues such as those faced by the court in the Orange County Investment Pool case.[21]

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18. *Id*. at 5.

19. See Tung Study, *supra* note 1, at 31-32.

20. *Id*. at 32.

21. The Commission takes no position on whether that case was correctly decided or whether the OCIP would be covered by the proposed incorporation of the "municipality" definition in federal law.

Substantive Reform Options

A variety of approaches is illustrated in the laws of other states. Over 20 states have no enabling statutes at all.[22] Twelve or more states have granted generally unfettered authority to some or all local entities.[23] Georgia forbids resort to Chapter 9.[24] A number of other states provide restrictions on bankruptcy filings by way of preliminary review or other conditions, including state prebankruptcy insolvency procedures.[25]

Professor Tung gives a strong argument in favor of discretionary access to bankruptcy protection through use of a gatekeeper. Fundamental to his analysis is the potential effect that one municipality's bankruptcy may have on the borrowing power of other municipalities, supporting the conclusion that a city or county should not have sole authority to take advantage of Chapter 9 in disregard of the fallout for other public entities. Professor Tung concludes that discretion to approve municipal bankruptcy filings should be vested in the Governor, as the authority best situated to decide whether and under what conditions a municipality may file for bankruptcy.[26] Other possibilities exist, such as a committee of officials, like the procedure passed by the Legislature but vetoed in 1996.[27]

Another well-argued proposal for reform has been presented to the Commission by Henry C. Kevane,[28] who agrees with Prof. Tung's reasons for early state involvement in the munic-

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22. Freyberg, *supra* note 16, at 1009, 1016.

23. Tung, *supra* note 1, at 21-23; Freyberg, *supra* note 16, at 1009-10.

24. Tung, *supra* note 1, at 23.

25. See Tung, *supra* note 1, at 23-25; Freyberg, *supra* note 16, at 1010-14.

26. See Tung, *supra* note 1, at 24-31.

27. See discussion of SB 349 under "Recent Reform Attempts" *supra*.

28. See Kevane Memorandum, *supra* note 14; Letter from Henry C. Kevane to California Law Revision Commission (June 21, 2000) (attached to First Supplement to Commission Staff Memorandum 2000-38 (June 21, 2000)).

ipal bankruptcy process, but believes quick access to bankruptcy protection from creditors is essential to local public entities. A trustee could be appointed by the Governor when a public entity had filed a Chapter 9 case and would have all the powers of the entity, including powers under Chapter 9. Mr. Kevane would limit the state government's function to helping formulate the adjustment plan and other post-filing issues, and argues that the correct focus is on shaping the adjustment plan and other fiscal matters (or dismissing the petition) once the factors can be better known.

CONCLUSION

The Commission has not found any consensus in favor of substantive reforms, whether providing for a gatekeeper or post-filing management. The Commission learned informally that the Governor's Office is not in support of accepting the gatekeeper function.[29] The Commission's study has engendered little interest from representatives of local public entities. The only written comment was received from the California County Counsels' Association, which expressed the view that substantive reform was not needed, particularly if it imposed a prefiling gatekeeper.[30]

Although it has been nearly five years since Senator Kopp's SB 349 establishing the Local Agency Bankruptcy Committee was vetoed by Governor Wilson, the Commission has concluded that a gatekeeper or other substantive restrictions on local agency filings are not acceptable to state and local officials. Weighing the factors discussed by Prof. Tung and Mr. Kevane is largely a political exercise: what is the state's

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29. See Commission Staff Memorandum 2000-66 (Sept. 29, 2000), at 1-2.

30. See Letter from Robert A. Ryan, Jr., to California Law Revision Commission (March 26, 2001) (attached to First Supplement to Commission Staff Memorandum 2001-32 (March 28, 2001)).

interest in controlling access as a gatekeeper, what is the risk to the fiscal soundness of the state and its subdivisions by unrestricted access to Chapter 9, and who can or should step in to remedy insolvency and when should they do it?

As we have seen in the Orange County crisis, the state can respond legislatively in serious cases. In other situations, such as school district insolvency, there are procedures in place for the state to use a trustee. Generally speaking, bankruptcy is not the only remedy, since there are a host of statutes governing municipal finance that also serve to avoid insolvency and promote sound credit.

In light of the political factors and the lack of a consensus, the Commission recommends only a technical statutory cleanup at this time. If conditions change dramatically in the future, the background study and other materials submitted to the Commission should be useful in helping to fashion an appropriate recommendation for substantive revision.

RECOMMENDED REVISIONS

The Commission recommends revision of Government Code Section 53760 with the goal of making the general authority of local public entities to file for Chapter 9 bankruptcy protection consistent with the scope and language of the federal Bankruptcy Code. The proposed statute authorizes local public entities to file a bankruptcy petition and exercise powers to the extent permitted municipalities under federal bankruptcy law. As revised, this section is intended to provide the specific state law authorization for municipal bankruptcy filing required under federal law.[31]

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31. 11 U.S.C. § 109(c)(2) (Westlaw 2001). In discussing the specificity requirement, the court in the Orange County Investment Pool case suggested: "For example that statute could authorize all 'municipalities' as defined in the Code to file bankruptcy." *In re* County of Orange, 183 B.R. 594, 605 (1995). This conclusion follows from the language in Section 109(c)(2) requiring autho-

The proposed revision will reaffirm the likely original intent of the California statute to provide the broadest possible access to municipal debt relief permissible under federal law.

In addition, the Commission recommends a number of conforming amendments and repeals to modernize language and eliminate duplicative authority.[32] These revisions would be technical, nonsubstantive changes in the statutes. Overlapping provisions, such as Government Code Section 53761, should be repealed as unnecessary and redundant.[33]

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rization "in its capacity as a municipality or by name." Granting state authorization for "municipalities" as a class satisfies the Bankruptcy Code standard.

32. See proposed amendments and repeals *infra* concerning Educ. Code § 41325 (school districts); Gov't Code §§ 43739 (cities), 53761 (general consent to bankruptcy), 59125 (Special Assessment and Bond Refunding Law of 1939); Water Code §§ 24767 (irrigation districts), 25115 (irrigation districts). A number of other provisions relating to bankruptcy are not in need of revision. See, e.g., Gov't Code §§ 59472, 59110, 59125, 59598; Ins. Code § 10089.21; Sts. & Hy. Code §§ 9011, 9075.

33. See proposed repeal of Gov't Code § 53761 *infra*. See also Kevane Memorandum, *supra* note 14, at 2 n.1.

PROPOSED LEGISLATION

Educ. Code § 41325 (technical amendment). Legislative intent concerning school district insolvency

SECTION 1. Section 41325 of the Education Code is amended to read:

41325. (a) The Legislature finds and declares that when a school district becomes insolvent and requires an emergency apportionment from the state in the amount designated in this article, it is necessary that the Superintendent of Public Instruction assume control of the district in order to ensure the district's return to fiscal solvency.

(b) It is the intent of the Legislature that the Superintendent of Public Instruction, operating through an appointed administrator, do all of the following:

(1) Implement substantial changes in the district's fiscal policies and practices, including, if necessary, the filing of a petition under Chapter 9 of the federal Bankruptcy ~~Act~~ *Code* for the adjustment of indebtedness.

(2) Revise the district's educational program to reflect realistic income projections, in response to the dramatic effect of the changes in fiscal policies and practices upon educational program quality and the potential for the success of all pupils.

(3) Encourage all members of the school community to accept a fair share of the burden of the district's fiscal recovery.

(4) Consult, for the purposes described in this subdivision, with the school district governing board, the exclusive representatives of the employees of the district, parents, and the community.

(5) Consult with and seek recommendations from the county superintendent of schools for the purposes described in this subdivision.

Comment. Subdivision (b)(1) of Section 41325 is amended to reflect the repeal of the former Bankruptcy Act and enactment of the Bankruptcy Code in 1978.

Gov't Code § 43739 (repealed). Authorization for municipal bankruptcy

SEC. 2. Section 43739 of the Government Code is repealed.

~~43739. Any city authorized to refund its indebtedness pursuant to this article may file a petition under any bankruptcy law of the United States. If the refunding of the city indebtedness is authorized in the bankruptcy proceeding, the city may refund its indebtedness pursuant to this article.~~

Comment. Former Section 43739 is superseded by Section 53760. The substance of the grant of authority to file for municipal bankruptcy provided in the first sentence of this section is continued in new Section 53760. The reference to the ability of a city to refund indebtedness is not continued because it is unnecessary. Section 53760 provides the broadest possible state authorization for municipal bankruptcy filings. See Section 53760 Comment.

The second sentence is not continued because it is unnecessary. Section 43720 provides the scope of this article and does not exclude its application in bankruptcy proceedings. Whether or not debt is refunded pursuant to this article should be determined in the bankruptcy proceedings.

Gov't Code § 53760 (repealed). Authorization for municipal bankruptcy

SEC. 3. Section 53760 of the Government Code is repealed.

~~53760. Any taxing agency or instrumentality of this State, as defined in Section 81 of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended, may file the petition mentioned in Section 83 of the act and prosecute to completion all proceedings permitted by Sections 81, 82, 83, and 84 of the act.~~

Comment. Former Section 53760 is superseded by a new Section 53760. The substance of the grant of authority to file for municipal bankruptcy provided in this section is continued in new Section 53760, which modernizes references to federal bankruptcy law. The Bankruptcy

Act sections listed in former Section 53760 were repealed in 1978. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598. The "taxing agency or instrumentality" phrase was drawn from the predecessor Bankruptcy Act of 1898, as amended in 1937. This language has been replaced by the more general term "municipality" in the Bankruptcy Code. See 11 U.S.C. § 101(40) (Westlaw 2001), as amended by the Bankruptcy Reform Act of 1994. To the extent that former Section 53760 could be interpreted in a more limited fashion (*cf. In re* County of Orange, 183 B.R. 594, 605 (Bankr. C.D. Cal. 1995)), that limitation is not continued in new Section 53760.

Gov't Code § 53760 (added). Authorization for municipal bankruptcy

SEC. 4. Section 53760 is added to the Government Code, to read:

53760. (a) Except as otherwise provided by statute, a local public entity in this state may file a petition and exercise powers pursuant to applicable federal bankruptcy law.

(b) As used in this section, "local public entity" means any entity, without limitation, that is a "municipality," as defined in paragraph (40) of Section 101 of Title 11 of the United States Code (Bankruptcy), or that qualifies as a debtor under any other federal bankruptcy law applicable to political subdivisions of the state.

Comment. Section 53760 supersedes former Sections 43739 (city bankruptcy), 53760 (taxing agency or instrumentality bankruptcy), and 53761 (state consent). The former sections contained obsolete references to repealed federal bankruptcy law. This section is intended to provide the broadest possible state authorization for municipal bankruptcy proceedings, and thus provides the specific state law authorization for municipal bankruptcy filing required under federal law. See 11 U.S.C. § 109(c)(2) (Westlaw 2001).

As recognized in the introductory clause of subdivision (a), this broad grant of authority is subject to specific limitations provided by statute. See, e.g., Ins. Code § 10089.21 (California Earthquake Authority precluded from resort to bankruptcy); Sts. & Hy. Code § 9011 (prerequisites to bankruptcy filing under Improvement Bond Act of 1915). See also Educ. Code § 41325 (control of insolvent school district by Superintendent of Public Instruction); Health & Safety Code § 129173 (health care district trusteeship).

Gov't Code § 53761 (repealed). Consent to bankruptcy

SEC. 5. Section 53761 of the Government Code is repealed.

~~53761. The State consents to the adoption of Sections 81, 82, 83, and 84 by Congress and consents to their application to the taxing agencies and instrumentalities of this State.~~

Comment. Former Section 53761 is superseded by Section 53760. The substance of the consent to file for municipal bankruptcy provided in this section is continued in new Section 53760, which modernizes references to federal bankruptcy law. The Bankruptcy Act sections listed in former Section 53760 were repealed in 1978. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598. To the extent that former Section 53761 could be interpreted to provide a more limited scope than federal law, that limitation is not continued.

Gov't Code § 59125 (amended). Special Assessment and Bond Refunding Law of 1939

SEC. 6. Section 59125 of the Government Code is amended to read:

59125. A legislative body authorized to conduct a proceeding pursuant to this chapter may file a petition and ~~take all actions required by any~~ *exercise powers under applicable* federal bankruptcy law ~~for a district formed under any improvement or acquisition law which provides for the payment of the improvement or acquisition by special assessment upon the property benefited~~ *as provided by Section 53760*.

Comment. Section 59125 is amended for consistency with the general authorization for municipal bankruptcy provided in Section 53760. See Section 53760 Comment. This is a technical, nonsubstantive revision.

Water Code § 24767 (amended). Irrigation districts, condition of modification plan

SEC. 7. Section 24767 of the Water Code is amended to read:

24767. An agreement or plan may not be carried out pursuant to this article until a proposal therefor is approved by the voters, and a plan may not be carried out until it is either:

(a) Agreed to in writing by all of the holders of bonds and warrants affected.

(b) Confirmed ~~by a decree of any United States District Court~~ in accordance with ~~the provision of the National Bankruptcy Act, as amended~~ *federal bankruptcy law*.

Comment. Subdivision (b) of Section 24767 is amended to generalize the reference to federal bankruptcy law, in recognition of the repeal of the former Bankruptcy Act and enactment of the Bankruptcy Code. The limitation on the effectiveness of a bankruptcy court decree — requiring that it be made by a district court — is deleted.

Water Code § 25115 (amended). Irrigation districts, approval of bondholders

SEC. 8. Section 25115 of the Water Code is amended to read:

25115. The approval of the holders of outstanding refunding bonds affected by the modification shall be evidenced by either of the following:

(a) The written consent of all of the owners and holders of the bonds.

(b) ~~A decree of any United States District Court in accordance with the provisions of the National Bankruptcy Act, as amended~~ *An order under federal bankruptcy law*, which ~~decree provides that the modification~~ *order* is binding upon the holders and owners of all of the outstanding refunding bonds affected.

Comment. Subdivision (b) of Section 25115 is amended to generalize the reference to federal bankruptcy law, in recognition of the repeal of the former Bankruptcy Act and enactment of the Bankruptcy Code, and to conform to language used in federal law. The limitations on the effectiveness of a bankruptcy court order — requiring that it be made by a district court and that it provide that it is binding on affected persons — are deleted. The content and effect of an order in bankruptcy are determined by federal law.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Rules of Construction for Trusts and Other Instruments

November 2001

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 *Rules of Construction for Trusts and Other Instruments*, 31 Cal. L. Revision Comm'n Reports 167 (2001). This is part of publication #212 [*2001-2002 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

JOYCE G. COOK, Chairperson
ASSEMBLY MEMBER HOWARD WAYNE, Vice Chairperson
BION M. GREGORY
DAVID HUEBNER
SENATOR BILL MORROW
SANFORD M. SKAGGS

November 15, 2001

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

The Law Revision Commission in this recommendation surveys the existing Probate Code rules of construction for wills, trusts, and other estate planning instruments. The rules have been criticized in recent years as being overly broad.

The Commission concludes that several of the rules should be limited in their application. A number of the rules should be repealed because they restate the common law (but do so in an incomplete fashion), because they repeat other statutes, or because they unduly inhibit the ability of a court to ascertain a donor's intent.

The Commission recommends further clarifications of existing statutes and improvements in terminology, and correction of statutes containing obsolete references to former law. The Commission has developed official Comments explaining the derivation of, and providing other relevant information concerning, the Probate Code rules of construction.

This recommendation is submitted pursuant to Resolution Chapter 78 of the Statutes of 2001.

Respectfully submitted,

Joyce G. Cook
Chairperson

RULES OF CONSTRUCTION FOR TRUSTS AND OTHER INSTRUMENTS

Background

Modern rules of construction for wills were enacted in California in 1983 on recommendation of the Law Revision Commission.[1] Subsequent legislation sponsored by the State Bar Estate Planning, Trust and Probate Law Section extended the rules of construction to trusts and other instruments.[2]

Problems in the application of the extended rules have become apparent.[3] The Commission has concluded that a comprehensive review of this matter is appropriate. The Commission retained Professor William McGovern of UCLA Law School as a consultant.[4]

This recommendation proposes adjustments in the rules of construction to ensure their proper functioning in the environment of their expanded application to trusts and other instruments.

Overview of Existing Law

The rules of construction — "Rules for Interpretation of Instruments" — are found in Division 11, Part 1 (Sections 21101-21140), of the Probate Code. All of the rules of con-

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1. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982); 17 Cal. L. Revision Comm'n Reports 822 (1983); 1983 Cal. Stat. ch. 842 (former Prob. Code § 6140 *et seq*.). All further statutory references are to the Probate Code, unless otherwise indicated.

2. 1994 Cal. Stat. ch. 806; see Sections 21101-21140.

3. See, e.g., Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 Hastings L.J. 667 (1997).

4. McGovern, *Rules of Construction: Probate Code Sections 21101-21140* (March 2000). The background study is available from the Commission's website at <http://www.clrc.ca.gov/pub/Printed-Reports/BKST-811-McGovernRulesConst.pdf>.

struction are based on previously existing Probate Code provisions applicable to wills. The basic idea of the 1994 extension to trusts and other instruments was to achieve uniformity among the common estate planning instruments.

Extension of the rules of construction beyond wills has been driven by the evolution of the inter vivos trust and other nonprobate transfer instruments as will substitutes. The concept of uniform rules of construction finds support in the Restatement of Trusts, which notes that a revocable inter vivos trust is ordinarily subject to rules of construction applicable to testamentary dispositions.[5] The Uniform Trust Code likewise provides: "The rules of construction that apply … to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property."[6] More problematic is extension of the same rules to other forms of donative transfer, such as inter vivos gifts, deeds, joint tenancies, and insurance policies.

Many of the original 1983 California rules of construction applicable to wills were based on the pre-1990 Uniform Probate Code.[7] Since then, a number of the Uniform Probate Code provisions have been revised, but the California statutes have not been adjusted. The Commission proposes revising several of the California statutes to parallel the 1990 Uniform Probate Code changes.

General Approach

The rules of construction are intended as aids to interpretation where the instrument is silent or ambiguous. Rules of

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5. Restatement (Third) of Trusts § 25(2) (1992).

6. Unif. Trust Code § 112 (2000).

7. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982).

construction are default rules in the sense that, if the instrument is clear on the matter, they are inapplicable.[8]

Even though the instrument may be silent on a point, there may nonetheless be clear extrinsic evidence of the donor's intent. The rules of construction should not apply where the donor's intent can be determined.

Rules of construction are necessarily blunt instruments. They are designed to achieve the result that would most likely be embraced by most donors, had they addressed the point. A particular rule of construction inevitably will yield an inappropriate result in some circumstances for a particular donor; but the rule can be overridden for that donor by showing the donor's intention in the circumstances, even though not expressed in the instrument.

The rules of construction result from the interplay of two conflicting lines of legal thought. One approach would minimize the role of rules of construction and free the court to make the most appropriate determination of the donor's intent. The other approach would seek to maximize guidance to the parties by providing presumptive answers for the most common situations, thereby limiting litigation over these issues. The tension between the two approaches can be seen in the various issues addressed in this recommendation.

Application of Rules of Construction

The rules of construction are, by their terms, applicable to wills, trusts, deeds, and any other "instrument."[9] This is a sweeping provision, since an instrument may be any writing that designates a beneficiary or makes a donative transfer of property.[10]

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8. See Section 21102(b) ("The rules of construction expressed in this part apply where the intention of the transferor is not indicated by the instrument.").

9. Section 21101.

10. Section 45.

The Commission has concluded that most of the rules of construction may appropriately be applied to all instruments. There are some exceptions, however. The existing statute makes clear that the rules of construction apply "[u]nless the provision or context otherwise requires."[11] This limitation is satisfactory and does not require further elaboration. The following rules of construction should have limited application:[12]

- Section 21105 — instrument passes all property including after-acquired property (limited to will)
- Section 21109 — requirement that transferee survive transferor (limited to at-death transfer)
- Section 21132 — change in form of securities (limited to at-death transfer)
- Section 21133 — proceeds of specific gift (limited to at-death transfer)
- Section 21135 — ademption by satisfaction (limited to at-death transfer)

Intention of Donor

The rules of construction should apply only where the intention of the maker of the instrument cannot be ascertained.[13] Language in Section 21102 suggests that the rules of construction may only be overridden by an expression of contrary intention in the instrument itself. However, existing law allows extrinsic evidence of a testator's intent to rebut the presumptive effect of the rules of construction.[14]

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11. Section 21101.

12. The Commission has cross-referenced examples of rules of construction that are limited by their terms in the Comment to Section 21101.

13. See discussion of "General Approach" *supra*.

14. See Section 6111.5; Estate of Anderson, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307 (1997) (extrinsic evidence admissible).

Likewise, although the intention of a donor "as expressed in the instrument" controls the legal effect of dispositions made in the instrument,[15] expressions in the instrument are not the exclusive means by which a donor's intention may be ascertained.[16] Under the parol evidence rule, for example, extrinsic evidence is admissible on the issue of a mistake or imperfection of the writing.[17]

The Commission believes the statute as currently phrased is overbroad. The role of extrinsic evidence in the determination of the donor's intention should be recognized in the statute. The Commission recommends addition of the following language to Section 21102: "Nothing in this section limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the transferor."[18]

It should be noted that the Commission in this recommendation does not address or propose to affect the law governing reformation of an instrument to effectuate the intention of the donor in case of mistake or for other cause.

Terminology

Testamentary gift. The existing rules of construction use the term "testamentary gift" to describe a transfer in possession or enjoyment that takes effect at or after death.[19] This terminology is misleading. It suggests the rules are limited to gifts

15. Section 21102(a).

16. For a recent example of the use of extrinsic evidence to determine the transferor's intent, see Estate of Guidotti, 90 Cal. App. 4th 1403, 109 Cal. Rptr. 2d 674 (2001).

17. Code Civ. Proc. § 1856(e). The parol evidence rule applies to wills, among other instruments. Code Civ. Proc. § 1856(h).

18. The Commission's Comment notes that the proposed language would neither expand nor limit the extent to which extrinsic evidence admissible under existing law may be used to determine the transferor's intent as expressed in the instrument — the provision would simply recognize the availability of extrinsic evidence notwithstanding the apparently absolute language of Section 21102.

19. Section 21104.

made by will, whereas the rules are intended to apply to nonprobate transfers as well.[20] Moreover, the definition is confusing in its ambiguous reference to the time a transfer "takes effect." The Commission recommends substitution of the term "at-death transfer," defined as a transfer that is revocable during the lifetime of the transferor. This term is more consistent with the transfer-transferor-transferee terminology used throughout the rules of construction.[21] It also is more consistent with contemporary usage, and better effectuates its application to nonprobate transfers.

While a joint tenancy is a form of at-death transfer, it is unique in that the rules of construction peculiar to at-death transfers are generally inapplicable to it. For example, since the distinguishing feature of joint tenancy tenure is the right of survivorship, application of antilapse principles to joint tenancy would defeat the transferor's intention. The proposed law excludes joint tenancy from the special treatment given other at-death transfers.

Beneficiary. The existing rules of construction are inconsistent in their use of the terms "beneficiary" and "transferee" to refer to the donee of a donative transfer.[22] Both terms are defined in the Probate Code,[23] and would work equally well in this context. Because "transferee" is the term predominantly used in the existing rules of construction, the Commission recommends that the term be used consistently throughout, replacing "beneficiary" in the instances where it occurs.

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20. See discussion of "Application of Rules of Construction" *supra*.

21. The Probate Code definitions of "transferor" and "transferee" are not in alphabetical sequence. See Sections 81 ("transferor" defined), 81.5 ("transferee" defined). The Commission does not recommend realignment at present.

22. Compare, e.g., Sections 21109 and 21110 ("transferee") with Sections 21134 and 21135 ("beneficiary").

23. See Sections 24 ("beneficiary" defined), 81.5 ("transferee" defined).

Presumption that Property Vests in Common

Section 21106 recapitulates the common law presumption that a transfer to two or more persons vests the property transferred to them as tenants in common, absent an expressed intent otherwise.[24] This statement of the law is incomplete and unnecessary.[25] The Commission recommends that it be repealed in reliance on the equivalent but more accurate rendition of the concept in the Civil Code. The Civil Code is the more appropriate location for the provision in light of its significant application to transactions outside the donative transfer context.

Common Law Doctrine of Worthier Title

Section 21108 abolishes the common law doctrine of worthier title, that a grantor cannot convey an interest to the grantor's own heirs. This section repeats Civil Code Section 1073. The dual codification was first enacted in 1959[26] on recommendation of the Commission. At that time the Commission observed that "the Probate Code provision is recommended only out of an abundance of caution since it is generally agreed that the American doctrine of worthier title does not apply to testamentary transfers."[27]

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24. For another codification of the common law presumption, see Civ. Code § 683.

25. There are numerous exceptions to the rule stated that are not reflected in the statement. See, e.g., Sections 5100 *et seq*. (multiple-party accounts), 5500 *et seq*. (Uniform TOD Security Registration Act). In addition, both the common law and other statutes cover the issue completely. See, e.g., Civ. Code § 686:

> Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in Section 683, or unless acquired as community property.

26. 1959 Cal. Stat. ch. 122.

27. *Recommendation Relating to the Doctrine of Worthier Title,* 2 Cal. L. Revision Comm'n Reports D-5 (1959).

Since 1959 circumstances have changed, and the principal contemporary relevance of the doctrine of worthier title is to trusts.[28] The duplicative provision in the Civil Code is unnecessary and should be repealed.

The transitional provision[29] in Section 21108, dating from 1959, is obsolete and should be repealed.

Requirement that Beneficiary Survive Donor

The beneficiary of a donative transfer must survive the donor in order to take the gift.[30] This rule is unduly broad. It is appropriately applied to wills (codifying the common law rule) and to trusts (will substitutes),[31] but its application to deeds is problematic. The statute could be read to require a beneficiary or donee of an outright gift of property to survive the settlor or donor in order to retain a gift.

The statute was not intended to rescind a completed transfer of property if the beneficiary were to predecease the donor.[32] The statute should be limited to gifts that remain revocable during the lifetime of the donor.[33]

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28. The issue arises when the settlor of a trust wants to terminate or modify a trust that gives an interest to the settlor's "heirs."

29. "This section applies to all cases in which a final judgment had not been entered as of September 18, 1959." Section 21108.

30. Section 21109(a).

31. California imposes a comparable survival requirement on pay-on-death accounts and Totten trusts. Section 5302.

32. See, e.g., Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 Hastings L.J. 667, 690-91 (1997).

33. The limitation to revocable gifts changes the traditional common law and California rule illustrated by Randall v. Bank of America, 48 Cal. App. 2d 249, 119 P.2d 754 (1941) (remainder interest in revocable trust held not divested by beneficiary's failure to survive settlor; upon settlor's death the trust property passed to deceased beneficiary's estate). However, the reference in Section 21109 to survival "until a future time required by the instrument" does not change the result of other future interest cases that have generally refused to find an implied condition of survival where the instrument fails expressly to impose

Antilapse Statute

A fundamental rule of donative transfer law is that a gift to a beneficiary fails (lapses) if the beneficiary does not survive the donor.[34] The antilapse statute is designed to prevent lapse of a gift to the donor's kindred who predecease the donor, unless it is clear that the donor intended the gift to lapse.[35]

Existing law has been criticized because (1) it appears to allow "mere words of survival" in an instrument to negate the antilapse statute, and (2) it appears to extend the antilapse statute to future interests.[36]

With respect to "mere" words of survival, the donor's inclusion of such words in an instrument may well reflect the

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such a condition, such as Estate of Stanford, 49 Cal. 2d 120, 315 P.2d 681 (1957) (testamentary trust for *A* for life, remainder to *A*'s "children"; despite class gift form, remainder passed to estate of child who predeceased *A*), and Estate of Ferry, 55 Cal. 2d 776, 361 P.2d 900, 13 Cal. Rptr. 180 (1961) (even though the interest in question was subject to another condition precedent, court refused to find an implied condition of survival). See also Restatement (Second) of Property (Donative Transfers) § 27.3 (1987).

In most jurisdictions, however, a transferor's use of a flexible, multi-generation class designation ("issue" or "descendants") is sufficient to support a finding that survival is required to the date of "distribution" (i.e., the termination of all preceding interests), there being no risk of excluding a line of the designated ancestor's descendants. Restatement (Second) of Property (Donative Transfers) § 28.2 (1987); Altman v. Rider, 191 S.W.2d 577 (Ky. App. 1956). Because, in other cases of these general types, the primary concern is the risk of disinheriting lines of descent if survival is required, the possibility that Section 21110 (extended antilapse provision) may substitute the issue of deceased beneficiary might influence courts in the interpretation of future interest provisions that do not expressly deal with questions of survival. *Cf.* Section 21102; Restatement (Third) of Trusts § 49, cmt. c, illus. 3 (1999); Dewire v. Haveles, 404 Mass. 274, 534 N.E.2d 782 (1989). See also Matter of Welles' Will, 173 N.E.2d 876 (N.Y. 1961) (4-3 decision struggling with potentially harsh or unintended effect of language conferring remainder on "all my grandchildren then living").

34. See Section 21109(a) ("A transferee who fails to survive the transferor or until any future time required by the instrument does not take under the instrument.").

35. Section 21110.

36. The extensive academic debate over these points is summarized in McGovern, *supra* note 4, at 10-22.

donor's intention that the gift lapse if the beneficiary fails to survive. The existing statute, however, could be read to imply that such language in an instrument is ineffective unless it requires survival for a specific time.[37] The Commission recommends revision of the law to state directly that a provision in an instrument requiring the transferee to survive the donor constitutes an intention of the donor that the antilapse statute not apply.

Whether the antilapse statute should apply to the gift of a future interest depends on the circumstances of the particular case. The Commission recommends that the statute continue to remain silent on this point, leaving the matter to case law.

Failed Transfer

Section 21111 provides rules for treatment of a failed transfer. A failed specific gift passes by intestacy, absent an alternate or residuary disposition. A failed residuary gift passes to the remaining residuary beneficiaries proportionately.

The existing statute does not state what happens if a residuary gift to a sole beneficiary or to a remainder beneficiary fails. The proposed law would correct this defect by making clear that, absent operation of the antilapse statute, the failed gift passes in the donor's estate. The proposed law also makes clear that in case of an intestacy, the intestate distribution is determined pursuant to the general class gift rules.[38]

Under the existing statute, it is unclear whether a gift of "my estate" is to be treated as a general gift or as a residuary gift. The proposed law makes clear that such a gift is to be

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37. See Section 21110(b):

> A requirement that the initial transferee survive for a specified period of time after the death of the transferor constitutes a contrary intention. A requirement that the initial transferee survive until a future time that is related to the probate of the transferor's will or administration of the estate of the transferor constitutes a contrary intention.

38. See Section 21114.

treated as a residuary gift. Thus, if a gift of "my estate" fails, it would go to other residuary beneficiaries or, if none, pass by intestacy.

Class Gift to Heirs, Next of Kin, Relatives, and the Like

The statute governing determination of beneficiaries entitled to take under a class gift contains a number of ambiguities.[39] The statute is based on an earlier version of Uniform Probate Code Section 2-711; the current version resolves the ambiguities.[40] The Commission recommends that the California statute be recast in conformity with the current version of the Uniform Probate Code.

Halfbloods, Adopted Persons, Persons Born Out of Wedlock, Stepchildren, and Foster Children

Section 21115 incorporates intestacy rules in interpreting class gifts, but fails to indicate which rules apply — those in effect at the time the instrument is executed or those in effect at the time the transfer takes effect in enjoyment. By comparison, in construing a gift to "heirs" under Section 21114, the determination is made as of the time when the transfer is to take effect in enjoyment and according to the intestate succession law in effect at that time.

There is no apparent reason to use different rules in the determination of "heirs" as opposed to "issue." Section 21115 should be conformed to Section 21114 on this point, and the

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39. *Id.*

40. The current version of the Uniform Probate Code resolves the following issues:

(1) Application of the section to interests acquired by operation of law.
(2) Application of escheat principles.
(3) Application of the law of another state.
(4) Elimination of the special rule for ancestral property.

See discussion in McGovern, *supra* note 4, at 24-25.

determination made under the intestate succession laws in effect at the time the transfer is to take effect in enjoyment.

Vesting of Testamentary Disposition

Section 21116 creates a presumption that interests vest at the donor's death, whereas a gift of a future interest to a class such as children or heirs does not vest until the date of distribution.[41] Besides the inconsistency created by Section 21116, its presumption in favor of early vesting unduly limits the ability of the court to consider all the circumstances in construing the intent of an instrument. The Commission recommends its repeal.

Satisfaction of Pecuniary Gift by Property Distribution

Section 21118 provides rules for valuing property used in satisfaction of a pecuniary gift. The statute has been criticized because it would allow overfunding of a marital (or charitable) deduction gift, as well as overfunding of a bypass trust or other pecuniary gift at the expense of a marital (or charitable deduction) residue.[42] The statute may also run afoul of the generation-skipping transfer tax requirement that assets allocated in satisfaction of a pecuniary gift must fairly reflect net appreciation or depreciation in the value of all assets available for funding the gift.[43]

To cure these problems, the Commission recommends that the applicable standard be drawn from current Treasury Regulations. Thus the property selected for satisfaction of a pecuniary gift would "fairly reflect net appreciation and depreciation (occurring between the valuation date and the

41. Sections 21113, 21114.

42. See *The Obsolete "Minimum Worth" Provision*, 16 CEB Est. Plan. & Cal. Prob. Rep. 60 (1994).

43. *Id.*

date of distribution) in all of the assets from which the distribution could have been made."[44]

Change in Form of Securities

The provisions applicable to a gift of securities that have changed form (e.g., by sale, merger, or reinvestment)[45] are based on Uniform Probate Code Section 2-605. The Uniform Probate Code has been revised to make clear that it applies regardless of whether the gift is characterized as general or specific. The Uniform Probate Code is also limited to gifts made by will, thus avoiding internal inconsistencies inherent in the California statute's application to other instruments.[46] The Commission recommends that California law be conformed to the revised Uniform Probate Code, and limited in its application to at-death transfers generally.

Ademption

Sections 21133–21135 provide rules for construing the donor's intent where the donor has made a specific gift of property but the property is no longer part of the donor's estate. This could occur because during the donor's lifetime the specifically given property was sold, foreclosed on, replaced, disposed of as part of a conservatorship estate, delivered to the beneficiary, and the like. The existing California provisions are based on the pre-1990 version of the Uniform Probate Code.[47] Since then, the Uniform Probate

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44. See Treas. Reg. § 26.2642-2(b)(2) (1996) (valuation).

45. Section 21132.

46. To apply the California law in a trust context would require that additional stock be both owned by the transferor and be part of the trust estate. Such gifts are not used by well-advised drafters See, e.g., Neumann & Shore, *Outright Noncharitable Gifts*, in 1 California Will Drafting § 12.61, at 298-99 (Cal. Cont. Ed. Bar, 3d ed. 1992).

47. See McGovern, *supra* note 4, at 28-29.

Code has been revised to address problems that have been identified.

The California version of these provisions should be conformed to the Uniform Probate Code as revised, excluding its general presumption of nonademption of specific devises.[48] The proposed law would also fill a gap in the statute governing ademption by satisfaction — an inter vivos gift of property to the beneficiary named in the instrument is a satisfaction of that specific gift.

Changes to Property that Is the Subject of a Specific Gift

The statutes applicable to a specific gift of property that is subject to a contract of sale or transfer,[49] or is subject to a charge or encumbrance,[50] or as to which the donor has an altered interest,[51] are derived from older Probate Code provisions dealing with ademption, and no longer serve a useful purpose. They state the obvious but are not exhaustive, whereas the case law on ademption is adequate and would effectuate the donor's intent.[52] The provisions may be repealed without loss.

Elimination of Redundant Provisions

A number of the rules of construction expressed in the Probate Code are redundant and should be repealed, either because their substance is covered more adequately else-

48. Unif. Prob. Code § 2-606(a) (1990).

49. Section 21136.

50. Section 21137.

51. Section 21138.

52. See, e.g., 12 B. Witkin, Summary of California Law *Wills and Probate* § 314 *et seq*. (9th ed. 1990).

where[53] or because they merely restate the common law but fail to accurately capture its nuances.[54]

Other rules of construction appear in the Probate Code and are duplicated elsewhere.[55] These provisions should be consolidated in the Probate Code, so that practitioners and others may easily find all relevant rules of construction in one location.

Effective Dates

As a general principle, the rules of construction apply retroactively to all instruments, regardless of their date of execution.[56] This is consistent with the purpose of rules of construction, which apply in circumstances where the intent of the maker of the instrument cannot be ascertained.[57] It is also consistent with the general approach of the Probate Code to apply new law except where it would create substantial injustice.[58]

Section 21140(b) creates an exception to retroactive application of the rules of construction in a case where Sections 1050-1054 would have applied to a decedent who died before January 1, 1985. This provision is no longer necessary. The statutes it refers to have relevance to very few cases,[59] and the likelihood of such an issue arising in the future with respect

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53. Compare, e.g., Sections 21109(b)-(c) and 220 (requirement that transferee survive transferor).

54. See Section 2113 (afterborn member of class); McGovern, *supra* note 4, at 24.

55. Compare Civ. Code § 1071 and Prob. Code § 21112 (conditions referring to issue); Civ. Code § 1073 and Prob. Code § 1073 (common law doctrine of worthier title abolished).

56. Section 21140(a).

57. Section 21102. See also, McGovern, *supra* note 4, at 30-32.

58. Section 3.

59. Sections 1050-1054 dealt with the effect of an advancement to an heir in determining the heir's intestate share.

to a pre-1985 decedent is remote. In the interest of simplification of the law, the provision should be repealed.

Conforming Revisions

When Sections 6140-6179 were renumbered in 1994 as Sections 21110-21140, the implementing legislation did not make conforming revisions in other statutes.[60] There remain a half-dozen cross references in the codes to the obsolete section numbers. Appropriate conforming revisions are included in this recommendation.[61]

Law Revision Commission Comments

The basic rules of construction for wills were enacted in 1983[62] on recommendation of the Commission. As with all Commission-sponsored legislation, Comments accompanied the statutes, explaining their derivation and relation to other statutes and to case law, and providing aids to construction and other useful information.[63]

These statutes were in place for 10 years before they were generalized and relocated.[64] Because this task was not done on Commission recommendation, the Official Comments to these sections were lost in the process.

As part of the present study, the Commission has prepared new Comments for the rules of construction. The new Comments are based on the old Comments, with revisions to reflect changes made in the generalization and relocation pro-

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60. See 1994 Cal. Stat. ch. 806.

61. See proposed amendments to Sections 221, 230, 250, 6103, 6205, 11640, *infra*.

62. See Section 6140 *et seq*., 1983 Cal. Stat. ch. 842.

63. See *Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982); 17 Cal. L. Revision Comm'n Reports 822 (1983).

64. See Sections 21101-21140.

cess, as well as to reflect changes proposed in this recommendation.

Contents

PROPOSED LEGISLATION

DIVISION 11. CONSTRUCTION OF WILLS, TRUSTS, AND OTHER INSTRUMENTS

PART 1. RULES OF INTERPRETATION

CHAPTER 1. GENERAL PROVISIONS

Prob. Code § 21101 (technical amendment). Application of part

SEC. ____. Section 21101 of the Probate Code is amended to read:

21101. Unless the provision or context otherwise requires, this part ~~shall apply~~ *applies* to a will, trust, deed, and any other instrument.

Comment. The amendment to Section 21101 is technical.

Section 21101 makes the rules of construction in this part applicable to a governing instrument of any type, except to the extent the application of a particular provision is limited by its terms to a specific type of donative disposition or governing instrument. See, e.g., Sections 21105 (will passes all property including after-acquired property), 21109 (requirement for at-death transfer that transferee survive transferor), 21132 (change in form of securities disposed of by at-death transfer), 21135 (ademption of at-death transfer by satisfaction). See also Section 45 ("instrument" defined).

Prob. Code § 21102 (amended). Intention of transferor

SEC. ____. Section 21102 of the Probate Code is amended to read:

21102. (a) The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.

(b) The rules of construction ~~expressed~~ in this part apply where the intention of the transferor is not indicated by the instrument.

(c) Nothing in this section limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the transferor.

Comment. The amendment to subdivision (b) of Section 21102 is technical.

The 1994 enactment of Section 21102 extended former Section 6140 (wills) to trusts and other instruments. See also Section 21101 (application of part). The section is drawn from Section 2-603 of the Uniform Probate Code (1987). As to the construction of provisions drawn from uniform acts, see Section 2.

Subdivision (c) is added to make clear the admissibility of extrinsic evidence under this section, including for the purpose of rebutting the presumed intention attributed to a transferor by a rule of construction. Subdivision (c) neither expands nor limits the extent to which extrinsic evidence admissible under former law may be used to determine the transferor's intent as expressed in the instrument. See e.g., Estate of Russell, 69 Cal. 2d 200, 215-16, 444 P.2d 353, 70 Cal. Rptr. 561 (1968). See generally 12 B. Witkin, Summary of California Law *Wills and Probate* §§ 245-47, at 280-84 (9th ed. 1990). *Cf.* Section 6111.5 (will); Estate of Anderson, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307 (1997) (extrinsic evidence admissible); Estate of Guidotti, 90 Cal. App. 4th 1403, 109 Cal. Rptr. 2d 674 (2001) (use of extrinsic evidence). See also Section 12206 (limitation in will of time for administration of estate is directory only). Likewise, under the parol evidence rule, extrinsic evidence may be available to explain, interpret, or supplement an expressed intention of the transferor. Code Civ. Proc. § 1856.

Nothing in this section affects the law governing reformation of an instrument to effectuate the intention of the transferor in case of mistake or for other cause.

Prob. Code § 21103 (technical amendment). Choice of law as to meaning and effect of instrument

SEC. ____. Section 21103 of the Probate Code is amended to read:

21103. The meaning and legal effect of a disposition in an instrument ~~shall be~~ *is* determined by the local law of a particular state selected by the transferor in the instrument unless the application of that law is contrary to the rights of the surviving spouse to community and quasi-community property, to any other public policy of this state applicable to

the disposition, or, in the case of a will, *to* Part 3 (commencing with Section 6500) of Division 6.

Comment. The amendments to Section 21103 are technical. The 1994 enactment of Section 21103 extended former Section 6141 (wills) to trusts and other instruments. See also Section 21101 (application of part).

This section is consistent with Section 2-602 of the Uniform Probate Code (1987). The reference in Section 2-602 of the Uniform Probate Code to an elective share is replaced by a reference to the rights of the surviving spouse to community and quasi-community property. The reference to Part 3 (commencing with Section 6500) of Division 6 is drawn from the reference in Section 2-602 of the Uniform Probate Code to provisions relating to elective share, exempt property, and allowances. As to the construction of provisions drawn from uniform acts, see Section 2. See also Section 78 (definition of "surviving spouse").

Prob. Code § 21104 (amended). "At-death transfer" defined

SEC. ____. Section 21104 of the Probate Code is amended to read:

21104. As used in this part, ~~"testamentary gift"~~ *"at-death transfer"* means a transfer ~~in possession or enjoyment that takes effect at or after death~~ *that is revocable during the lifetime of the transferor, but does not include a joint tenancy or joint account with right of survivorship*.

Comment. Section 21104 is amended to replace the former definition of "testamentary gift." As used in this part, an at-death transfer does not include an irrevocable lifetime transfer, such as an outright gift or an irrevocable trust. An at-death transfer does include a will and a revocable trust, as well as a pay-on-death account, "Totten" (or bank account) trust, beneficiary designation under an insurance policy or pension plan, and the like. An irrevocable beneficiary designation is usually subject to a survival requirement pursuant to the terms of its governing instrument for purposes of Section 21109 (requirement that transferee survive transferor).

The term is used in Sections 21109 (requirement that transferee survive transferor), 21110 (anti-lapse), 21117 (classification of at-death transfer), 21132 (change in form of securities), 21133 (proceeds of specific gift), and 21135 (ademption by satisfaction).

Prob. Code § 21105 (technical amendment). Will passes all property including after-acquired property

SEC. ____. Section 21105 of the Probate Code is amended to read:

21105. Except as *otherwise* provided in Sections 641 and 642, a will passes all property the testator owns at death, including property acquired after execution of the will.

Comment. The amendment to Section 21105 is technical. The 1994 enactment of Section 21105 continued former Section 6142.

The section is drawn from Section 2-603 of the Uniform Probate Code (1987). As to the construction of provisions drawn from uniform acts, see Section 2. Nothing in the section limits the extent to which extrinsic evidence admissible under former law may be used to determine the testator's intent as expressed in the will. See Section 21102 (intention of transferor).

Prob. Code § 21106 (repealed). Transferees as owners in common

SEC. ____. Section 21106 of the Probate Code is repealed.

~~21106. A transfer of property to more than one person vests the property in them as owners in common.~~

Comment. Section 21106 is repealed as incomplete and unnecessary. *Cf.* Civ. Code § 686 (what interests are in common).

Prob. Code § 21107 (technical amendment). Direction in instrument to convert real property into money

SEC. ____. Section 21107 of the Probate Code is amended to read:

21107. If an instrument directs the conversion of real property into money at the transferor's death, the *real* property and its proceeds shall be deemed personal property from the time of the transferor's death.

Comment. The amendment to Section 21107 is technical. The 1994 enactment of Section 21107 extended former Section 6144 (wills) to trusts and other instruments. See also Section 21101 (application of part).

This section is declaratory of the common law doctrine of equitable conversion. See *In re* Estate of Gracey, 200 Cal. 482, 488-89, 253 P. 921 (1927). See generally 11 B. Witkin, Summary of California Law *Equity* §§163-66, at 842-47 (9th ed. 1990). Nothing in the section limits the

extent to which extrinsic evidence admissible under former law may be used to determine the transferor's intent as expressed in the instrument. See generally Witkin, *id*; Section 21102 (intention of transferor).

Prob. Code § 21108 (amended). Common law doctrine of worthier title abolished

SEC. ____. Section 21108 of the Probate Code is amended to read:

21108. The law of this state does not include (a) the common-law rule of worthier title that a transferor cannot devise an interest to his or her own heirs or (b) a presumption or rule of interpretation that a transferor does not intend, by a transfer to his or her own heirs or next of kin, to transfer an interest to them. The meaning of a transfer of a legal or equitable interest to a transferor's own heirs or next of kin, however designated, shall be determined by the general rules applicable to the interpretation of instruments. ~~This section applies to all cases in which a final judgment had not been entered as of September 18, 1959.~~

Comment. Section 21108 is amended to remove an obsolete transitional provision.

The 1994 enactment of Section 21108 extended former Section 6145 (wills) to trusts and other instruments. See also Sections 21101 (application of part), 21114 (class gift to heirs, next of kin, relatives, and the like). For background on this section, see *Recommendation and Study Relating to the Doctrine of Worthier Title*, 2 Cal. L. Revision Comm'n Reports D-1 (1959).

Prob. Code § 21109 (amended). Requirement that transferee survive transferor

SEC. ____. Section 21109 of the Probate Code is amended to read:

21109. ~~(a)~~ A transferee who fails to survive the transferor *of an at-death transfer* or until any future time required by the instrument does not take under the instrument.

~~(b) If it cannot be established by clear and convincing evidence that the transferee has survived the transferor, it is deemed that the beneficiary did not survive the transferor.~~

~~(c) If it cannot be established by clear and convincing evidence that the transferee survived until a future time required by the instrument, it is deemed that the transferee did not survive until the required future time.~~

Comment. Subdivision (a) of Section 21109 is amended to clarify and limit its application. See Section 21104 ("at-death transfer" defined).

Subdivisions (b) and (c) are deleted as unnecessary. The general "clear and convincing evidence" standard of Section 220 applies.

The 1994 enactment of Section 21109 extended former Section 6146 (wills) to at-death transfers. See Section 21104 ("at-death transfer" defined). The question of whether or not survival is required in other cases is determined according to general rules of interpretation and construction. See, e.g., Section 21102 (intention of transferor).

The at-death transfer provision of Section 21109 changes the traditional common law and California rule illustrated by *Randall v. Bank of America*, 48 Cal. App. 2d 249, 119 P.2d 754 (1941) (remainder interest in revocable trust held not divested by beneficiary's failure to survive settlor; upon settlor's death the trust property passed to deceased beneficiary's estate). However, language of this section referring to survival "until a future time required by the instrument" does not change the result of other future interest cases that have generally refused to find an implied condition of survival where the instrument fails expressly to impose such a condition, such as *Estate of Stanford*, 49 Cal. 2d 120, 315 P.2d 681 (1957) (testamentary trust for *A* for life, remainder to *A*'s "children"; despite class gift form, remainder passed to estate of child who predeceased *A*), and *Estate of Ferry*, 55 Cal. 2d 776, 361 P.2d 900, 13 Cal. Rptr. 180 (1961) (even though the interest in question was subject to another condition precedent, court refused to find an implied condition of survival). See also Restatement (Second) of Property (Donative Transfers) § 27.3 (1987).

With respect to a class gift of a future interest, Section 21109 must be read together with Section 21114. If the transferee fails to survive but is properly related to the transferor or the transferor's spouse, the antilapse statute may substitute the transferee's issue. See Section 21110. See also Section 21112 (conditions referring to "issue").

For a provision governing the administration and disposition of community property and quasi-community property where one spouse

does not survive the other, see Section 103. See also Sections 230-234 (proceeding to determine whether devisee survived testator).

Prob. Code § 21110 (amended). Anti-lapse

SEC. ____. Section 21110 of the Probate Code is amended to read:

21110. (a) Subject to subdivision (b), if a transferee is dead when the instrument is executed~~, or is treated as if the transferee predeceased the transferor~~, or fails *or is treated as failing* to survive the transferor or until a future time required by the instrument, the issue of the deceased transferee take in the transferee's place in the manner provided in Section 240. A transferee under a class gift shall be a transferee for the purpose of this subdivision unless the transferee's death occurred before the execution of the instrument and that fact was known to the transferor when the instrument was executed.

(b) The issue of a deceased transferee do not take in the transferee's place if the instrument expresses a contrary intention or a substitute disposition. A requirement that the initial transferee survive ~~for a specified period of time after the death of~~ the transferor constitutes a contrary intention. A requirement that the initial transferee survive until a future time that is related to the probate of the transferor's will or administration of the estate of the transferor constitutes a contrary intention.

(c) As used in this section, "transferee" means a person who is kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor.

Comment. Subdivision (b) of Section 21110 is amended to delete the reference to a specified period of time, in order to avoid the implication that a specific period of time is the only expression of survival that constitutes a contrary intention. While an expression of that type may well indicate an intention that the antilapse statute not apply, other survival requirements in an instrument may also be sufficient to override the antilapse statute.

In applying the provision of subdivision (b) relating to a substitute gift, care must be taken not to ascribe to the transferor too readily or too broadly an intention to override the antilapse statute, the purpose of which is to lessen the risk of serious oversight by the transferor. For example, by providing a substitute taker, the transferor may very well intend to override the antilapse statute in the ordinary case. If, however, the substitute taker has also predeceased the transferor, the transferor may have intended that the antilapse statute should apply to the first taker.

In addition to the limitations prescribed in subdivision (b), Section 21110 is also subject to the general principle that rules of construction such as this section do not apply if it is determined that the transferor intended a contrary result. See Section 21102 (intention of transferor).

Section 21110 does not make a substitute gift in the case of a class gift where a person otherwise answering the description of the class was dead when the instrument was executed and that fact was known to the transferor. It is consistent with *Estate of Steidl*, 89 Cal. App. 2d 488, 201 P.2d 58 (1948) (antilapse statute applied where class member died before testator but after execution of will).

Subdivision (c) makes the antilapse statute apply not only to kindred of the transferor but also to kindred of a surviving, deceased, or former spouse of the transferor. Thus, if the transferor were to make a transfer to a stepchild who predeceased the transferor, Section 21110 will make a substitute gift to issue of the predeceased stepchild. The term "kindred" was taken from former Section 92 (repealed by 1983 Cal. Stat. ch. 842, § 18) and refers to persons related by blood. *In re* Estate of Sowash, 62 Cal. App. 512, 516, 217 P. 123 (1923). In addition, an adoptee is generally kindred of the adoptive family and not of the natural relatives. See Section 21115 (halfbloods, adopted persons, persons born out of wedlock, stepchildren, and foster children, plus issue of such persons, as "kindred" or "issue"). See also Estate of Goulart, 222 Cal. App. 2d 808, 35 Cal. Rptr. 465 (1963).

As to when a transferee is treated as having predeceased the transferor, see Sections 220 (simultaneous death), 282 (effect of disclaimer), 250 (effect of feloniously and intentionally killing decedent), 6122 & 5600 (effect of dissolution of marriage), See also Sections 230-234 (proceeding to determine survival), 240 (manner of taking by representation).

Prob. Code § 21111 (amended). Failure of transfer

SEC. ____. Section 21111 of the Probate Code is amended to read:

21111. ~~Except as provided in Section 21110:~~

~~(a) If a transfer, other than a residuary gift or a transfer of a future interest,~~ *(a) Except as provided in subdivision (b) and subject to Section 21110, if a transfer* fails for any reason, the property is transferred as follows:

(1) If the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument.

(2) If the transferring instrument does not provide for an alternative disposition but does provide for the transfer of a residue, the property becomes a part of the residue transferred under the instrument.

(3) If the transferring instrument does not provide for an alternative disposition and does not provide for the transfer of a residue, *or if the transfer is itself a residuary gift,* the property is transferred to the decedent's estate.

(b) ~~If~~ *Subject to Section 21110, if* a residuary gift or a future interest is transferred to two or more persons and the share of a transferee fails for any reason, *and no alternative disposition is provided,* the share passes to the other transferees in proportion to their other interest in the residuary gift or the future interest.

(c) A transfer of "all my estate" or words of similar import is a residuary gift for purposes of this section.

(d) If failure of a future interest results in an intestacy, the property passes to the heirs of the transferor determined pursuant to Section 21114.

Comment. Section 21111 is amended to clarify the treatment of a failed residuary gift.

Under subdivision (a)(1), an alternative disposition may take the form of a transfer of specifically identifiable property (specific gift) or a transfer from general assets of the transferor (general gift) that includes the specific property.

The 1994 enactment of Section 21111 extended former Section 6148 (wills) to trusts and other instruments. See also Section 21101 (application of part). This section is drawn from Section 2-606 of the

Uniform Probate Code (1987). As to the construction of provisions drawn from uniform acts, see Section 2.

With respect to a residuary devise, subdivision (b) abolishes the "no residue of a residue" rule, illustrated by *Estate of Murphy*, 157 Cal. 63, 106 P. 230 (1910). It preserves the change made by former Section 6148 in the California case law rule that if the share of one of several residuary devisees fails, the share passed by intestacy. See, e.g., Estate of Russell, 69 Cal. 2d 200, 215-16, 444 P.2d 353, 70 Cal. Rptr. 561 (1968); *In re* Estate of Kelleher, 205 Cal. 757, 760-61, 272 P. 1060 (1928); Estate of Anderson, 166 Cal. App. 2d 39, 42, 332 P.2d 785 (1985).

For purposes of this section, a gift of "my estate" is a residuary gift rather than a general gift. Subdivision (c). In the case of a failed gift of a portion of an estate or residue, this section may be applied in appropriate circumstances so as to prevent an intestacy or a distorted disposition.

Where a failed gift is transferred to the decedent's estate under this section, it will often result in an intestacy. *Cf.* Section 21114 (class gift to heirs, next of kin, relatives, and the like).

Prob. Code § 21112 (technical amendment). Conditions referring to "issue"

SEC. ____. Section 21112 of the Probate Code is amended to read:

21112. A condition in a transfer of a present or future interest that refers to a person's death "with" or "without" issue, or to a person's "having" or "leaving" issue or no issue, or a condition based on words of similar import, is construed to refer to that person's being dead at the time the transfer takes effect in enjoyment and to ~~his or her~~ *that person* either having or not having, as the case may be, issue who are alive at the time of enjoyment.

Comment. The amendment to Section 21112 is technical. The 1994 enactment of Section 21112 extended former Section 6149 (wills) to trusts and other instruments. See also Section 21101 (application of part).

The section overrules California's much criticized theory of indefinite failure of issue established by *In re Estate of Carothers*, 161 Cal. 588, 119 P. 926 (1911). See generally 12 B. Witkin, Summary of California Law *Wills and Probate* §§ 279-80, at 310-12 (9th ed. 1990). Section 6149 adopts the majority view of the Restatement of Property. See Witkin, *id.* § 280, at 310-12; Annot., 26 A.L.R.3d 407 (1969); Restatement of Property § 269 (1940). Under Section 21112, if the

transfer is "to *A* for life, remainder to *B* and *B*'s heirs, but if *B* dies without issue, then to *C*," the transfer is read as meaning "if *B* dies before *A* without issue living at the death of *A*." If *B* survives *A*, whether or not *B* then has living issue, *B* takes the transfer absolutely. If *B* predeceases *A* with issue then living but at the time of *A*'s subsequent death *B* does not have living issue, the transfer goes to *C*.

Prob. Code § 21113 (repealed). Afterborn member of class

SEC. ____. Section 21113 of the Probate Code is repealed.

~~21113. (a) A transfer of a present interest to a class includes all persons answering the class description at the transferor's death.~~

~~(b) A transfer of a future interest to a class includes all persons answering the class description at the time the transfer is to take effect in enjoyment.~~

~~(c) A person conceived before but born after the transferor's death or after the time the transfer takes effect in enjoyment takes if the person answers the class description.~~

Comment. Section 21113 is repealed as unnecessary. It inadequately codified the common law "rule of convenience," failing to include its common law exceptions. See Restatement (Second) of Property §§ 26.1-26.2 (1987).

Prob. Code § 21114 (amended). Class gift to heirs, next of kin, relatives, and the like

SEC. ____. Section 21114 of the Probate Code is amended to read:

21114. ~~A transfer of a present or future interest to the transferor's or another~~ *(a) If a statute or an instrument provides for transfer of a present or future interest to, or creates a present or future interest in, a* designated person's "heirs," *"heirs at law,"* "next of kin," "relatives," or "family," or ~~to "the persons entitled thereto under the intestate succession laws," or to persons described by words of similar import, is a transfer to those who would be the transferor's or other designated person's heirs, their identities and respective shares shall be determined as if the transferor or other~~

~~designated person were to die intestate at the time when the transfer is to take effect in enjoyment and according to the California statutes of intestate succession of property not acquired from a predeceased spouse in effect at that time~~ *words of similar import, the transfer is to the persons, including the state under Section 6800, and in the shares, that would succeed to the designated person's intestate estate under the intestate succession law of the designated person's domicile if the designated person died when the transfer is to take effect in enjoyment*. If the designated person's surviving spouse is living but is remarried at the time the transfer is to take effect in enjoyment, the surviving spouse is not an heir of the designated person for purposes of this section.

(b) As used in this section, "designated person" includes the transferor.

Comment. Section 21114 is amended to conform to Uniform Probate Code Section 2-711 (1993). The amendment clarifies a number of issues:

(1) Application of the section to interests acquired by operation of law.

(2) Application of escheat principles.

(3) Application of the law of another state, based on the designated person's domicile.

(4) Elimination of the special rule for ancestral property.

The 1994 enactment of Section 21114 extended former Section 6151 (wills) to trusts and other instruments. See also Section 21101 (application of part). The former section was drawn from Section 2514 of the Pennsylvania Consolidated Statutes, Title 20, and established a special rule for a class gift to an indefinite class such as the transferor's or another designated person's "heirs," "next of kin," "relative," "family," and the like. As Section 21114 applies to a transfer of a future interest, the section is consistent with Section 21109 in that Section 21114 establishes a constructional preference against early vesting. However, Section 21114 differs from Section 21109 in that one who does not survive until the future interest takes effect in enjoyment is not deemed a member of the indefinite class described in Section 21114 (such as "heirs"), is therefore not a "transferee" under the class gift, and no substitute gift will be made by the antilapse statute (Section 21110). If the transfer of a future interest is to a more definite class such as "children," one coming within that description who fails to survive until

the transfer takes effect in enjoyment does not take under the instrument (Section 21109) but may nonetheless be a "deceased transferee" under the antilapse statute (Section 21110) permitting substitution of the deceased transferee's issue. See Sections 21109 & 21110 Comments. See also Section 21115(c)(3) (rules for determining persons who would be heirs of transferor or other person).

By postponing the determination of class membership until the gift takes effect in enjoyment where the class is indefinite (e.g., to "heirs"), Section 21114 should reduce the uncertainty of result under prior law. See Halbach, *Future Interests: Express and Implied Conditions of Survival*, 49 Cal. L. Rev. 297, 317-20 (1961). Section 21114 is consistent with *Estate of Easter*, 24 Cal. 2d 191, 148 P.2d 601 (1944).

Prob. Code § 21115 (amended). Halfbloods, adopted persons, persons born out of wedlock, stepchildren, and foster children

SEC. ____. Section 21115 of the Probate Code is amended to read:

21115. (a) Except as provided in subdivision (b), halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of these persons when appropriate to the class, are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession.

(b) In construing a transfer by a transferor who is not the natural parent, a person born to the natural parent shall not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse. In construing a transfer by a transferor who is not the adoptive parent, a person adopted by the adoptive parent shall not be considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse.

(c) Subdivisions (a) and (b) shall also apply in determining:

(1) Persons who would be kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor under Section 21110.

(2) Persons to be included as issue of a deceased transferee under Section 21110.

(3) Persons who would be the transferor's or other designated person's heirs under Section 21114.

(d) The rules for determining intestate succession under this section are those in effect at the time the transfer is to take effect in enjoyment.

Comment. Subdivision (d) is added to Section 21115 for consistency with the choice of law rules of Section 21114. The 1994 enactment of Section 21115 extended former Section 6152 (wills) to trusts and other instruments. See also Section 21101 (application of part).

Subdivision (a) is drawn from Section 2-611 of the Uniform Probate Code (1987). As to the construction of provisions drawn from uniform acts, see Section 2. To the extent that California cases had addressed the matter, subdivision (a) is consistent with prior California law. See 12 B. Witkin, Summary of California Law *Wills and Probate* §§ 287-90, at 320-23 (9th ed. 1990). For the rules for determining relationship and inheritance rights for purposes of intestate succession, see Sections 6406, 6408. Under some circumstances stepchildren and foster children are included in terms of class gift or relationship pursuant to the rules for intestate succession. See Section 6408 (when stepchild or foster child treated the same as adopted child).

Subdivision (b) precludes the adoption of a person (often an adult) solely for the purpose of permitting the adoptee to take under the testamentary instrument of another. Subdivision (b) also construes a transfer to exclude a child born out of wedlock (where the transferor is not the parent) if the child never lives while a minor as a regular member of the parent's household. A child is included in class gift terminology in the transferor's instrument if the child lived while a minor or as a regular member of the household of the parent's spouse or surviving spouse. As a result, a child born of a marital relationship will almost always be included in the class, consistent with the transferor's likely intent.

Subdivision (c) makes clear that the rules stated in subdivisions (a) and (b) apply for the purposes of the antilapse statute (Section 21110) and in construing transfers (Section 21114).

Prob. Code § 21116 (repealed). Vesting of testamentary disposition

SEC. ____. Section 21116 of the Probate Code is repealed.

~~21116. A testamentary disposition by an instrument, including a transfer to a person on attaining majority, is presumed to vest at the transferor's death.~~

Comment. Section 21116 is not continued. It codified a presumption in favor of early vesting that limited the ability of the court to consider all the circumstances in construing the intent of an instrument.

Prob. Code § 21117 (amended). Classification of at-death transfer

SEC. ____. Section 21117 of the Probate Code is amended to read:

21117. ~~Testamentary gifts~~ *At-death transfers* are classified as follows:

(a) A specific gift is a transfer of specifically identifiable property.

(b) A general gift is a transfer from the general assets of the transferor that does not give specific property.

(c) A demonstrative gift is a general gift that specifies the fund or property from which the transfer is primarily to be made.

(d) A general pecuniary gift is a pecuniary gift within the meaning of Section 21118.

(e) An annuity is a general pecuniary gift that is payable periodically.

(f) A residuary gift is a transfer of property that remains after all specific and general gifts have been satisfied.

Comment. Section 21117 is amended to correct terminology. See Section 21104 ("at-death transfer" defined). The 1994 enactment of Section 21117 extended former Section 6154 (wills) to trusts and other instruments. See also Section 21101 (application of part).

For the priority that a demonstrative gift has over other general gifts and the priority that an annuity has over other general gifts, see Section 21403(b). See also *Recommendation Relating to Interest and Income During Administration*, 19 Cal. L. Revision Comm'n Reports 1019 (1988); *Comments to Conforming Revisions and Repeals*, 19 Cal. L. Revision Comm'n Reports 1031, 1089-90 (1988); *Communication from*

the California Law Revision Commission Concerning Assembly Bill 2841, 19 Cal. L. Revision Comm'n Reports 1201, 1228-29 (1988).

Prob. Code § 21118 (amended). Satisfaction of pecuniary gift by property distribution

SEC. ____. Section 21118 of the Probate Code is amended to read:

21118. (a) If an instrument authorizes a fiduciary to satisfy a pecuniary gift wholly or partly by distribution of property other than money, property selected for that purpose shall be valued at its fair market value on the date of distribution, unless the instrument expressly provides otherwise. If the instrument permits the fiduciary to value the property selected for distribution as of a date other than the date of distribution, then, unless the instrument expressly provides otherwise, the property selected by the fiduciary for that purpose shall ~~have an aggregate fair market value on the date or dates of distribution that, when added to any cash distributed, will amount to no less than the amount of the pecuniary gift as stated in, or determined by, the instrument~~ *fairly reflect net appreciation and depreciation (occurring between the valuation date and the date of distribution) in all of the assets from which the distribution could have been made*.

(b) As used in this section, "pecuniary gift" means a transfer of property made in an instrument that either is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the instrument.

Comment. Section 21118 is amended to incorporate the standard of Treasury Regulations Section 26.2642-2(b)(2) (1996) (valuation).

CHAPTER 2. ASCERTAINING THE MEANING OF LANGUAGE USED IN THE INSTRUMENT

Prob. Code § 21120 (amended). Every expression given some effect, failure of transfer avoided

SEC. ____. Section 21120 of the Probate Code is amended to read:

21120. The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative. Preference is to be given to an interpretation of an instrument that will prevent ~~intestacy~~ *failure of a transfer*, rather than one that will result in ~~an intestacy~~ *failure of a transfer*.

Comment. Section 21120 is amended to more fully implement its application to trusts and other instruments. The 1994 enactment of Section 21120 extended former Section 6160 (wills) to trusts and other instruments. See also Section 21101 (application of part).

This part does not apply to an instrument if its terms expressly or by necessary implication make this part inapplicable. See Section 21101 (application of part).

Prob. Code § 21121 (technical amendment). Construction of instrument as a whole

SEC. ____. Section 21121 of the Probate Code is amended to read:

21121. All ~~the~~ parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument.

Comment. The amendment to Section 21121 is technical. The 1994 enactment of Section 21121 extended former Section 6161 (wills) to trusts and other instruments. See also Section 21101 (application of part).

Prob. Code § 21122 (technical amendment). Words given their ordinary meaning, technical words

SEC. ____. Section 21122 of the Probate Code is amended to read:

21122. The words of an instrument are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained. Technical words are not necessary to give effect to a disposition in an instrument. Technical words ~~in an instrument~~ are to be considered as having been used in their technical sense unless (a) the context clearly indicates a contrary intention or (b) it satisfactorily appears that the instrument was drawn solely by the transferor and that the transferor was unacquainted with the technical sense.

Comment. The amendment to Section 21122 is technical. The 1994 enactment of Section 21122 extended former Section 6162 (wills) to trusts and other instruments. See also Section 21101 (application of part).

CHAPTER 3. EXONERATION AND ADEMPTION

Prob. Code § 21131 (technical amendment). No exoneration

SEC. ____. Section 21131 of the Probate Code is amended to read:

21131. A specific gift passes the property transferred subject to any mortgage, deed of trust, or other lien existing at the date of death, without right of exoneration, regardless of a general directive to pay debts contained in the instrument ~~of transfer~~.

Comment. The amendment to Section 21131 is technical. See Section 45 ("instrument" defined). The 1994 enactment of Section 21131 extended former Section 6170 (wills) to trusts and other instruments. See also Section 21101 (application of part). See also Section 21117(a) ("specific gift" defined).

This section expands the rule stated in Section 2-609 of the Uniform Probate Code (1987) to cover any lien. This expansion makes Section 21131 consistent with Section 21404. As to the construction of provisions drawn from uniform acts, see Section 2. Former Section 6170

reversed the prior California case law rule that, in the absence of an expressed intention of the testator to the contrary, if the debt which encumbers the devised property is one for which the testator was personally liable, the devisee was entitled to "exoneration," that is, to receive the property free of the encumbrance by having the debt paid out of other assets of the estate. See 12 B. Witkin, Summary of California Law *Wills and Probate* § 624, at 654-55 (9th ed. 1990). The rule stated in Section 21131 applies in the absence of a contrary intention of the transferor. See Section 21102. See also Sections 32 ("devise" means a disposition of real or personal property by will), 62 ("property" defined).

Prob. Code § 21132 (repealed). Change in form of securities

SEC. ____. Section 21132 of the Probate Code is repealed.

~~21132. (a) If the transferor intended a specific gift of certain securities rather than the equivalent value thereof, the beneficiary of the specific gift is entitled only to:~~

~~(1) As much of the transferred securities as is a part of the estate at the time of the transferor's death.~~

~~(2) Any additional or other securities of the same entity owned by the transferor by reason of action initiated by the entity excluding any acquired by exercise of purchase options.~~

~~(3) Securities of another entity owned by the transferor as a result of a merger, consolidation, reorganization or other similar action initiated by the entity.~~

~~(4) Any additional securities of the entity owned by the transferor as a result of a plan of reinvestment if it is a regulated investment company.~~

~~(b) Distributions prior to death with respect to a security specifically given and not provided for in subdivision (a) are not part of the specific gift.~~

Comment. Former Section 21132 is superseded by new Section 21132 (change in form of securities).

Prob. Code § 21132 (added). Change in form of securities

SEC. ____. Section 21132 is added to the Probate Code, to read:

21132. (a) If a transferor executes an instrument that makes an at-death transfer of securities and the transferor then owned securities that meet the description in the instrument, the transfer includes additional securities owned by the transferor at death to the extent the additional securities were acquired by the transferor after the instrument was executed as a result of the transferor's ownership of the described securities and are securities of any of the following types:

(1) Securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options.

(2) Securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization.

(3) Securities of the same organization acquired as a result of a plan of reinvestment.

(b) Distributions in cash before death with respect to a described security are not part of the transfer.

Comment. New Section 21132 supersedes former Section 21132 (change in form of securities). The 1994 enactment of Section 21132 extended former Section 6171 (wills) to other at-death transfers. See also Section 21101 (application of part). The new section is based on Uniform Probate Code Section 2-605 (1990); the former section was based on Uniform Probate Code Section 2-605 (1987). As to the construction of provisions drawn from uniform acts, see Section 2.

This section is generally consistent with prior California case law. See 12 B. Witkin, Summary of California Law *Wills and Probate* §§ 317-18, at 350-51 (9th ed. 1990). The rules stated in Section 21132 apply in the absence of a contrary intention of the transferor. See Section 21102.

Under Section 21132, if the transferor makes a specific gift of only a portion of the stock the transferor owns in a particular company and there is a stock split or stock dividend, the specific transferee is entitled only to a proportionate share of the additional stock received. For example, if the transferor owns 500 shares of stock, transfers 100 shares to a child, and the stock splits two for one, the child is entitled to 200 shares, not 600.

Prob. Code § 21133 (amended). Proceeds of specific gift

SEC. ____. Section 21133 of the Probate Code is amended to read:

21133. A recipient of *an at-death transfer of* a specific gift has ~~the right to the remaining property specifically given~~ *a right to the property specifically given, to the extent the property is owned by the transferor at the time the gift takes effect in possession or enjoyment,* and all of the following:

(a) Any balance of the purchase price (together with any security ~~interest~~ *agreement*) owing from a purchaser to the transferor at ~~death~~ *the time the gift takes effect in possession or enjoyment* by reason of sale of the property.

(b) Any amount of an eminent domain award for the taking of the property unpaid at ~~death~~ *the time the gift takes effect in possession or enjoyment*.

(c) Any proceeds unpaid at ~~death~~ *the time the gift takes effect in possession or enjoyment* on fire or casualty insurance on *or other recovery for injury to* the property.

(d) Property owned by the transferor at ~~death~~ *the time the gift takes effect in possession or enjoyment and acquired* as a result of foreclosure, or obtained in lieu of foreclosure, of the security *interest* for a specifically given obligation.

(e) Real or tangible personal property owned by the transferor at the time the gift takes effect in possession or enjoyment that the transferor acquired as a replacement for specifically given real or tangible personal property.

Comment. The 1994 enactment of Section 21133 extended former Section 6172 (wills) to trusts and other instruments. See also Section 21101 (application of part). The section is limited in its application to at-death transfers — transfers that are revocable during the transferor's lifetime but become effective on the transferor's death. See Section 21104 ("at-death transfer" defined). See also Section 21117(a) ("specific gift" defined).

Section 21133 is amended for conformity with Uniform Probate Code Section 2-606(a) (1990). (Section 21133 is based on former Uniform Probate Code Section 2-608(a) (1987), which is superseded by Uniform

Probate Code Section 2-606(a) (1990).) As to the construction of provisions drawn from uniform acts, see Section 2.

This section is generally similar to prior California case law. See, e.g. Estate of Shubin, 252 Cal. App. 2d 588, 60 Cal. Rptr. 678 (1967); *cf.* Estate of Newsome, 248 Cal. App. 2d 712, 56 Cal. Rptr. 874 (1967). See also Sections 32 ("devise" defined), 62 ("property" defined). The rules stated in Section 21133 apply in the absence of a contrary intention of the transferor. See Section 21102.

The rules of nonademption in Sections 21133-21135 are not exclusive, and nothing in these provisions is intended to increase the incidence of ademption in California. See Section 21139.

Prob. Code § 21134 (amended). Effect of conservatorship or power of attorney on specific gift

SEC. ____. Section 21134 of the Probate Code is amended to read:

21134. (a) Except as otherwise provided in this section, if specifically given property is sold or *mortgaged* by a conservator *or by an agent acting within the authority of a durable power of attorney for an incapacitated principal*, the ~~beneficiary~~ *transferee* of the specific gift has the right to a general pecuniary gift equal to the net sale price of*, or the amount of the unpaid loan on,* the property.

(b) Except as otherwise provided in this section, if an eminent domain award for the taking of specifically given property is paid to a conservator *or to an agent acting within the authority of a durable power of attorney for an incapacitated principal*, or if the proceeds on fire or casualty insurance on*, or recovery for injury to,* specifically gifted property are paid to a conservator *or to an agent acting within the authority of a durable power of attorney for an incapacitated principal*, the recipient of the specific gift has the right to a general pecuniary gift equal to the eminent domain award or the insurance proceeds *or recovery*.

(c) ~~This~~ *For the purpose of the references in this section to a conservator, this* section does not apply if, after the sale, *mortgage,* condemnation, fire, or casualty, *or recovery,* the

conservatorship is terminated and the transferor survives the termination by one year.

(d) *For the purpose of the references in this section to an agent acting with the authority of a durable power of attorney for an incapacitated principal, (1) "incapacitated principal" means a principal who is an incapacitated person, (2) no adjudication of incapacity before death is necessary, and (3) the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal.*

(e) The right of the ~~beneficiary~~ *transferee* of the specific gift under this section shall be reduced by any right the ~~beneficiary~~ *transferee* has under Section 21133.

Comment. The 1994 enactment of Section 21134 extended former Section 6173 (wills) to trusts and other instruments. See also Sections 21101 (application of part), 21117(a) ("specific gift" defined).

Section 21134 is amended for conformity with Uniform Probate Code Section 2-606(b) (1990). (Section 21134 is based on former Uniform Probate Code Section 2-608(b) (1987), which is superseded by Uniform Probate Code Section 2-606(b) (1990).) As to the construction of provisions drawn from uniform acts, see Section 2.

Subdivisions (a) and (b) are consistent with prior California case law. See Estate of Packham, 232 Cal. App. 2d 847, 43 Cal. Rptr. 318 (1965). See also Section 62 ("property" defined). The rules stated in Section 21134 apply in the absence of a contrary intention of the transferor. See Section 21102. See also Section 21139 (rules stated in Sections 21133 to 21135 not exhaustive).

Subdivision (c) revises the corresponding Uniform Probate Code language to refer to the conservatorship being terminated rather than to it being "adjudicated that the disability of the testator has ceased." The application of subdivision (c) turns on whether a conservatorship has been terminated, and not on whether the transferor has regained the capacity to make an instrument of transfer. Thus subdivision (c) provides a rule of administrative convenience and avoids the need to litigate the question of whether the conservatee had capacity to make an instrument of transfer after the time of the sale, condemnation, fire, or casualty.

Prob. Code § 21135 (amended). Ademption by satisfaction

SEC. ____. Section 21135 of the Probate Code is amended to read:

21135. (a) Property given by a transferor during his or her lifetime to a ~~beneficiary~~ *person* is treated as a satisfaction of a ~~testamentary gift~~ *an at-death transfer* to that person in whole or in part only if one of the following conditions is satisfied:

(1) The instrument provides for deduction of the lifetime gift from the ~~testamentary gift~~ *at-death transfer*.

(2) The transferor declares in a contemporaneous writing that the ~~transfer is to be deducted from the testamentary gift or~~ *gift* is in satisfaction of the ~~testamentary gift~~ *at-death transfer or that its value is to be deducted from the value of the at-death transfer*.

(3) The transferee acknowledges in writing that the gift is in satisfaction of the ~~testamentary gift.~~ *at-death transfer or that its value is to be deducted from the value of the at-death transfer*.

(4) The property given is the subject of a specific gift of that property to that person.

(b) Subject to subdivision (c), for the purpose of partial satisfaction, property given during lifetime is valued as of the time the transferee came into possession or enjoyment of the property or as of the time of death of the transferor, whichever occurs first.

(c) If the value of the gift is expressed in the contemporaneous writing of the transferor, or in an acknowledgment of the transferee made contemporaneously with the gift, that value is conclusive in the division and distribution of the estate.

(d) If the transferee fails to survive the transferor, the gift is treated as a full or partial satisfaction of the gift, as appropriate, in applying Sections 21110 and 21111 unless the transferor's contemporaneous writing provides otherwise.

Comment. The 1994 enactment of Section 21135 extended former Section 6174 (wills) to trusts and other instruments. See also Section 21101 (application of part).

Section 21135 is amended for conformity with Uniform Probate Code Section 2-609 (1990). (Section 21135 is based on former Uniform Probate Code Section 2-612 (1987), which is superseded by Uniform Probate Code Section 2-609 (1990).) As to the construction of provisions drawn from uniform acts, see Section 2.

Section 21135 is also amended to fill gaps and correct terminology. See Sections 21104 ("at-death transfer" defined), 21117 (classification of at-death transfer). See also Section 11640 (hearing and order resolving questions arising under Section 21135). For a comparable intestate succession rule concerning advancements, see Section 6409.

Prob. Code § 21136 (repealed). Contract for sale or transfer of specifically devised property

SEC. ____. Section 21136 of the Probate Code is repealed.

~~21136. If the transferor after execution of the transfer instrument enters into an agreement for the sale or transfer of specifically given property, the beneficiary of the specific gift has the right to the property subject to the remedies of the purchaser or transferee.~~

Comment. Section 21136 is not continued. The matter is governed by case law. See, e.g., 12 B. Witkin, Summary of California Law *Wills and Probate* § 314 *et seq.*, at 347-50 (9th ed. 1990).

Prob. Code § 21137 (repealed). Transferor placing charge or encumbrance on specifically devised property

SEC. ____. Section 21137 of the Probate Code is repealed.

~~21137. If the transferor after execution of the transfer instrument places a charge or encumbrance on specifically given property for the purpose of securing the payment of money or the performance of any covenant or agreement, the beneficiary of the specific gift has the right to the property subject to the charge or encumbrance.~~

Comment. Section 21137 is not continued. The matter is governed by case law. See, e.g., 12 B. Witkin, Summary of California Law *Wills and Probate* § 314 *et seq.*, at 347-50 (9th ed. 1990).

Prob. Code § 21138 (repealed). Act of transferor altering transferor's interest in specifically devised property

SEC. ____. Section 21138 of the Probate Code is repealed.

~~21138. If the transferor after execution of the transfer instrument alters, but does not wholly divest, the transferor's interest in property that is specifically given by a conveyance, settlement, or other act, the beneficiary of the specific gift has the right to the remaining interest of the transferor in the property.~~

Comment. Section 21138 is not continued. The matter is governed by case law. See, e.g., 12 B. Witkin, Summary of California Law *Wills and Probate* § 314 *et seq*., at 347-50 (9th ed. 1990).

Prob. Code § 21139 (amended). Rules stated in Sections 21133 to 21135 not exhaustive

SEC. ____. Section 21139 of the Probate Code is amended to read:

21139. The rules stated in Sections 21133 to ~~21138~~ *21135*, inclusive, are not exhaustive, and nothing in those sections is intended to increase the incidence of ademption under the law of this state.

Comment. The 1994 enactment of Section 21139 extended former Section 6178 (wills) to trusts and other instruments. See also Section 21101 (application of part). Section 21139 is amended to reflect repeal of Sections 21136-21138.

This section recognizes that the rules stated in Sections 21133-21135 cover a number of special situations where a specific gift is not adeemed but do not cover all situations where a specific gift is not adeemed. This section also makes clear that the inclusion of these specific statutory rules is not intended to increase the incidence of ademption in California.

CHAPTER 4. EFFECTIVE DATES

Prob. Code § 21140 (amended). Effective dates

SEC. ____. Section 21140 of the Probate Code is amended to read:

21140. ~~(a) Except as otherwise provided and subject to subdivision (b), this~~ *This* part applies to all instruments, regardless of when they were executed.

~~(b) The repeal of former Sections 1050, 1051, 1052, and 1053 and the amendment of former Section 1054, by Chapter 842 of the Statutes of 1983, do not apply to cases where the decedent died before January 1, 1985. If the decedent died before January 1, 1985, the case is governed by the former provisions as they would exist had Chapter 842 of the Statutes of 1983 not been enacted.~~

Comment. Section 21140 is amended to delete the transitional provision in subdivision (b).

CONFORMING REVISIONS

Civ. Code § 1071 (repealed). Conditions referring to issue

SEC. ____. Section 1071 of the Civil Code is repealed.

~~1071. Where a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean successors, or issue living at the death of the person named as ancestor.~~

Comment. Section 1071 is repealed as unnecessary. It repeated Probate Code Section 21112.

Civ. Code § 1073 (repealed). Common law doctrine of worthier title abolished

SEC. ____. Section 1073 of the Civil Code is repealed.

~~1073. The law of this State does not include (1) the common law rule of worthier title that a grantor cannot convey an interest to his own heirs or (2) a presumption or rule of interpretation that a grantor does not intend, by a grant to his own heirs or next of kin, to transfer an interest to them. The meaning of a grant of a legal or equitable interest to a grantor's own heirs or next of kin, however designated, shall~~

~~be determined by the general rules applicable to the interpretation of grants. This section shall be applied in all cases in which final judgment has not been entered on its effective date.~~

Comment. Section 1073 is repealed as unnecessary. It repeated Probate Code Section 21108.

Prob. Code § 221 (amended). Exceptions to applicability of chapter

SEC. ____. Section 221 of the Probate Code is amended to read:

221. (a) This chapter does not apply in any case where Section 103, ~~6146~~, 6211, or 6403 applies.

(b) This chapter does not apply in the case of a trust, deed, or contract of insurance, or any other situation, where (1) provision is made dealing explicitly with simultaneous deaths or deaths in a common disaster or otherwise providing for distribution of property different from the provisions of this chapter or (2) provision is made requiring one person to survive another for a stated period in order to take property or providing for a presumption as to survivorship that results in a distribution of property different from that provided by this chapter.

Comment. Section 221 is amended to delete the reference to former Section 6146, which has been repealed. The former section is superseded by Section 21109 (requirement that transferee survive transferor), which is amended to delete its special rules in reliance on this chapter.

Prob. Code § 230 (amended). Petition for purpose of determining survival

SEC. ____. Section 230 of the Probate Code is amended to read:

230. A petition may be filed under this chapter for any one or more of the following purposes:

(a) To determine for the purposes of Section 103, 220, 222, 223, 224, ~~6146, 6147~~, 6211, 6242, 6243, ~~6244, or~~ 6403,

21109, 21110, or other provision of this code whether one person survived another.

(b) To determine for the purposes of Section ~~1389.4 of the Civil Code~~ *673* whether issue of an appointee survived the donee.

(c) To determine for the purposes of Section ~~24606~~ *24611* of the Education Code whether a person has survived in order to receive benefits payable under the system.

(d) To determine for the purposes of Section ~~21371~~ *21509* of the Government Code whether a person has survived in order to receive money payable under the system.

~~(e) To determine for the purposes of a case governed by former Sections 296 to 296.8, inclusive, repealed by Chapter 842 of the Statutes of 1983, whether persons have died other than simultaneously.~~

Comment. Section 230 is amended to correct cross-references. References to former provisions that have been repealed are replaced by references to the provisions, if any, that have superseded them. Subdivision (e), relating to determinations under the former Uniform Simultaneous Death Act, is repealed as obsolete.

Prob. Code § 250 (amended). Wills, intestate succession, and family protection

SEC. ____. Section 250 of the Probate Code is amended to read:

250. (a) A person who feloniously and intentionally kills the decedent is not entitled to any of the following:

(1) Any property, interest, or benefit under a will of the decedent, or a trust created by or for the benefit of the decedent or in which the decedent has an interest, including any general or special power of appointment conferred by the will or trust on the killer and any nomination of the killer as executor, trustee, guardian, or conservator or custodian made by the will or trust.

(2) Any property of the decedent by intestate succession.

(3) Any of the decedent's quasi-community property the killer would otherwise acquire under Section 101 or 102 upon the death of the decedent.

(4) Any property of the decedent under Part 5 (commencing with Section 5700) of Division 5.

(5) Any property of the decedent under Part 3 (commencing with Section 6500) of Division 6.

(b) In the cases covered by subdivision (a):

(1) The property interest or benefit referred to in paragraph (1) of subdivision (a) passes as if the killer had predeceased the decedent and Section 21110 does not apply.

(2) Any property interest or benefit referred to in paragraph (1) of subdivision (a) which passes under a power of appointment and by reason of the death of the decedent passes as if the killer had predeceased the decedent, and Section ~~1389.4 of the Civil Code~~ *673* does not apply.

(3) Any nomination in a will or trust of the killer as executor, trustee, guardian, conservator, or custodian which becomes effective as a result of the death of the decedent shall be interpreted as if the killer had predeceased the decedent.

Comment. Section 250 is amended to correct a cross-reference.

Prob. Code § 6103 (amended). Application of certain chapters where testator died before January 1, 1985

SEC. ____. Section 6103 of the Probate Code is amended to read:

6103. Except as otherwise specifically provided, Chapter 1 (commencing with Section 6100), Chapter 2 (commencing with Section 6110), Chapter 3 (commencing with Section 6120), Chapter 4 (commencing with Section 6130), ~~Chapter 5 (commencing with Section 6140),~~ Chapter 6 (commencing with Section 6200), and Chapter 7 (commencing with Section 6300) *of this division, and Part 1 (commencing with Section 21101) of Division 11,* do not apply where the testator died before January 1, 1985, and the law applicable prior to

January 1, 1985, continues to apply where the testator died before January 1, 1985.

Comment. Section 6103 is amended to correct a cross-reference. Former Chapter 5 (rules of construction of wills) has been repealed and is superseded by Sections 21101-21140 (rules for interpretation of instruments).

Prob. Code § 6205 (amended). "Descendants"

SEC. ____. Section 6205 of the Probate Code is amended to read:

6205. "Descendants" means children, grandchildren, and their lineal descendants of all generations, with the relationship of parent and child at each generation being determined as provided in Section ~~6152~~ *21115*. A reference to "descendants" in the plural includes a single descendant where the context so requires.

Comment. Section 6205 is amended to correct a cross-reference.

Prob. Code § 6409 (amended). Advancements

SEC. ____. Section 6409 of the Probate Code is amended to read:

6409. (a) If a person dies intestate as to all or part of his or her estate, property the decedent gave during lifetime to an heir is treated as an advancement against that heir's share of the intestate estate only if one of the following conditions is satisfied:

(1) The decedent declares in a contemporaneous writing ~~that the gift is to be deducted from the heir's share of the estate or~~ that the gift is an advancement against the heir's share of the estate *or that its value is to be deducted from the value of the heir's share of the estate*.

(2) The heir acknowledges in writing that the gift is to be so deducted or is an advancement *or that its value is to be deducted from the value of the heir's share of the estate*.

(b) Subject to subdivision (c), the property advanced is to be valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever occurs first.

(c) If the value of the property advanced is expressed in the contemporaneous writing of the decedent, or in an acknowledgment of the heir made contemporaneously with the advancement, that value is conclusive in the division and distribution of the intestate estate.

(d) If the recipient of the property advanced fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue unless the declaration or acknowledgment provides otherwise.

Comment. Section 6409 is amended for conformity with Section 21135. It is consistent with Uniform Probate Code Section 2-109 (1990).

Prob. Code § 11640 (amended). Petition and order

SEC. ____. Section 11640 of the Probate Code is amended to read:

11640. (a) When all debts have been paid or adequately provided for, or if the estate is insolvent, and the estate is in a condition to be closed, the personal representative shall file a petition for, and the court shall make, an order for final distribution of the estate.

(b) The court shall hear and determine and resolve in the order all questions arising under Section ~~6174~~ *21135* (ademption by satisfaction) or Section 6409 (advancements).

(c) If debts remain unpaid or not adequately provided for or if, for other reasons, the estate is not in a condition to be closed, the administration may continue for a reasonable time, subject to Chapter 1 (commencing with Section 12200) of Part 11 (time for closing estate).

Comment. Section 11640 is amended to correct a cross-reference.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Cases in Which Court Reporter Is Required

November 2001

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 *Cases in Which Court Reporter Is Required*, 31 Cal. L. Revision Comm'n Reports 223 (2001). This is part of publication #212 [*2001-2002 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

JOYCE G. COOK, Chairperson
ASSEMBLY MEMBER HOWARD WAYNE, Vice Chairperson
BION M. GREGORY
DAVID HUEBNER
SENATOR BILL MORROW
SANFORD M. SKAGGS

November 15, 2001

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

This recommendation would consolidate the rules governing when a court reporter must be provided in civil and criminal cases. Nonsubstantive revisions would also be made to clarify the application of the statute and related provisions, consistent with existing law.

This recommendation is submitted pursuant to Resolution Chapter 78 of the Statutes of 2001.

Respectfully submitted,

Joyce G. Cook
Chairperson

CASES IN WHICH COURT REPORTER IS REQUIRED

Two closely similar provisions specify when a court reporter is required in a civil or criminal case.[1] These provisions are unnecessarily duplicative and should be consolidated. Nonsubstantive revisions should also be made to clarify the application of the statute and related provisions, consistent with existing law.

Consolidation of Duplicative Provisions

Code of Civil Procedure Section 269(a) governs the use of a court reporter in an unlimited civil case or a felony case.[2]

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1. In its study on revision of the codes to accommodate trial court unification, the Commission recommended further study of the role of court reporters in a county in which the courts have unified. *Trial Court Unification: Revision of Codes,* 28 Cal. L. Revision Comm'n Reports 51, 86 (1998). The Legislature subsequently directed the Commission to undertake such a study. Gov't Code § 70219.

2. Code of Civil Procedure Section 269(a) provides:

> 269. (a) The official reporter of a superior court, or any of them, where there are two or more, shall, at the request of either party, or of the court in a civil case other than a limited civil case, and on the order of the court, the district attorney, or the attorney for the defendant in a felony case, take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, all arraignments, pleas, and sentences of defendants in felony cases, arguments of the prosecuting attorney to the jury, and all statements and remarks made and oral instructions given by the judge. If directed by the court, or requested by either party, the official reporter shall within such reasonable time after the trial of the case as the court may designate, write the transcripts out, or the specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify that the transcripts were correctly reported and transcribed, and when directed by the court, file the transcripts with the clerk of the court.

For the full text of the provision, see "Proposed Legislation" *infra*. Unless otherwise specified, all further statutory references are to the Code of Civil Procedure.

Section 274c governs the use of a court reporter in a limited civil case or a misdemeanor or infraction case.[3]

The only significant difference between these provisions, other than the distinction in cases to which they apply, pertains to who is entitled to request a court reporter in a criminal case. Section 269(a) requires shorthand reporting "on the order of the court, the district attorney, or the attorney for the defendant" in a felony case. In contrast, Section 274c only requires shorthand reporting "on the order of the court" in a misdemeanor or infraction case.

This distinction does not merit two separate code provisions. It is cumbersome to have two substantively similar provisions, one for limited civil cases and misdemeanor and infraction cases, and the other for felony cases and all other civil cases. The provisions should be consolidated into a single section.

The Commission recommends broadening Section 269(a) to apply to all civil and criminal cases, and repealing Section 274c.[4] This would not be a substantive change in the law,

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3. Section 274c provides:

> 274c. Official reporters shall, at the request of either party or of the court in a limited civil case, or on the order of the court in a misdemeanor or infraction case, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas and sentences of defendants in criminal cases, the arguments of the prosecuting attorney to the jury, and all statements and remarks made and oral instructions given by the judge; and if directed by the court, or requested by either party, must, within such reasonable time after the trial of the case as the court may designate, write out the same, or such specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify to the same as being correctly reported and transcribed, and when directed by the court, file the same with the clerk of the court.

4. Section 274c is cross-referenced in Government Code Section 72197. Instead of correcting this cross-reference, the proposed law would repeal Government Code Section 72197, because the provision is obsolete. The provision pertains to temporary reassignment of a court reporter from a superior court to a

because the proposed legislation would continue the current rules on who is entitled to request a court reporter in a criminal case.[5]

Nonsubstantive Clarification of Section 269

Section 269 should also be revised to clarify its application consistent with existing law:

Official reporters pro tempore. The statute should be amended to refer to official reporters "pro tempore," as well as official reporters, as is already done in other provisions.[6]

Arguments to the jury. The existing provisions require that the arguments of "the prosecuting attorney" to the jury be included in the transcript. The statute should be revised to refer simply to the arguments of "the attorneys," consistent with existing practice and with other statutes.[7]

Request of "the district attorney." The statute should be amended to require court reporting at the request of "the prosecution," rather than at the request of "the district attorney," because in some circumstances the Attorney General acts as prosecutor in place of the district attorney.[8]

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municipal court, but the municipal courts no longer exist due to trial court unification. Cal. Const. art. VI, § 5(e).

5. The rules in subdivisions (b) and (c) of Section 269 would not be affected by the Commission's proposal to consolidate Sections 269(a) and 274c. Broadening Section 269(a) to cover limited civil cases and misdemeanor and infraction cases would not change the scope of subdivision (b), because subdivision (b) is expressly limited to felony cases. Similarly, Section 269(c), relating to computer-readable transcripts, involves a distinct subject. It should be converted into a separate section. Neither consolidation of Section 274c with Section 269(a), nor relocation of Section 269(c), would affect the scope of the provision, which applies to all courts and all transcripts.

6. See, e.g., Bus. & Prof. Code § 8016; Code Civ. Proc. § 273; Gov't Code §§ 68105, 68525, 69941, 69944, 69946, 69955.

7. See, e.g., Gov't Code § 72194.5 ("arguments of the attorneys").

8. See Gov't Code § 12553 (disqualification of district attorney); see also Penal Code § 1424 (motion to disqualify district attorney).

Subordinate judicial officer. The statute should be amended to make clear that it requires shorthand reporting regardless of whether a proceeding is conducted by a judge or by another type of judicial officer. The availability of shorthand reporting does not depend on the status of the person conducting a proceeding.[9]

Pro per felony defendant. The statute should be amended to clarify its application to a pro per felony defendant. It should be clear that a felony defendant is entitled to a court reporter on request by the defendant personally, not just on request by the defendant's attorney. This would conform to existing interpretations of the statute.[10]

Transcript for nonparty. The statute should be amended to make clear that a nonparty is generally entitled to obtain a transcript. This is consistent with longstanding practice and other statutory language.[11] It also conforms to constitutional

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9. For an exception to this rule, see Gov't Code § 70141.11 (court reporting for Contra Costa County commissioner).

10. See generally People v. Turner, 67 Cal. App. 4th 1258, 1266, 79 Cal. Rptr. 2d 740 (1998) ("a verbatim record is implicitly among the rights of which a defendant appearing in propria persona must be apprised"); Andrus v. Municipal Court, 143 Cal. App. 3d 1041, 1050, 192 Cal. Rptr. 341 (1983) (California confers right to free verbatim record "in felony proceedings by statute (Code Civ. Proc., § 269)"); *In re* Armstrong, 126 Cal. App. 3d 565, 572, 178 Cal. Rptr. 902 (1981) (a felony defendant "*is*, as a matter of right, entitled to have 'taken down,' all related testimony and oral proceedings") (emphasis in original); People v. Goudeau, 8 Cal. App. 3d 275, 279-80, 87 Cal. Rptr. 424 (1970) ("In California felony proceedings a court reporter must be present if requested by the defendant, the district attorney, or on order of the court. (Code Civ. Proc., § 269.)"); People v. Hollander, 194 Cal. App. 2d 386, 391-93, 14 Cal. Rptr. 917 (1961) (denial of transcript to pro per indigent defendant was prejudicial error).

11. See Section 269(c) (any "court, party, *or person* may request delivery of any transcript in a computer-readable form") (emphasis added). See also Government Code Section 69950, which refers to the fee for a copy of a transcript for "*any other person*," but also refers to the fee for "each copy for the *party* buying the original made at the same time." (Emphasis added.) A conforming revision would replace "party" with "court, party, or other person" in this provision.

constraints.[12] A nonparty is entitled to a transcript of a proceeding that was open to the public,[13] a proceeding that was erroneously closed to the public,[14] and a proceeding that was properly closed, once the reasons for closure are no longer viable.[15]

Computer-readable transcript. The statute should be amended to convert the provision on computer-readable transcripts[16] into a separate section,[17] because it concerns a distinct subject. Revisions should also be made to clarify how the provision applies where a transcript is corrected, and to make clear that a computer-readable version of a transcript is available only where a person is entitled to a hard-copy version.

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12. See, e.g., Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (media request for transcript of preliminary hearing); Fisher v. King, 232 F.3d 391, 397 (4th Cir. 2000) (general public and press "enjoy a qualified right of access under the First Amendment to criminal proceedings *and the transcripts thereof*") (emphasis added); United States v. Antar, 38 F.3d 1348, 1360-61 (3d Cir. 1994) ("First Amendment right of access must extend equally to transcripts as to live proceedings"); United States v. Berger, 990 F. Supp. 1054, 1057 (C.D. Ill. 1998) ("There is no question that a written transcript of the Governor's deposition would be made available to the public upon the admission of his testimony before the jury."); State *ex rel*. Scripps Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas, 73 Ohio St. 3d 19, 21, 652 N.E.2d 179 (1995) (right of access "includes both the live proceedings and the transcripts which document those proceedings"); see also NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999) (constitutional right of access applies to civil as well as criminal cases).

13. See *Scripps Howard Broadcasting Co.,* 73 Ohio St. 3d at 21 (transcript of contempt proceeding that was open to the public); see also *Antar*, 38 F.3d at 1359-61 (transcript where court requested but did not order press to leave courtroom).

14. See generally *Press-Enterprise Co*., 478 U.S. at 15.

15. See United States v. Ellis, 90 F.3d 447, 450 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997); Phoenix Newspapers, Inc. v. United States Dist. Court, 156 F.3d 940, 947-48 (9th Cir. 1998).

16. Section 269(c).

17. See proposed Section 271 *infra*.

Nonsubstantive Clarification of Related Provisions

Similar nonsubstantive revisions should be made in a number of provisions related to Sections 269 and 274c:

Transcription fee. Government Code Section 69950 governs transcription fees. It should be amended to reflect changes in technology and conform to the rule that a nonparty is generally entitled to obtain a transcript.

Trial court unification. Penal Code Section 190.9 includes a cross-reference to Section 269 that requires correction. The provision also needs to be revised to reflect unification of the municipal and superior courts.[18] Similarly, Government Code Section 72197 includes a cross-reference to Section 274c, but the statute should be repealed due to trial court unification.

Transcript of special hearing on suppression motion in felony case. Penal Code Section 1539, concerning preparation of the transcript of a special hearing on a suppression motion, also requires revisions to reflect trial court unification. Before unification, the superior court conducted special hearings in felony cases, but not special hearings in misdemeanor cases.[19] Because Penal Code Section 1539 was limited to a "special hearing in the superior court," it applied only to a special hearing in a felony case. After unification, however, the superior court conducts special hearings in misdemeanor cases, as well as special hearings in felony cases.[20] To make clear that Penal Code Section 1539 still applies only to a special hearing in a felony case, it should be amended to refer to

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18. The last remaining municipal court was eliminated on February 8, 2001, when the municipal and superior courts in Kings County unified.

19. See former Penal Code § 1538.5 (1997 Cal. Stat. ch. 279, § 3).

20. See Penal Code § 1538.5 & Comment.

"a special hearing in a felony case," instead of "a special hearing in the superior court."[21]

Scope and Effect of Proposal

The proposed legislation would not change the extent to which court reporters may be used in the courts. It is a nonsubstantive proposal, intended to aid courts and practitioners by simplifying and clarifying existing law concerning when a court reporter is required.

The recommendation does not address the following significant issues related to court reporting, some of which may be the subject of future Commission recommendations:

(1) Whether the defendant in a misdemeanor or infraction case should be entitled to request shorthand reporting.[22]

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21. Penal Code Section 1539 does not address whether a defendant is entitled to shorthand or other verbatim reporting of a special hearing in a misdemeanor case pursuant to the United States Constitution, California Constitution, or other statutory provision. The proposed Comment provides citations to cases on shorthand reporting in misdemeanor cases.

The proposed amendment would also revise the statute to reflect elimination of the county clerk's role as ex officio clerk of the superior court. See former Gov't Code § 26800 (county clerk acting as clerk of superior court). As part of trial court funding reform, the powers, duties, and responsibilities formerly exercised by the county clerk as ex officio clerk of the court are now delegated to the court administrative or executive officer, and the county clerk has been relieved of those powers, duties, and responsibilities. See Gov't Code §§ 69840 (powers, duties, and responsibilities of clerk of court), 71620 (trial court personnel).

22. For cases relating to the extent to which a defendant may be constitutionally entitled to a verbatim record at public expense in a misdemeanor case, see Ryan v. Commission on Judicial Performance, 45 Cal. 3d 518, 541-42, 754 P.2d 724, 247 Cal. Rptr. 378 (1988); Andrus v. Municipal Court, 143 Cal. App. 3d 1041, 1049-56, 192 Cal. Rptr. 341 (1983); *In re* Armstrong, 126 Cal. App. 3d 565, 178 Cal. Rptr. 902 (1981). For use of electronic recording (as opposed to shorthand reporting) to create a verbatim record in a misdemeanor case, see Gov't Code § 72194.5; *In re* Armstrong, 126 Cal. App. 3d at 575.

(2) Whether statutes authorizing the court to order the county treasurer to pay transcript fees are obsolete in light of recent changes in trial court funding.[23]

(3) Whether distinctions in the superior and municipal court procedures for charging, depositing, and paying court reporter fees, and other statutes providing special rules for municipal courts, should be maintained in a unified court.[24]

(4) Whether the statutes governing reporters and their fees in various counties require revision.[25]

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23. See, e.g., Gov't Code §§ 69952, 70131. The Legislature has directed the Commission to review these statutes, among others, and make recommendations to the Legislature as to their disposition. Gov't Code § 71674. Although both of these provisions refer to Code of Civil Procedure Section 269, neither would be affected by consolidation of Sections 269(a) and 274c. The cross-references incorporate matters required by Section 269 to be included in a transcript, not cases in which a transcript may be ordered.

24. See, e.g., Gov't Code § 68086 (procedures for court reporter fees). The Commission is reviewing the codes for provisions that are obsolete due to the unification of the municipal and superior courts in every county. See Gov't Code § 71674; 2001 Cal. Stat. res. ch. 78.

25. The Commission has previously identified this as a matter requiring further legislative attention. "Among the county-specific statutes that must be harmonized in a county in which the courts unify are those governing appointment and compensation of municipal court reporters, and regulating their fees." *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 77 (1998). The Legislature has directed the Commission to review these statutes, among others, and make recommendations to the Legislature as to their disposition. Gov't Code § 71674.

PROPOSED LEGISLATION

Code Civ. Proc. § 269 (amended). Reporting of cases

SECTION 1. Section 269 of the Code of Civil Procedure is amended to read:

269. (a) ~~The official reporter of a superior court, or any of them, where there are two or more, shall, at the request of either party, or of the court in a civil case other than a limited civil case, and on the order of the court, the district attorney, or the attorney for the defendant in a felony case,~~ *An official reporter or official reporter pro tempore of the superior court shall* take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, ~~all~~ arraignments, pleas, ~~and~~ sentences ~~of defendants in felony cases~~, arguments of the ~~prosecuting attorney~~ *attorneys* to the jury, and ~~all~~ statements and remarks made and oral instructions given by the ~~judge. If directed~~ *judge or other judicial officer, in the following cases:*

(1) In a civil case, on order of the court or at the request of a party.

(2) In a felony case, on order of the court or at the request of the prosecution, the defendant, or the attorney for the defendant.

(3) In a misdemeanor or infraction case, on order of the court.

(b) Where a transcript is ordered by the court~~,~~ or requested by ~~either~~ *a* party, *or where a nonparty requests a transcript that the nonparty is entitled to receive, regardless of whether the nonparty was permitted to attend the proceeding to be transcribed,* the official reporter *or official reporter pro tempore* shall, within ~~such~~ *a* reasonable time after the trial of the case ~~as~~ *that* the court ~~may designate~~ *designates*, write the transcripts out, or the specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify that the transcripts were

correctly reported and transcribed, and when directed by the court, file the transcripts with the clerk of the court.

~~(b)~~

(c) In any case where a defendant is convicted of a felony, after a trial on the merits, the record on appeal shall be prepared immediately after the verdict or finding of guilt is announced unless the court determines that it is likely that no appeal from the decision will be made. The court's determination of a likelihood of appeal shall be based upon standards and rules adopted by the Judicial Council.

~~(c) Any court, party, or person may request delivery of any transcript in a computer-readable form, except that an original transcript shall be on paper. A copy of the original transcript ordered within 120 days of the filing or delivery of the transcript by the official reporter shall be delivered in computer-readable form upon request if the proceedings were produced utilizing computer-aided transcription equipment. Except as modified by standards adopted by the Judicial Council, the computer-readable transcript shall be on disks in standard ASCII code unless otherwise agreed by the reporter and the court, party, or person requesting the transcript. Each disk shall be labeled with the case name and court number, the dates of proceedings contained on the disk, and the page and volume numbers of the data contained on the disk. Each disk as produced by the court reporter shall contain the identical volume divisions, pagination, line numbering, and text of the certified original paper transcript or any portion thereof. Each disk shall be sequentially numbered within the series of disks.~~

Comment. Subdivision (a) of Section 269 is amended to:

(1) Continue former Section 274c without substantive change.

(2) Refer to official reporters pro tempore, as well as official reporters. This is not a substantive change. See Gov't Code § 69941 (appointment of official reporter and official reporter pro tempore).

(3) Substitute "arguments of the attorneys" for "arguments of the prosecuting attorney," consistent with standard practice. See, e.g., Gov't Code § 72194.5 ("arguments of the attorneys").

(4) Substitute "prosecution" for "district attorney," to reflect that the Attorney General sometimes acts as prosecutor in place of the district attorney. See Gov't Code § 12553 (disqualification of district attorney); see also Penal Code § 1424 (motion to disqualify district attorney).

(5) Make clear that it requires shorthand reporting regardless of whether a proceeding is conducted by a judge or by another type of judicial officer (e.g., a commissioner). For an exception to this rule, see Gov't Code § 70141.11 (court reporting for Contra Costa County commissioner).

(6) Make clear that a felony defendant, whether represented by counsel or in pro per, is entitled to a court reporter on request by the defendant personally or by the defendant's attorney (if any). This is not a substantive change. See generally People v. Turner, 67 Cal. App. 4th 1258, 1266, 79 Cal. Rptr. 2d 740 (1998) ("verbatim record is implicitly among the rights of which a defendant appearing in propria persona must be apprised"); Andrus v. Municipal Court, 143 Cal. App. 3d 1041, 1050, 192 Cal. Rptr. 341 (1983) (California confers right to free verbatim record "in felony proceedings by statute (Code Civ. Proc., § 269)."); *In re* Armstrong, 126 Cal. App. 3d 565, 572, 178 Cal. Rptr. 902 (1981) (felony defendant "*is*, as a matter of right, entitled to have 'taken down,' all related testimony and oral proceedings") (emphasis in original); People v. Goudeau, 8 Cal. App. 3d 275, 279-80, 87 Cal. Rptr. 424 (1970) ("In California felony proceedings a court reporter must be present if requested by the defendant, the district attorney, or on order of the court. (Code Civ. Proc., § 269.)"); People v. Hollander, 194 Cal. App. 2d 386, 391-93, 14 Cal. Rptr. 917 (1961) (denial of transcript to pro per indigent defendant was prejudicial error).

Subdivision (b) is amended to make clear that a nonparty is generally entitled to request preparation of a transcript. This is consistent with longstanding practice and conforms to constitutional constraints. See, e.g., Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (media request for transcript of preliminary hearing); Fisher v. King, 232 F.3d 391, 397 (4th Cir. 2000) (general public and press "enjoy a qualified right of access under the First Amendment to criminal proceedings *and the transcripts thereof*") (emphasis added); United States v. Antar, 38 F.3d 1348, 1360-61 (3d Cir. 1994) ("First Amendment right of access must extend equally to transcripts as to live proceedings"); United States

v. Berger, 990 F. Supp. 1054, 1057 (C.D. Ill. 1998) ("There is no question that a written transcript of the Governor's deposition would be made available to the public upon the admission of his testimony before the jury."); State *ex rel.* Scripps Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas, 73 Ohio St. 3d 19, 21, 652 N.E.2d 179 (1995) (right of access "includes both the live proceedings and the transcripts which document those proceedings"); see also NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999) (constitutional right of access applies to civil as well as criminal cases). A nonparty is entitled to a transcript of (1) a proceeding that was open to the public, see *Scripps Howard Broadcasting*, 73 Ohio St. 3d at 21; (2) a proceeding that was erroneously closed to the public, see generally *Press-Enterprise*, 478 U.S. at 15; and (3) a proceeding that was properly closed, once "the competing interests precipitating closure are no longer viable," see Phoenix Newspapers, Inc. v. United States Dist. Court, 156 F.3d 940, 947-48 (9th Cir. 1998).

Subdivision (b) is also amended to refer to official reporters pro tempore, as well as official reporters.

Former subdivision (c) is continued in Section 271 without substantive change.

The other revisions in Section 269 are technical, nonsubstantive changes.

Code Civ. Proc. § 271 (added). Computer-readable transcripts

SEC. 2. Section 271 is added to the Code of Civil Procedure, to read:

271. (a) Any court, party, or other person entitled to a transcript may request that it be delivered in computer-readable form, except that an original transcript shall be on paper. A copy of the original transcript ordered within 120 days of the filing or delivery of the transcript by the official reporter or official reporter pro tempore shall be delivered in computer-readable form upon request if the proceedings were produced utilizing computer-aided transcription equipment.

(b) Except as modified by standards adopted by the Judicial Council, the computer-readable transcript shall be on disks in standard ASCII code unless otherwise agreed by the reporter and the court, party, or other person requesting the transcript.

Each disk shall be labeled with the case name and court number, the dates of proceedings contained on the disk, and the page and volume numbers of the data contained on the disk. Except where modifications are necessary to reflect corrections of a transcript, each disk as produced by the official reporter shall contain the identical volume divisions, pagination, line numbering, and text of the certified original paper transcript or any portion thereof. Each disk shall be sequentially numbered within the series of disks.

Comment. Section 271 continues former Section 269(c) without change, except to insert subdivisions, refer to official reporters pro tempore as well as official reporters, make clear that a computer-readable version of a transcript is available only where a person is entitled to a hard-copy version, and clarify how the provision applies where a transcript is corrected. These revisions are nonsubstantive. See Gov't Code § 69941 (appointment of official reporter and official reporter pro tempore).

Code Civ. Proc. § 274c (repealed). Reporting of limited civil cases and misdemeanor and infraction cases

SEC. 3. Section 274c of the Code of Civil Procedure is repealed.

~~274c. Official reporters shall, at the request of either party or of the court in a limited civil case, or on the order of the court in a misdemeanor or infraction case, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas and sentences of defendants in criminal cases, the arguments of the prosecuting attorney to the jury, and all statements and remarks made and oral instructions given by the judge; and if directed by the court, or requested by either party, must, within such reasonable time after the trial of the case as the court may designate, write out the same, or such specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify to the same as being correctly reported and~~

~~transcribed, and when directed by the court, file the same with the clerk of the court.~~

Comment. Former Section 274c is continued in Section 269(a) without substantive change.

Gov't Code § 69950 (amended). Transcription fee

SEC. 4. Section 69950 of the Government Code is amended to read:

69950. *(a)* The fee for transcription for original ribbon *or printed* copy is eighty-five cents ($0.85) for each 100 words, and for each copy ~~for the party buying the original made~~ *purchased* at the same time *by the court, party, or other person purchasing the original*, fifteen cents ($0.15) for each 100 words.

(b) The fee for a first copy to any *court, party, or* other person *who does not simultaneously purchase the original* shall be twenty cents ($0.20) for each 100 words, and for each additional copy, ~~made~~ *purchased* at the same time, fifteen cents ($0.15) for each 100 words.

Comment. Section 69950 is amended to conform to the rule that a nonparty is generally entitled to obtain a transcript. See Code Civ. Proc. § 269 & Comment.

The section is also amended to reflect changes in technology. When the provision was first enacted, carbon paper was still in use and it was routine to create a copy at the same time as the original. Now the original typically is made first, then copied.

The section is further amended to specify the fee where the person who purchases the original subsequently (as opposed to simultaneously) purchases a copy.

Gov't Code § 72197 (repealed). Duties on assignment to municipal court

SEC. 5. Section 72197 of the Government Code is repealed.

~~72197. Whenever such request has been granted and any official reporter of the superior court has been assigned to act as a pro tempore phonographic reporter of the municipal court, such reporter shall, during the period of such~~

~~assignment to the municipal court, perform the duties of an official reporter of such municipal court and during the time of any such assignment such reporter shall be subject to the provisions of Sections 69942 to 69955, inclusive, and Sections 273 and 274c of the Code of Civil Procedure.~~

Comment. Section 72197 is repealed to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

Penal Code § 190.9 (amended). Record in death penalty cases

SEC. 6. Section 190.9 of the Penal Code is amended to read:

190.9. (a)(1) In any case in which a death sentence may be imposed, all proceedings conducted in the ~~municipal and~~ superior ~~courts~~ *court*, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present. The court reporter shall prepare and certify a daily transcript of all proceedings commencing with the preliminary hearing. Proceedings prior to the preliminary hearing shall be reported but need not be transcribed until the ~~municipal or superior~~ court receives notice as prescribed in paragraph (2) of subdivision (a).

(2) Upon receiving notification from the prosecution that the death penalty is being sought, the ~~superior court shall notify the court in which the preliminary hearing took place. Upon this notification, the court in which the preliminary hearing took place~~ *clerk* shall order the transcription and preparation of the record of all proceedings prior to and including the preliminary hearing in the manner prescribed by the Judicial Council in the rules of court. The record of all proceedings prior to and including the preliminary hearing shall be certified by the court no later than 120 days following notification ~~by the superior court~~ unless the ~~superior court grants an extension of~~ time *is extended* pursuant to rules of

court adopted by the Judicial Council. Upon certification, ~~the court in which the preliminary hearing took place shall forward the record to the superior court for incorporation~~ *the record of all proceedings is incorporated* into the superior court record.

(b)(1) The court shall assign a court reporter who uses computer-aided transcription equipment to report all proceedings under this section.

(2) Failure to comply with the requirements of this section relating to the assignment of court reporters who use computer-aided transcription equipment shall not be a ground for reversal.

(c) Any computer-readable transcript produced by court reporters pursuant to this section shall conform to the requirements of ~~subdivision (c) of Section 269~~ *Section 271* of the Code of Civil Procedure.

Comment. Subdivision (a) of Section 190.9 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

Subdivision (a) is also amended to make clear that the clerk of the superior court is responsible for ordering transcription and preparation of the record in a death penalty case.

Subdivision (c) is amended to correct a cross-reference. The substance of former Code of Civil Procedure Section 269(c) is continued in Code of Civil Procedure Section 271.

Penal Code § 1539 (amended). Transcript of special hearing

SEC. 7. Section 1539 of the Penal Code is amended to read:

1539. (a) If a special hearing be held in ~~the superior court~~ *a felony case* pursuant to Section 1538.5, or if the grounds on which the warrant was issued be controverted and a motion to return property be made (i) by a defendant on grounds not covered by Section 1538.5; (ii) by a defendant whose property has not been offered or will not be offered as evidence against ~~him~~ *the defendant*; or (iii) by a person who is not a defendant in a criminal action at the time the hearing

is held, the judge or magistrate must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated by a shorthand reporter in the manner prescribed in Section 869.

(b) The reporter shall forthwith transcribe ~~his~~ *the reporter's* shorthand notes pursuant to this section if any party to a special hearing in ~~the superior court~~ *a felony case* files a written request for its preparation with the clerk of the court in which the hearing was held. The reporter shall forthwith file in the superior court an original and as many copies thereof as there are defendants (other than a fictitious defendant) or persons aggrieved. The reporter shall be entitled to compensation in accordance with the provisions of Section 869. In every case in which a transcript is filed as provided in this section, the ~~county~~ clerk *of the court* shall deliver the original of such transcript so filed ~~with him~~ to the district attorney immediately upon receipt thereof and shall deliver a copy of such transcript to each defendant (other than a fictitious defendant) upon demand ~~by him~~ without cost to ~~him~~ *the defendant*.

(c) Upon a motion by a defendant pursuant to this chapter, the defendant shall be entitled to discover any previous application for a search warrant in the case which was refused by a magistrate for lack of probable cause.

Comment. Section 1539 is amended to make clear that it applies only to a special hearing in a felony case pursuant to Section 1538.5. This implements the principle that trial court unification did not change the extent to which court reporter services or electronic reporting is used in the courts. 1998 Cal. Stat. ch. 931, § 507; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 60 (1998); see also 1997 Cal. Stat. ch. 279, § 3 (former Section 1538.5(g), (i)).

As before unification, Section 1539 does not address whether shorthand or other verbatim reporting is required at a special hearing in a misdemeanor case pursuant to the state or federal Constitution or some other provision of law. For cases relating to the extent to which a defendant may be constitutionally entitled to a verbatim record at public expense in a misdemeanor case, see Ryan v. Commission on Judicial

Performance, 45 Cal. 3d 518, 541-42, 754 P.2d 724, 247 Cal. Rptr. 378 (1988); Andrus v. Municipal Court, 143 Cal. App. 3d 1041, 1049-56, 192 Cal. Rptr. 341 (1983); *In re* Armstrong, 126 Cal. App. 3d 565, 178 Cal. Rptr. 902 (1981).

Section 1539 is also amended to reflect elimination of the county clerk's role as ex officio clerk of the superior court. See former Gov't Code § 26800 (county clerk acting as clerk of superior court). The powers, duties, and responsibilities formerly exercised by the county clerk as ex officio clerk of the court are delegated to the court administrative or executive officer, and the county clerk is relieved of those powers, duties, and responsibilities. See Gov't Code §§ 69840 (powers, duties, and responsibilities of clerk of court), 71620 (trial court personnel).

Uncodified (added). Effect of act

SEC. 8. Nothing in this act is intended to change the extent to which official reporter services or electronic reporting may be used in the courts.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Electronic Communications and Evidentiary Privileges

February 2002

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 *Electronic Communications and Evidentiary Privileges*, 31 Cal. L. Revision Comm'n Reports 245 (2001). This is part of publication #212 [*2001-2002 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

JOYCE G. COOK, Chairperson
ASSEMBLY MEMBER HOWARD WAYNE, Vice Chairperson
DAVID HUEBNER
SENATOR BILL MORROW

February 11, 2002

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

The Law Revision Commission recommends revision of Evidence Code provisions to make clear that (1) a privileged communication does not lose its privileged status simply because it is transmitted electronically, and (2) the statutory presumption of confidentiality and statutory waiver requirements apply to newly created privileges. Evid. Code §§ 912, 917, 952.

This recommendation is submitted pursuant to Resolution Chapter 78 of the Statutes of 2001.

Respectfully submitted,

Joyce G. Cook
Chairperson

ELECTRONIC COMMUNICATIONS AND EVIDENTIARY PRIVILEGES

The Law Revision Commission has initiated a review of the Evidence Code to determine whether existing provisions are satisfactory in their application to electronic communications.[1] Pursuant to that review, legislation was enacted on Commission recommendation to repeal the Best Evidence Rule[2] and replace it with the Secondary Evidence Rule.[3] The Commission now recommends that the Evidence Code provisions governing privileges for communications made in confidence between persons in specified relationships ("confidential communication privileges") be standardized in their application to electronic communications.

Confidentiality of Electronic Communications

Evidence Code Section 952 defines a confidential communication for purposes of the lawyer-client privilege. The provision was revised in 1994 to add a sentence stating, "A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer."[4] This language addresses the potential argument

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1. See Harvey, *The Need for Evidence Code Revisions To Accommodate Electronic Communication and Storage* (Background Study, June 2000). The background study may be obtained from the Commission's website at <http://www.clrc.ca.gov/pub/Printed-Reports/BKST-811-HarveyElecEvid.pdf>.

2. See *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369 (1996).

3. See Evid. Code § 1521; 1998 Cal. Stat. ch. 100. Unless otherwise indicated, all further statutory references are to the Evidence Code.

4. 1994 Cal. Stat. ch. 587, § 9. This was a noncontroversial reform in an omnibus civil practice bill authored by the Assembly Judiciary Committee. It has been praised in commentary. See O'Neil III, et al., *Detours on the Informa-*

that, because an electronic communication between a lawyer and client is subject to interception, it is not confidential and thus not protected by the lawyer-client privilege.

This potential argument applies to all of the confidential communication privileges, not just the lawyer-client privilege. But the addition of the language on electronic communications in the lawyer-client privilege, combined with the lack of such language in comparable provisions for other relationships,[5] provides grounds for an argument that there is no confidentiality and therefore no privilege for an electronic communication made in the course of any other relationship.

To negate that potential argument, the language on confidentiality of an electronic communication should be removed from Section 952 and generalized in Section 917, which creates a presumption of confidentiality for communications made in privileged relationships.[6] The Commission further

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tion Superhighway: The Erosion of Evidentiary Privileges in Cyberspace & Beyond, 1997 Stan. Tech. L. Rev. 3:

> This legislation is a useful model because it is broad enough to encompass new and emerging technologies and to remove the need for judicial evaluation of these technologies. Most importantly, it provides the protection necessary to allow lawyers and their clients to freely and efficiently use new technologies without risk of waiver.

5. See Sections 980 (confidential marital communication), 992 (confidential communication between patient and physician), 1012 (confidential communication between patient and psychotherapist), 1032 (penitential communication), 1035.4 (confidential communication between sexual assault victim and counselor), 1037.2 (confidential communication between domestic violence victim and counselor).

6. New York has a provision along these lines. See N.Y. C.P.L.R. 4548 (McKinney 2001) ("No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication."). See also 18 U.S.C. § 2517(4) ("No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.").

recommends that references to specific modes of communication (e.g., email, facsimile, cellular telephone, or cordless telephone) be omitted from the statute, and that a broad definition of "electronic" be included.[7] By using generic terminology, the proposed legislation would provide flexibility to accommodate new technologies.

Newly Created Privileges

Generalization of the language on electronic communications exposes a flaw in the drafting of Section 917. The provision creates a presumption of confidentiality for communica-

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7. The proposed definition of "electronic" is the same as in the Uniform Electronic Transactions Act (1999), which was enacted in California as Civil Code Sections 1633.1-1633.17. The comment to Section 2 of the Uniform Electronic Transactions Act (Civ. Code § 1633.2) states:

> **"Electronic."** The basic nature of most current technologies and the need for a recognized, single term warrants the use of "electronic" as the defined term. The definition is intended to assure that the Act will be applied broadly as new technologies develop. The term must be construed broadly in light of developing technologies in order to fulfill the purpose of this Act to validate commercial transactions regardless of the medium used by the parties. Current legal requirements for "writings" can be satisfied by almost any tangible media, whether paper, other fibers, or even stone. The purpose and applicability of this Act covers intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form, but which lack the tangible aspect of paper, papyrus or stone.
>
> While not all technologies listed are technically "electronic" in nature (e.g., optical fiber technology), the term "electronic" is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. However, whether a particular technology may be characterized as technically "electronic," i.e., operates on electromagnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered by this Act. This act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form.

tions made in the specific relationships that were mentioned in the Evidence Code when the code was created in 1965. At that time, the only confidential communication privileges contained in the code were the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, and husband-wife privileges. Since then, the Legislature has created two additional confidential communication privileges: A privilege for confidential communications between a sexual assault victim and counselor,[8] and a privilege for confidential communications between a domestic violence victim and counselor.[9]

Under Section 917, a communication made in the course of one of the listed relationships is presumed to have been made in confidence, and the party opposing a claim of privilege has the burden to establish that the communication was not confidential. The policy considerations underlying this presumption apply equally to all of the confidential communication privileges.[10] The provision should be revised to make clear

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8. Sections 1035-1036.2.

9. Sections 1037-1037.7.

10. The 1965 Comment to Section 917 explains the policy considerations and discusses the effect of the presumption:

> A number of sections provide privileges for communications made "in confidence" in the course of certain relationships. Although there appear to have been no cases involving the question in California, the general rule elsewhere is that a communication made in the course of such a relationship is presumed to be confidential and the party objecting to the claim of privilege has the burden of showing that it was not. [Citations omitted.]
>
> If the privilege claimant were required to show that the communication was made in confidence, he would be compelled, in many cases, to reveal the subject matter of the communication in order to establish his right to the privilege. Hence, Section 917 is included to establish a presumption of confidentiality, if this is not already the existing law in California. See Sharon v. Sharon, 79 Cal. 633, 678, 22 Pac. 26, 40 (1889) (attorney-client privilege); Hager v. Shindler, 29 Cal. 47, 63 (1865) ("*Prima facie*, all communications made by a client to his

that the presumption of confidentiality applies to all of the confidential communications privileges.

Similarly, the provision governing waiver of a privilege (Section 912) should be revised to make clear that it applies to the privilege for confidential communications between a domestic violence victim and counselor. The provision has already been amended to include the privilege for confidential communications between a sexual assault victim and counselor.

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attorney or counsel [in the course of that relationship] must be regarded as confidential.").

To overcome the presumption, the proponent of the evidence must persuade the presiding officer that the communication was not made in confidence. Of course, if the facts show that the communication was not intended to be kept in confidence, the communication is not privileged. See Solon v. Lichtenstein, 39 Cal. 2d 75, 244 P.2d 907 (1952). And the fact that the communication was made under circumstances where others could easily overhear is a strong indication that the communication was not intended to be confidential and is, therefore, unprivileged. See Sharon v. Sharon, 79 Cal. 633, 677, 22 Pac. 26, 39 (1889); People v. Castiel, 153 Cal. App. 2d 653, 315 P.2d 79 (1957).

PROPOSED LEGISLATION

Evid. Code § 912 (amended). Waiver

SECTION 1. Section 912 of the Evidence Code is amended to read:

912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), ~~or~~ 1035.8 (sexual assault victim-counselor privilege)*, or 1037.5 (domestic violence victim-counselor privilege)* is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), ~~or~~ 1035.8 (sexual assault victim-counselor privilege), *or 1037.5 (domestic violence victim-counselor privilege),* a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), ~~or~~ 1035.8 (sexual assault victim-counselor privilege), *or 1037.5 (domestic violence victim-counselor privilege),* when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, ~~or~~ sexual assault counselor*, or domestic violence counselor* was consulted, is not a waiver of the privilege.

Comment. Section 912 is amended to make clear that it applies to the privilege for confidential communications between a domestic violence victim and counselor, which did not exist when the statute was originally enacted in 1965. See Sections 1037-1037.7 (domestic violence victim).

Evid. Code § 917 (amended). Presumption of confidentiality

SEC. 2. Section 917 of the Evidence Code is amended to read:

917. *(a)* Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, ~~or~~ husband-wife*, sexual assault victim-counselor, or domestic violence victim-counselor* relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

(b) A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character solely because it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.

(c) For purposes of this section, "electronic" has the meaning provided in Section 1633.2 of the Civil Code.

Comment. Subdivision (a) of Section 917 is amended to make clear that it also applies to confidential communication privileges created after its original enactment in 1965. See Sections 1035-1036.2 (sexual assault victim), 1037-1037.7 (domestic violence victim). The presumption set forth in subdivision (a) applies regardless of how a communication is transmitted. In each instance, the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

Subdivision (b) is drawn from New York law (N.Y. C.P.L.R. 4548 (McKinney 2001)) and from language formerly found in Section 952 relating to confidentiality of an electronic communication between a client and a lawyer. For waiver of privileges, see Section 912 & Comment.

Under subdivision (c), the definition of "electronic" is broad, including any "intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form." Unif. Electronic Transactions Act, § 2 comment (1999) (enacted as Civ. Code § 1633.2).

For discussion of ethical considerations where a lawyer communicates with a client by electronic means, see Bus. & Prof. Code § 6068(e) (attorney has duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client"); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 99-413 ("Protecting the Confidentiality of Unencrypted E-Mail"); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 92-368 ("Inadvertent Disclosure of Confidential Materials").

For examples of provisions on the admissibility of electronic communications, see Evid. Code §§ 1521 & Comment (Secondary Evidence Rule), 1552 (printed representation of computer information or computer program), 1553 (printed representation of images stored on video or digital medium); Civ. Code § 1633.13 ("In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form."). See also People v. Martinez, 22 Cal. 4th 106, 990 P.2d 563, 91 Cal. Rptr. 2d 687 (2000); People v. Hernandez, 55 Cal. App. 4th 225, 63 Cal. Rptr. 2d 769 (1997); Aguimatang v. California State Lottery, 234 Cal. App. 3d 769, 286 Cal. Rptr. 57 (1991); People v. Lugashi, 205 Cal. App. 3d 632, 252 Cal. Rptr. 434 (1988).

Evid. Code § 952 (amended). "Confidential communication between client and lawyer" defined

SEC. 3. Section 952 of the Evidence Code is amended to read:

952. As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. ~~A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer.~~

Comment. Section 952 is amended to delete the last sentence concerning confidentiality of electronic communications, because this rule is generalized in Section 917(b)-(c) applicable to all confidential communication privileges.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Administrative Rulemaking Refinements

February 2002

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 *Administrative Rulemaking Refinements*, 31 Cal. L. Revision Comm'n Reports 259 (2001). This is part of publication #212 [*2001-2002 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

JOYCE G. COOK, Chairperson
ASSEMBLY MEMBER HOWARD WAYNE, Vice Chairperson
DAVID HUEBNER
SENATOR BILL MORROW

February 11, 2002

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

The Law Revision Commission has previously proposed a number of improvements to the law governing rulemaking by state administrative agencies. This recommendation proposes additional refinements, which include the following:

- Clarification of the requirement that an agency consider reasonable alternatives to a proposed rulemaking action.
- Clarification of the requirement that an agency answer substantive inquiries regarding a proposed rulemaking action.
- Revision of the existing Internet publication requirement, to require posting of the text of a proposed emergency rulemaking action and to specify when and for how long documents must be posted.

This recommendation is submitted pursuant to Resolution Chapter 78 of the Statutes of 2001.

Respectfully submitted,

Joyce G. Cook
Chairperson

ADMINISTRATIVE RULEMAKING REFINEMENTS

The Law Revision Commission has recommended a number of reforms of the law governing rulemaking by state administrative agencies.[1] Most of these recommendations have been enacted into law.[2] This recommendation addresses rulemaking issues not previously considered by the Commission.

Description of Alternatives

Existing law requires that an agency describe reasonable alternatives to a rulemaking action it is proposing, as well as separately describing reasonable alternatives that would lessen any adverse impact on small business.[3] However, an agency is not required "to artificially construct alternatives or to justify why it has not identified alternatives."[4] Although this limitation on the duty to describe alternatives appears to apply to both types of "reasonable alternatives," there is some ambiguity on this point. The proposed law would redraft the limitation provision to make its application clear. The proposed law would also revise the provision requiring a description of alternatives that would lessen any adverse impact on small business so that it more closely parallels the provision requiring a description of reasonable alternatives generally.

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1. See *Administrative Rulemaking: Consent Regulations and other Noncontroversial Regulations*, 28 Cal. L. Revision Comm'n Reports 625 (1998); *Administrative Rulemaking: Advisory Interpretations*, 28 Cal. L. Revision Comm'n Reports 657 (1998); *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 469 (1999); *Improving Access to Rulemaking Information*, 30 Cal. L. Revision Comm'n Reports 517 (2001); *Administrative Rulemaking Cleanup*, 30 Cal. L. Revision Comm'n Reports 533 (2001); *Rulemaking Under Penal Code Section 5058*, 30 Cal. L. Revision Comm'n Reports 545 (2001).

2. See 2000 Cal. Stat. ch. 1060; 2001 Cal. Stat. ch. 59; 2001 Cal. Stat. ch. 141.

3. Gov't Code § 11346.2(b)(3).

4. *Id.*

Designation of Agency Representative

Existing law requires that the notice of proposed rulemaking action designate an agency representative to whom inquiries regarding the proposed rulemaking action may be directed, and, "where appropriate," designate a person to respond to substantive questions regarding the proposed rulemaking action.[5] It is not clear whether the phrase "where appropriate" vests discretion in the rulemaking agency to determine whether to designate a substantive contact. This ambiguity may lead to disputes where an agency has decided that designation of a substantive contact is not appropriate. The proposed law would delete the ambiguous provision and add a new provision requiring that any question that an agency representative cannot answer be referred to another person in the agency for a prompt response.

Internet Publication

Existing law requires that an agency that maintains an Internet Web site publish certain rulemaking documents.[6] The proposed law would expand this requirement to include publication of: (1) the text of a proposed emergency rulemaking action, and (2) the date the proposed emergency rulemaking action is submitted to the Office of Administrative Law. Existing law provides a very abbreviated opportunity for public comment regarding an emergency rulemaking action.[7] Internet posting of information regarding a proposed emergency rulemaking action would enhance the opportunity for public review and comment, without significantly delaying the emergency rulemaking process.

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5. Gov't Code § 11346.5(a)(14).

6. Gov't Code § 11340.85(c).

7. See Section 11349.6 (review of emergency regulation), 1 Cal. Code Regs. § 55 (public comments regarding emergency regulation).

Existing law does not specify when or for how long rulemaking documents must be posted on the Internet. The proposed law would require that rulemaking documents be posted within a reasonable time after issuance and remain posted until at least 15 days after the rulemaking process has been completed.

Fish and Game Commission

Existing law exempts the Fish and Game Commission from the time periods that ordinarily apply to the rulemaking procedure.[8] On the Law Revision Commission's recommendation, a new time period was added to the rulemaking procedure.[9] At that time, the Law Revision Commission was unaware of the Fish and Game Commission's special exemption and did not recommend expansion of that exemption to cover the new time period. The proposed law would correct this oversight.

Technical Revisions

The tentative recommendation also includes a small number of technical, nonsubstantive revisions.[10]

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8. Fish & Game Code § 202.

9. Gov't Code § 11347; 2000 Cal. Stat. ch. 1060, § 28.

10. See proposed amendments to Gov't Code §§ 11343(f), 11346.5(a)(7)(C), 11347.6, *infra*.

PROPOSED LEGISLATION

Fish & Game Code § 202 (amended). Regulations

SECTION 1. Section 202 of the Fish and Game Code is amended to read:

202. The commission shall exercise its powers under this article by regulations made and promulgated pursuant to this article. Regulations adopted pursuant to this article shall not be subject to the time periods for the adoption, amendment, or repeal of regulations prescribed in Sections 11343.4, 11346.4, ~~and~~ 11346.8*, and 11347.1* of the Government Code.

Comment. Section 202 is amended to make clear that the Fish and Game Commission is not subject to the time period provided in Government Code Section 11347.1. That section merely elaborates the requirements of Government Code Section 11346.8(d).

Gov't Code § 11340.85 (amended). Electronic communications

SEC. 2. Section 11340.85 of the Government Code is amended to read:

11340.85. (a) As used in this section, "electronic communication" includes electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication.

(b) Notwithstanding any other provision of this chapter that refers to mailing or to oral or written communication:

(1) An agency may permit and encourage use of electronic communication, but may not require use of electronic communication.

(2) An agency may publish or distribute a document required by this chapter or by a regulation implementing this chapter by means of electronic communication, but shall not make that the exclusive means by which the document is published or distributed.

(3) A notice required or authorized by this chapter or by a regulation implementing this chapter may be delivered to a person by means of electronic communication if the person has expressly indicated a willingness to receive the notice by means of electronic communication.

(4) A comment regarding a regulation may be delivered to an agency by means of electronic communication.

(5) A petition regarding a regulation may be delivered to an agency by means of electronic communication if the agency has expressly indicated a willingness to receive a petition by means of electronic communication.

(c) An agency that maintains an Internet Web site or other similar forum for the electronic publication or distribution of written material shall publish on that Web site or other forum information regarding a proposed regulation or regulatory repeal or amendment, that includes, but is not limited to, the following:

(1) Any public notice required by this chapter or by a regulation implementing this chapter.

(2) The initial statement of reasons prepared pursuant to subdivision (b) of Section 11346.2.

(3) The final statement of reasons prepared pursuant to subdivision (a) of Section 11346.9.

(4) Notice of a decision not to proceed prepared pursuant to Section 11347.

(5) The text of a proposed action or instructions on how to obtain a copy of the text.

(6) A statement of any decision made by the office regarding a proposed action.

(7) The date a rulemaking action is filed with the Secretary of State.

(8) The effective date of a rulemaking action.

(9) A statement to the effect that a business or person submitting a comment regarding a proposed action has the right to request a copy of the final statement of reasons.

(10) The text of a proposed emergency adoption, amendment, or repeal of a regulation pursuant to Section 11346.1 and the date it was submitted to the office for review and filing.

(d) *A document that is required to be posted pursuant to subdivision (c) shall be posted within a reasonable time after issuance of the document and shall remain posted until at least 15 days after (1) the rulemaking action is filed with the Secretary of State, or (2) notice of a decision not to proceed is published pursuant to Section 11347.* Publication under subdivision (c) supplements any other required form of publication or distribution. Failure to comply with this section is not grounds for disapproval of a proposed regulation. Subdivision (c) does not require an agency to establish or maintain a Web site or other forum for the electronic publication or distribution of written material.

(e) Nothing in this section precludes the office from requiring that the material submitted to the office for publication in the California Code of Regulations or the California Regulatory Notice Register be submitted in electronic form.

(f) This section is intended to make the regulatory process more user-friendly and to improve communication between interested parties and the regulatory agencies.

Comment. Subdivision (c) of Section 11340.85 is amended to extend the existing Internet publication requirement to include the text of a proposed emergency rulemaking action. See Section 11349.6 (review of emergency regulation), 1 Cal. Code Regs. § 55 (public comments regarding emergency regulation).

Subdivision (d) is amended to specify when and for how long a document must be posted under subdivision (c).

Gov't Code § 11343 (amended). Transmission and filing

SEC. 3. Section 11343 of the Government Code is amended to read:

11343. Every state agency shall:

(a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one that is a building standard.

(b) Transmit to the office for filing with the Secretary of State a certified copy of every order of repeal of a regulation required to be filed under subdivision (a).

(c) Deliver to the office, at the time of transmittal for filing a regulation or order of repeal six duplicate copies of the regulation or order of repeal, together with a citation of the authority pursuant to which it or any part thereof was adopted.

(d) Deliver to the office a copy of the notice of proposed action required by Section 11346.4.

(e) Transmit to the California Building Standards Commission for approval a certified copy of every regulation, or order of repeal of a regulation, that is a building standard, together with a citation of authority pursuant to which it or any part thereof was adopted, a copy of the notice of proposed action required by Section 11346.4, and any other records prescribed by the State Building Standards Law (Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code).

(f) Whenever a certification is required by this section, it shall be made by the head of the state agency ~~or his or her designee which~~ *that* is adopting, amending, or repealing the regulation*, or by a designee of the agency head,* and the certification and delegation shall be in writing.

Comment. Subdivision (f) of Section 11343 is amended to reflect the fact that the head of an agency may be its governing body, rather than an individual officer. This is a technical, nonsubstantive change.

Gov't Code § 11346.2 (amended). Documents submitted to Office of Administrative Law

SEC. 4. Section 11346.2 of the Government Code is amended to read:

11346.2. Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:

(a) A copy of the express terms of the proposed regulation.

(1) The agency shall draft the regulation in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style. The agency shall draft the regulation in plain English.

(2) The agency shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations.

(3) The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.

(b) An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement of reasons shall include, but not be limited to, all of the following:

(1) A statement of the specific purpose of each adoption, amendment, or repeal and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose for which it is proposed. Where the adoption or amendment of a regulation would mandate the use of specific technologies or equipment, a statement of the reasons why the agency believes these mandates or prescriptive standards are required.

(2) An identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation.

(3)(A) A description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.

(B) A description of ~~any~~ reasonable alternatives ~~the agency has identified or that have otherwise been identified and brought to the attention of the agency~~ *to the regulation* that would lessen any adverse impact on small business *and the agency's reasons for rejecting those alternatives*. ~~It is not the intent of this paragraph to require the agency to~~

(C) Notwithstanding subparagraph (A) or (B), an agency is not required to artificially construct alternatives*, describe unreasonable alternatives,* or ~~to~~ justify why it has not ~~identified~~ *described* alternatives.

(4) Facts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business.

(5) A department, board, or commission within the Environmental Protection Agency, the Resources Agency, or the Office of the State Fire Marshal shall describe its efforts, in connection with a proposed rulemaking action, to avoid unnecessary duplication or conflicts with federal regulations contained in the Code of Federal Regulations addressing the same issues. These agencies may adopt regulations different from federal regulations contained in the Code of Federal Regulations addressing the same issues upon a finding of one or more of the following justifications:

(A) The differing state regulations are authorized by law.

(B) The cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment.

(c) A state agency that adopts or amends a regulation mandated by federal law or regulations, the provisions of which are identical to a previously adopted or amended federal regulation, shall be deemed to have complied with subdivision (b) if a statement to the effect that a federally mandated regulation or amendment to a regulation is being proposed, together with a citation to where an explanation of the provisions of the regulation can be found, is included in the notice of proposed adoption or amendment prepared pursuant to Section 11346.5. However, the agency shall comply fully with this chapter with respect to any provisions in the regulation that the agency proposes to adopt or amend that are different from the corresponding provisions of the federal regulation.

Comment. Subdivision (b)(3) of Section 11346.2 is amended to make clear that the former second sentence of subdivision (b)(3)(B) applies to subdivision (b)(3)(A) and (B). This is a technical, nonsubstantive change. Subdivision (b)(3)(B) is amended to more closely conform to subdivision (b)(3)(A). This is a nonsubstantive change except that an agency is now required to give reasons for rejecting reasonable alternatives that would lessen any adverse impact on small business.

Gov't Code § 11346.5 (amended). Notice of proposed rulemaking action

SEC. 5. Section 11346.5 of the Government Code is amended to read:

11346.5. (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

(1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.

(2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(3) An informative digest drafted in plain English in a format similar to the Legislative Counsel's digest on legislative bills. The informative digest shall include the following:

(A) A concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and of the effect of the proposed action.

(B) If the proposed action differs substantially from an existing comparable federal regulation or statute, a brief description of the significant differences and the full citation of the federal regulations or statutes.

(C) A policy statement overview explaining the broad objectives of the regulation and, if appropriate, the specific objectives.

(4) Any other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.

(5) A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4.

(6) An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state.

For purposes of this paragraph, "cost or savings" means additional costs or savings, both direct and indirect, that a

public agency necessarily incurs in reasonable compliance with regulations.

(7) If a state agency, in proposing to adopt, amend, or repeal any administrative regulation, makes an initial determination that the action may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, it shall include the following information in the notice of proposed action:

(A) Identification of the types of businesses that would be affected.

(B) A description of the projected reporting, recordkeeping, and other compliance requirements that would result from the proposed action.

(C) The following statement: "The (name of agency) has made an initial determination that the (adoption/amendment/repeal) of this regulation may have a significant, *statewide* adverse economic impact ~~on businesses~~ *directly affecting business*, including the ability of California businesses to compete with businesses in other states. The (name of agency) (has/has not) considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

(i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.

(ii) Consolidation or simplification of compliance and reporting requirements for businesses.

(iii) The use of performance standards rather than prescriptive standards.

(iv) Exemption or partial exemption from the regulatory requirements for businesses."

(8) If a state agency, in adopting, amending, or repealing any administrative regulation, makes an initial determination that the action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action. In making this declaration, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support its initial determination.

An agency's initial determination and declaration that a proposed adoption, amendment, or repeal of a regulation may have or will not have a significant, adverse impact on businesses, including the ability of California businesses to compete with businesses in other states, shall not be grounds for the office to refuse to publish the notice of proposed action.

(9) A description of all cost impacts, known to the agency at the time the notice of proposed action is submitted to the office, that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

If no cost impacts are known to the agency, it shall state the following:

"The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action."

(10) A statement of the results of the assessment required by subdivision (b) of Section 11346.3.

(11) The finding prescribed by subdivision (c) of Section 11346.3, if required.

(12) A statement that the action would have a significant effect on housing costs, if a state agency, in adopting, amending, or repealing any administrative regulation, makes

an initial determination that the action would have that effect. In addition, the agency officer designated in paragraph (14), shall make available to the public, upon request, the agency's evaluation, if any, of the effect of the proposed regulatory action on housing costs.

(13) A statement that the adopting agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

(14) The name and telephone number of the ~~following:~~

~~(A) The~~ agency representative and designated backup contact person to whom inquiries concerning the proposed administrative action may be directed.

~~(B) An agency person or persons designated to respond to questions on the substance of the proposed regulations, where appropriate.~~

(15) The date by which comments submitted in writing must be received to present statements, arguments, or contentions in writing relating to the proposed action in order for them to be considered by the state agency before it adopts, amends, or repeals a regulation.

(16) Reference to the fact that the agency proposing the action has prepared a statement of the reasons for the proposed action, has available all the information upon which its proposal is based, and has available the express terms of the proposed action, pursuant to subdivision (b).

(17) A statement that if a public hearing is not scheduled, any interested person or his or her duly authorized representative may request, no later than 15 days prior to the close of the written comment period, a public hearing pursuant to Section 11346.8.

(18) A statement indicating that the full text of a regulation changed pursuant to Section 11346.8 will be available for at least 15 days prior to the date on which the agency adopts, amends, or repeals the resulting regulation.

(19) A statement explaining how to obtain a copy of the final statement of reasons once it has been prepared pursuant to subdivision (a) of Section 11346.9.

(20) If the agency maintains an Internet website or other similar forum for the electronic publication or distribution of written material, a statement explaining how materials published or distributed through that forum can be accessed.

(b) The agency representative designated in paragraph (14) of subdivision (a) shall make available to the public upon request the express terms of the proposed action. The representative shall also make available to the public upon request the location of public records, including reports, documentation, and other materials, related to the proposed action. *If the representative receives an inquiry regarding the proposed action that the representative cannot answer, the representative shall refer the inquiry to another person in the agency for a prompt response.*

(c) This section shall not be construed in any manner that results in the invalidation of a regulation because of the alleged inadequacy of the notice content or the summary or cost estimates, or the alleged inadequacy or inaccuracy of the housing cost estimates, if there has been substantial compliance with those requirements.

Comment. Subdivision (a)(7)(C) of Section 11346.5 is amended to conform to the language used in the introductory paragraph of subdivision (a)(7). This is a technical, nonsubstantive change.

Subdivisions (a)(14) and (b) are amended to require that inquiries received by an agency representative be answered promptly, either by the agency representative or by another person in the agency.

Gov't Code § 11347.6 (amended). Comments of specified agencies

SEC. 6. Section 11347.6 of the Government Code is amended to read:

11347.6. Each state agency that adopts regulations shall, in the final statement of reasons, separately identify comments made by the Office of Small Business Advocate and the *Technology,* Trade*,* and Commerce Agency pursuant to subdivision (e) of Section 15363.6 and respond to each and every comment made by that office or agency directed at the proposed action or at the procedures followed by the agency in proposing or adopting the action, including providing a basis for why those comments were rejected, if applicable.

Comment. Section 11347.6 is amended to update the reference to the Technology, Trade and Commerce Agency. See Section 15310.1. This is a technical, nonsubstantive change.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

The Double Liability Problem in Home Improvement Contracts

February 2002

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 *The Double Liability Problem in Home Improvement Contracts*, 31 Cal. L. Revision Comm'n Reports 281 (2001). This is part of publication #212 [*2001-2002 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

JOYCE G. COOK, Chairperson
ASSEMBLY MEMBER HOWARD WAYNE, Vice Chairperson
DAVID HUEBNER
SENATOR BILL MORROW

February 11, 2002

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

The Law Revision Commission recommends special protections for homeowners who face potential double liability for labor and materials under home improvement contracts. This problem arises where the owner pays the prime contractor under the terms of their contract, but the prime contractor does not pay amounts due to subcontractors and equipment and material suppliers, who can then enforce their claims against the owner's property or construction funds.

After studying a variety of different approaches, the Commission has opted for a simple, easily understood and applied rule to protect the more vulnerable class of consumers from having to pay twice. The Commission recommends adoption of a good-faith payment rule, limiting the liability of homeowners to the extent they have paid in good faith, but leaving existing mechanic's lien and stop notice remedies in place, applicable to amounts remaining unpaid. Thus, mechanic's lien and stop notice rights of subcontractors and suppliers would not be affected to the extent that the homeowner has not paid in good faith for labor, supplies, equipment, and materials furnished.

The proposed law would apply only to home improvement contracts under $15,000. The application of this rule would be determined based on the amount of the home improvement contract, including any changes, extras, or other modifications occurring after execution of the contract.

This recommendation is submitted pursuant to Resolution Chapter 78 of the Statutes of 2001.

Respectfully submitted,

Joyce G. Cook
Chairperson

THE DOUBLE LIABILITY PROBLEM IN HOME IMPROVEMENT CONTRACTS

The Double Liability Problem

This recommendation addresses the double liability risk faced by consumers under home improvement contracts.[1] The double liability problem arises because, even though the owner has paid the prime contractor according to the terms of the contract, subcontractors and material suppliers are entitled to enforce mechanic's lien and stop notice rights[2] against the

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1. This recommendation is submitted as part of the Commission's fulfillment of a request from the Assembly Judiciary Committee to undertake a "comprehensive review of [mechanic's lien] law, making suggestions for possible areas of reform and aiding the review of such proposals in future legislative sessions." See Letter from Assembly Members Sheila James Kuehl (Chair) and Rod Pacheco (Vice Chair) to Nat Sterling, June 28, 1999 (attached to Commission Staff Memorandum 99-85 (Nov. 16, 1999)). The Commission has longstanding authority from the Legislature to study mechanic's liens under its general authority to consider creditors' remedies, including liens, foreclosures, and enforcement of judgments, and its general authority to consider the law relating to real property. For the text of the most recent legislative authorization, see 2001 Cal. Stat. res. ch. 78.

The greatest part of the Commission's study of mechanic's liens has been consumed by the important consumer protection issue addressed in this recommendation. This proposal follows a Tentative Recommendation on *The Double Payment Problem in Home Improvement Contracts* (September 2001), which included a proposal for a mandatory 50% bond, coupled with the good-faith payment rule as in the present proposal. In light of opposition to mandatory bonding, the Commission tabled that part of the proposal and decided to take a simpler approach to address the problem.

The Commission is also preparing a separate report providing broader background on alternatives to address the double liability problem that have been discussed in the Commission's study.

The Commission also has plans to submit proposed general revisions of the mechanic's lien law. This study will require a significant commitment of time and resources by the Commission, its staff and consultants, and other interested persons, and thus will not be ready in the 2002 legislative year.

2. The mechanic's lien is governed by Civil Code Sections 3082-3267. As used in this recommendation, "mechanic's lien law" generally should be taken to include stop notice rights. The Contractors' State License Law also contains many important provisions governing contractors in the home improvement

owner's property if they are not paid by the prime contractor.[3] The homeowner who pays a second time for the materials or the services of subcontractors has a justifiable grievance. But the homeowner is not the only victim in this situation, since the subcontractors and supplier have also not been paid and understandably will seek payment from the homeowner through enforcement of mechanic's liens or stop notice rights.

Homeowners may find out too late that their faith in the prime contractor was misplaced. The statute sets a trap through the "preliminary 20-day notice" under Civil Code Section 3097, which guarantees mechanic's lien and stop notice rights relating back 20 days before the notice is given. In smaller, quicker jobs, such as roofing, fencing, driveways, and the like, the homeowner is more likely to have paid most or all of the home improvement contract price before receiving any notice. And then it is too late to avoid double liability if the prime contractor is insolvent or fraudulent.

Cautious homeowners, who take the time to learn the law and the available options, and are willing to spend money on additional protections such as joint control or bonding, can avoid paying twice. But not many homeowners take these extraordinary steps, especially in smaller projects. Because subcontractors and suppliers have mechanic's lien and stop notice rights permitting them to pursue payment even from homeowners who have fully paid the prime contractor, they have less incentive to follow standard business practices in evaluating the creditworthiness of the prime contractor, much less take any special steps to protect their right to payment from the prime contractor.

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business. See Bus. & Prof. Code §§ 7000-7191, esp. §§ 7150-7168 (home improvement business).

3. See Civ. Code § 3123. A subcontractor may also be the defaulting party, failing to pay lower-tier subcontractors and suppliers.

The mechanic's lien law is unfairly balanced against the average consumer. It is natural for the homeowner to rely on his or her relationship with the prime contractor and to have confidence that payments under a home improvement contract are directed to the subcontractors, material and equipment suppliers, and laborers who have contributed to the project, in full satisfaction of the owner's obligations. If the prime contractor or a higher-tier subcontractor does not pay subcontractors and suppliers, the homeowner won't find out about it until it is too late to avoid some double payment liability and perhaps an incomplete project resulting in even more costs and delay.

Significance of Problem

The significance of this double payment problem is a matter of serious disagreement. There are no comprehensive statistics indicating the magnitude of the problem. Communications to the Commission suggest that actual mechanic's lien foreclosures are fairly rare, but foreclosures would only be the tip of the iceberg because homeowners would normally settle before suffering a foreclosure.

Assembly Member Mike Honda's office identified 61 double payment cases occurring over a three-year period, pulling information from a variety of sources.[4] Anecdotal evidence of a number of double payment occurrences has been presented to the Commission from individual homeowners and others, as well as from the Contractors' State License Board, although the Board does not necessarily receive reports of double payment and does not collect statistics in this category. In short, there is currently no good measure of the magnitude of the double payment problem. It is certain that when it occurs, it is considered a significant problem to

4. See Commission Staff Memorandum 2000-9 (Jan. 31, 2000), p. 2.

the person who is compelled to pay twice for the same work or materials.

Several commentators have suggested that the double payment problem occurs so infrequently that it does not justify any major revisions in the mechanic's lien statutes.[5] Some have suggested approaching the issue as one of educating the home improvement consumer so that he or she will know how to make sure subcontractors and suppliers are paid. Others believe that the problem is serious enough, even though it may be relatively uncommon, that some legislative response is needed.

Risk Allocation

The double payment problem may be viewed as a question of who should bear the risk of nonpayment by the prime contractor (or by a subcontractor higher in the payment chain) in a situation where the owner has paid, and which parties are in the best position to be knowledgeable about the risks and remedies and take the appropriate steps. Under the existing scheme, homeowners assume all of the risk associated with the failure of prime contractors to pay subcontractors and suppliers. This is counter to the normal expectations of how risk should be allocated in a marketplace.

A major defect that has been identified in the existing system is reliance on the homeowner to sort through the various notices and correctly anticipate the best remedy. Homeowners are likely to initiate few home improvement projects in a lifetime, whereas contractors and suppliers have daily experience in the business. This principle lies at the heart of consumer protection. Of course, there may also be significant inequalities in business and legal sophistication, bargaining power,

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5. See, e.g., Hunt, *Report to Law Revision Commission Regarding Recommendations for Changes to the Mechanic's Lien Law* [Part 2] (February 2000) (attached to Commission Staff Memorandum 2000-9 (Jan. 31, 2000)).

financial soundness, and risk aversion among prime contractors, subcontractors, and suppliers, but as a class, those in the construction business and trades should be expected to have greater knowledge and sophistication about how things work than homeowners.

The scores of letters received in the course of this study, and remarks of persons attending Commission meetings, reveal problems with the operation of the home improvement marketplace. Work may be done without a written contract; credit checks are infrequent; Contractors' State License Board regulations are ignored or unenforced; sharp practices are not uncommon; payments are delayed or misdirected; subcontractors and suppliers continue to work with contractors even after experiencing payment problems. Facilitating many of these problems and temptations is the ability of subcontractors and suppliers to compel double payment from the homeowner. Where education, regulation, and policing won't work, perhaps only market forces can.

COMMISSION RECOMMENDATION

After a lengthy study of these issues, consideration of several alternatives, and a review of comments and criticisms of various experts and stakeholders,[6] the Commission is propos-

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6. The Commission has been ably assisted by its consultants James Acret, Keith Honda, and Gordon Hunt who have prepared written materials and attended many Commission meetings. Mr. Hunt prepared written reports in the early stages of the project, bearing on the double payment issue as well as general reforms. See, e.g., Hunt, *Report to Law Revision Commission Regarding Recommendations for Changes to the Mechanic's Lien Law [Part 1]* (November 1999) (attached to Commission Staff Memorandum 99-85 (Nov. 16, 1999)); Hunt, *Report to Law Revision Commission Regarding Recommendations for Changes to the Mechanic's Lien Law [Part 2]* (February 2000) (attached to Commission Staff Memorandum 2000-9 (Jan. 31, 2000)); Hunt, *Report to Law Revision Commission Regarding Current Proposals Pending Before the Commission Regarding Changes to the Mechanic's Lien Law* (August 2000) (attached to First Supplement to Commission Staff Memorandum 2000-63 (Oct.

ing an amendment of the mechanic's lien statute to protect homeowners from having to pay twice and thereby reallocate the risk in lower-priced home improvement contracts so that subcontractors and suppliers would need to take more care in determining the credit-worthiness of their customers or assume the risk of nonpayment.

The proposed law would apply to "home improvement contracts," as defined under the Contractor's State License Law,[7]

2, 2000)). Mr. Acret and Mr. Honda have also submitted numerous written materials. See, e.g., Commission Staff Memorandums 2000-9 & Second Supplement, 2000-26 & Second Supplement, First Supplement to Memorandum 2000-63, 2000-78. A number of other interested persons, some of them representing stakeholders in the construction world, have provided important assistance to the Commission, including Sam K. Abdulaziz, Peter Freeman, Ellen Gallagher (CSLB), Kenneth Grossbart. A complete list of persons attending Commission meetings relating to mechanic's liens can be compiled from the Minutes of the following meetings: November 1999; February, April, June, July, October, and December 2000; February, May, June, and November 15 and 30, 2001; February 2002. Written commentary can be found in the exhibits to Commission meeting materials, available from the Commission's website at <http://www.clrc.ca.gov>. For a collection of all mechanic's liens materials, see <ftp://clrc.ca.gov/pub/Study-H-RealProperty/H820-MechanicsLiens/>.

7. Home improvement is defined in Business and Professions Code Section 7151:

> 7151. "Home improvement" means the repairing, remodeling, altering, converting, or modernizing of, or adding to, residential property and shall include, but not be limited to, the construction, erection, replacement, or improvement of driveways, swimming pools, including spas and hot tubs, terraces, patios, awnings, storm windows, landscaping, fences, porches, garages, fallout shelters, basements, and other improvements of the structures or land which is adjacent to a dwelling house. "Home improvement" shall also mean the installation of home improvement goods or the furnishing of home improvement services.
>
> For purposes of this chapter, "home improvement goods or services" means goods and services, as defined in Section 1689.5 of the Civil Code, which are bought in connection with the improvement of real property. Such home improvement goods and services include, but are not limited to, carpeting, texture coating, fencing, air conditioning or heating equipment, and termite extermination. Home improvement goods include goods which are to be so affixed to real property as to become a part of real property whether or not severable therefrom.

in an amount under $15,000, including any extras and change orders.[8] Home improvement contracts are appropriate for special treatment under the mechanic's lien law because this class of construction contracts has been the focus of special legislative attention for more than 30 years.[9] Employing other classifications, such as "single-family, owner-occupied dwelling," may also be appropriate, but it should be more straightforward to use an existing classification that is familiar to contractors and suppliers. Since home improvement contracts are required to be executed in a special form, it should not be difficult to determine whether the job is a home improvement project.

An owner who pays the prime contractor in good faith would not be subject to further liability. This rule is consistent

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Home improvement contract is defined in Business and Professions Code Section 7151.2:

> 7151.2. "Home improvement contract" means an agreement, whether oral or written, or contained in one or more documents, between a contractor and an owner or between a contractor and a tenant, regardless of the number of residence or dwelling units contained in the building in which the tenant resides, if the work is to be performed in, to, or upon the residence or dwelling unit of the tenant, for the performance of a home improvement as defined in Section 7151, and includes all labor, services, and materials to be furnished and performed thereunder. "Home improvement contract" also means an agreement, whether oral or written, or contained in one or more documents, between a salesperson, whether or not he or she is a home improvement salesperson, and (a) an owner or (b) a tenant, regardless of the number of residence or dwelling units contained in the building in which the tenant resides, which provides for the sale, installation, or furnishing of home improvement goods or services.

8. The Commission has also considered the option of basing the cap amount on the value of each claimant's portion of the home improvement contract, but this approach is more complicated to administer and would result in some subcontractors and suppliers being subject to the cap and others not subject to it in the same home improvement project. Priorities between potential claimants are complicated where

9. See, e.g., 1969 Cal. Stat. ch. 1583 (enacting Bus. & Prof. Code §§ 7151.2, 7159). Special rules, including home improvement certification requirements are set out in Business and Professions Code Sections 7150-7168.

with the common expectations of people who have not learned of the special "direct lien" rules applicable to mechanic's liens in California since 1911.[10] From the owner's perspective, common sense and fairness dictate that payment to the prime contractor pursuant to their contract should be the end of the owner's liability.

Protection of homeowners' good faith payments would leave existing mechanic's lien and stop notice remedies in place, but applicable only to the extent that amounts remained unpaid under the home improvement contract. Subcontractors and suppliers could thus continue to serve preliminary 20-day notices, but the mechanic's lien liability would be limited to amounts remaining unpaid, or in the rare case, amounts that were not paid in good faith. This rule would be an explicit exception to the so-called "direct lien" under existing law.[11]

Protecting homeowners under small contracts serves the fundamental purpose of providing a meaningful degree of consumer protection without complicated forms and technical deadlines. The $15,000 contract cap also recognizes that subcontractors and suppliers will rarely pursue the mechanic's lien remedy under existing law for smaller amounts because of the costs involved. The lack of recoverable attorney's fees in mechanic's lien foreclosure makes it impractical for a subcontractor or supplier to pursue collection for amounts under $5,000 or $8,000 (depending on the assessment of the particular business). In most cases, an individual subcontractor or supplier's portion of a home improvement contract under $15,000 would almost always fall in the range of unforeclosable liabilities.

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10. The historical development of the mechanic's lien law is summarized in "Appendix: Constitutional Considerations" *infra* p. 297 *et seq*.

11. See Civ. Code § 3123. For a discussion of the constitutional issues concerning this type of proposal, see "Appendix: Constitutional Considerations" *infra* p. 297 *et seq*.

If a trade contractors or suppliers are reluctant to rely on the creditworthiness of their customers (the prime contractor or higher-tier subcontractor), they are free to work out an arrangement directly with the homeowner, either at the commencement of the project or later, upon the failure of the higher-tier contractor to pay for work or supplies already furnished.

The major defect in the existing system is reliance on the homeowner to foresee the problem, sort through the various notices, and correctly anticipate the best remedy. As a general rule, homeowners are likely to initiate few home improvement projects in a lifetime, whereas contractors and suppliers have daily experience in the business. This principle lies at the heart of consumer protection. Of course, there may also be significant inequalities in business and legal sophistication, bargaining power, financial soundness, and risk aversion among prime contractors, subcontractors, and suppliers. But as a class, those in the construction business and trades should be expected to have greater knowledge and sophistication about how things work than homeowners as a class.

PROPOSED LEGISLATION

Civ. Code § 3113 (added). Limitation on owner's liability

SECTION 1. Section 3113 is added to the Civil Code, to read:

3113. (a) Notwithstanding any other provisions in this title, in the case of a home improvement contract in an amount less than fifteen thousand dollars ($15,000), including extras and change orders, the aggregate amount of mechanic's liens and stop notices that may be enforced is limited to the amount remaining unpaid to the original contractor under the contract. Payments made to the original contractor in good faith discharge the owner's liability to all claimants to the extent of the payments.

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

Comment. Section 3113 protects owners who, in good faith, pay the prime contractor according to the terms of a home improvement contract. This section is intended to shield owners from liability to pay twice for the same work, materials, or equipment in cases where subcontractors and suppliers do not receive payments that have been made by the owner. As made clear by the introductory clause of subdivision (a), this section provides an exception to the "direct lien" rule in Sections 3123 and 3124. Existing rights and procedures under this title remain applicable as to the amount remaining unpaid by the owner.

APPENDIX: CONSTITUTIONAL CONSIDERATIONS

A statutory revision that restricts or restructures the mechanic's lien right must be evaluated in light of the state constitutional provision mandating legislative implementation of mechanic's liens. Article XIV, Section 3, of the California Constitution provides as follows:

> Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens.[1]

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1. This is the language as revised in 1976, which is identical to the original 1879 provision in Article XX, Section 15, except that "persons furnishing materials" was substituted for the original "materialmen" by an amendment in 1974. Note that the beneficiaries of the constitutional lien differ from the statutory implementation in Civil Code Section 3110 (the constitutional classes are in bold):

> **Mechanics**, **materialmen**, contractors, subcontractors, lessors of equipment, **artisans**, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, and draymen, and all persons and **laborers of every class** performing labor upon or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in or furnishing appliances, teams, or power contributing to a work of improvement ….

Literally, only material suppliers and persons performing three classes of labor are covered by the constitutional language. An early treatise summarized the different classes of workers as follows: The man who constructs anything by mere routine and rule is a mechanic. The man whose work involves thought, skill, and constructive power is an artificer. The hod-carrier is a laborer; the bricklayer is a mechanic; the master mason is an artificer.…" Treatise on the Law of Mechanics' Liens and Building Contracts § 110, at 102 n.8 (S. Bloom ed. 1910). Currently, the statutes do not define "mechanic" or "artisan," but "laborer" is defined in Civil Code Section 3089(a) as "any person who, acting as an employee, performs labor upon or bestows skill or other necessary services on any work of improvement."

Would a statute protecting homeowners from having to pay twice for the same labor or materials pass constitutional muster? Or is the proposed law within the acceptable range of legislative discretion in balancing competing interests? An understanding of the constitutional and statutory history and relevant case law is critical to answering these questions.

Background and History

The mechanic's lien statutes date back to the first Legislature, which enacted a rudimentary mechanic's lien statute on April 12, 1850 — five days before defining property rights of spouses.[2] The first mechanic's lien case reached the Supreme Court that same year, when the court ruled that a lumber merchant did not have a lien on the building under the mechanic's lien statute where he had failed to comply with the 60-day recording period following completion of construction.[3]

The double liability problem appeared in the cases within the first decade. In *Knowles v. Joost*[4] the Supreme Court ruled that, under the statute, an owner who had paid the contractor in full was not liable to materialmen.[5]

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2. Compiled Laws ch. 155. Section 1 granted a lien to "master builders, mechanics, lumber merchants, and all other persons performing labor or furnishing materials" in constructing any building or wharf. Section 2 provided a notice procedure whereby any "sub-contractor, journeyman, or laborer" could, in effect, garnish payments from the owner. Section 3 provided for recording and commencement of an action "to enforce his lien."

3. Walker v. Hauss-Hijo, 1 Cal. 183 (1850).

4. 13 Cal. 620 (1859).

5. "It was not the design of the Legislature to make him responsible, except upon notice, or to a greater extent, than the sum due to the contractor at the date of the notice." *Id.* at 621. The first reported reference to the problem came in Cahoon v. Levy, 6 Cal. 295, 296-97 (1856):

> If they are to be allowed sixty days after the completion of the building to serve such notice on the owner, it will not unfrequently occur that he will be subjected to pay the same amount twice; as it will be impossible for him to ascertain the claims against the principal contractor, and his

In *McAlpin v. Duncan*[6] the court again addressed the double liability problem, this time under the 1858 statute:

> The question presented by the record is, whether the defendant, having paid the contractor in full before notice of the claims of these parties, can be compelled to pay a second time.…
>
> [The 1858 statute] is not a little confused and difficult of satisfactory construction. If it were designed to give to the sub-contractor and laborer a lien upon the property of the owner for the entire amount of the last or sub-contract, without any regard to the amount of the principal contract, a very curious anomaly would exist, and the whole property of the owner might be placed at the discretion of the contractor, to be encumbered by him as he chose. Such laws, as we have held in this very class of cases, are to be strictly construed, as derogating from the common law.…
>
> We think all that can be gathered from this act, is that material-men, sub-contractors, etc., have a lien upon the property described in the act to the extent (if so much is necessary) of the contract price of the principal contractor; that these persons must give notice of their claims to the owner, or the mere existence of such claims will not prevent the owner from paying the contractor, and thereby discharging himself from the debt; that by giving notice, the owner becomes liable to pay the sub-contractor, etc. (as on garnishment or assignment, etc.), *but that if the owner pays according to his contract, in ignorance of such claims, the payment is good*.
>
> Unless this view is correct, the grossest absurdities appear. We have, in the first place, a valid contract, with nothing appearing against it, which yet cannot be enforced — a clear right of action on the part of the contractor, with no defense by the defendant, and yet which cannot be enforced; *or* which the plaintiff may enforce at law, and yet, if the defendant pays the money, with or without suit,

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agreement with him may be for payment by instalments, or on the completion of the work.

6. 16 Cal. 126 (1860).

> he must pay it again. Innumerable liens may be created, without the knowledge of the owner, for which he might be held liable; while the owner could never pay anything until after long delays, whatever the terms of the contract, or the contractor's necessity for money, unless payment were made at the expense, or at the risk of the payor. Such a construction would lead to law suits and difficulties innumerable. By the other construction, no injustice is done or confusion wrought. These sub-contractors, etc., have only to notify their claims to the owner, in order to secure them. *If they, by their own laches, suffer the owner to pay over the money according to the terms of his contract, they ought not to complain; for it was by their own neglect of a very simple duty that the loss accrued; and it would be unjust to make the owner pay a second time because of that neglect*.[7]

Of course, cases such as *McAlpin* were decided before mechanic's liens were addressed in the constitution, but *McAlpin* touches on several themes that remain relevant 140 years later. The court was faced with a "confused" and "difficult" statute, and balanced the interests of the parties by placing responsibility where it logically lay, in order to avoid the injustice of double payment.

These cases were the beginning of a long line of consistent rulings, even though the statute changed in its details from time to time. Thus, in *Renton v. Conley*[8] the court ruled under the 1868 statute, as it had under the 1856 and 1858 statues, that

> notwithstanding the broad language of the statute, … where the owner had made payments to the contractor in good faith, under and in pursuance of the contract, before receiving notice, either actual or constructive, of the liens, the material men and laborers could not charge the buildings

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7. *Id*. at 127-28 [emphasis added].

8. 49 Cal. 185, 188 (1874).

> with liens, exceeding the balance of the contract price remaining unpaid when notice of the lien was given.

The first codification of the mechanic's lien statute in the 1872 Code of Civil Procedure included, in Section 1183, a provision that "the aggregate amount of such liens must not exceed the amount which the owner would otherwise liable to pay." But the code revisions of 1873-74 restored much of the language of the 1868 act, including the provision making contractors and subcontractors agents of the owner, and omitted the limitation on the aggregate amount of liens.

Nevertheless, the line of contract-based cases continued through the period of the Constitutional Convention in 1878-79 and thereafter, up until the "direct lien" revision in 1911 (with a brief detour through an 1880 amendment). This case law was reflected in the constitutional debates. In 1885 the statute was amended to reflect the basic contract analysis of the cases, with some creative rules applicable where the contract was void or not completed. The strict limitations imposed by the courts through the contract analysis resulted in hardship to subcontractors, suppliers, and laborers employed by the contractor where there were no payments were due because the contract was void or where the contractor abandoned the project. Under the cases during this era, only the amount remaining due and unpaid was available for claims of subcontractors, suppliers, and laborers not in privity with the owner.[9]

In 1885, however, the situation of the void contract was addressed, giving the claimants under the original contractor a direct lien for the value of their work, not limited by the con-

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9. See, e.g., Dingley v. Greene, 54 Cal. 333, 336 (1880) ("if there is no existing lien on the original contract, none exists on the subsidiary contract"); Wiggins v. Bridge, 70 Cal. 437, 11 P. 754 (1886); F. James, The Law of Mechanics' Liens upon Real Property in the State of California §§ 80-81, at 83-85 (1900, Supp. 1902).

tract amount.[10] Reflecting the perspective of 100 years ago, Counselor James in his treatise analyzed this rule as follows:

> The effect of section 1200 is, in all cases coming within its provisions, to charge the property of the owner with liens of persons other than the owner to the extent in value of the work actually done or of the materials actually furnished by them measured always by the standard of the contract price. If the effect was to *charge the property of the owner with such liens beyond the limit of the contract price, it would according to all of the authorities, be unconstitutional*.[11]

Clearly it was the expectation at the time, shortly after adoption of the constitutional mechanic's lien provision, that the mechanic's lien right was subject to overriding contract principles.

The 1885 amendments did not change the fundamental rule existing from the earliest years that protected a good-faith owner from liability for double payment where payments had already been made under the contract with the original contractor. Payment of any part of the contract price before commencement of the project was forbidden and at least 25% of the contract price was required to be withheld until at least 35 days after final completion. Code of Civil Procedure Section 1184 was revised to impose a duty on the owner to withhold "sufficient money" due the contractor to pay the claim of other lien claimants who gave notice to the owner. The amendments also required payment in money (later held unconstitutional), mandated written contracts for jobs over $1000, and provided for allowances for attorney's fees of claimants (later held unconstitutional).

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10. See 1885 Cal. Stat. ch. 152, §§ 1, 2.

11. James, *supra* note 9, § 310, at 329.

End of the Contract Era

The dominance of the law of contract — which had survived repeated legislative adjustments in the 1850s through 1880, the Constitutional Convention of 1878-79, and the more significant legislative revisions in 1885 and after — came to an end with the revision of 1911.[12] Code of Civil Procedure Section 1183 was amended to adopt the "direct lien" approach: "The liens in this chapter provided for shall be direct liens, and shall not in the case of any claimants, other than the contractor be limited, as to amount, by any contract price agreed upon between the contractor and the owner except as hereinafter provided.…"[13] The pre-1911 limitation on the liability of the owner to amounts remaining due under the contract was now only available through obtaining a payment bond in the amount of 50% of the contract price. In general terms, the current statute is a direct descendent of the 1911 revisions.

The leading case of *Roystone Co. v. Darling*[14] gives a useful overview of the 1911 revision and the reasons for it, and places the statutory history in context with the case law. *Roystone* also is significant for the fact that it reflects a broad view of legislative power to implement the constitutional mandate:

> [The 1911 statutory] revision made some radical changes in the law, and it presents new questions for decision. It will aid in the understanding of the purpose and meaning of this act if we call to mind, as briefly as may be, the history of the mechanic's lien laws in this state and the state of the law on the subject at the time the amendments in question were enacted.

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12. 1911 Cal. Stat. ch. 681.

13. The rule in former Code of Civil Procedure Section 1183 is continued in Civil Code Section 3123, which also refers to "direct liens."

14. 171 Cal. 526, 530-33, 37-38, 154 P. 15 (1915).

Prior to the adoption of the constitution of 1879 the lien of mechanics and materialmen for work done and materials furnished in the erection of buildings was entirely a creature of the legislature. The former constitution contained no declaration on the subject. Numerous decisions of the supreme court had declared that all such liens were limited by the contract between the owner and the contractor, and could not, in the aggregate, exceed the contract price. The doctrine that the right of contract could not be invaded by legislative acts purporting to give liens beyond the price fixed in the contract between the owner and the contractor, or regardless of the fact that the price had been wholly or partially paid, was so thoroughly established that litigation involving it had virtually ended. Section 1183 of the [Code of Civil Procedure], as amended in 1874, declared that every person performing labor or furnishing materials to be used in the construction of any building should have a lien upon the same for such work or material. It did not limit the liens to the contract price. In this condition of the law the constitution of 1879 was adopted.…

….

In 1880 section 1183 was again amended by inserting a direct declaration that "the lien shall not be affected by the fact that no money is due, or to become due, on any contract made by the owner with any other party." This amendment of 1880 first came before the supreme court for consideration in *Latson v. Nelson*, [2 Cal. Unrep. 199], … a case not officially reported. The court in that case considered the power of the legislature to disregard the contract of the owner with the contractor and give the laborer or materialman a lien for an amount in excess of the money due thereon from the owner to the contractor. In effect, it declared that section 15, article XX, of the constitution was not intended to impair the right to contract respecting property guaranteed by section 1, article I, thereof, and that the provisions of the code purporting to give a lien upon property in favor of third persons, in disregard of and exceeding the obligations of the owner concerning that property, was an invalid restriction of the liberty of contract.… In the meantime the legislature of 1885 …, apparently recogniz-

ing and conceding the force of the decision in *Latson v. Nelson*, undertook to secure and enforce the constitutional lien by other means, that is, by regulating the mode of making and executing contracts, rather than by disregarding the right of contract. It amended sections 1183 and 1184 of the code by providing that in all building contracts the contract price should be payable in installments at specified times after the beginning of the work, that at least one-fourth thereof should be made payable not less than thirty-five days after the completion of the work contracted for, that all such contracts exceeding one thousand dollars should be in writing, subscribed by the parties thereto, and should be filed in the office of the county recorder before the work was begun thereunder, that if these regulations were followed, liens upon the property for the erection of the structure should be confined to the unpaid portion of the contract price, but that all contracts which did not conform thereto, or which were not filed as provided, should be void, that in such case the contractor should be deemed the agent of the owner, and the property should be subject to a lien in favor of any person performing labor or furnishing material to the contractor upon the building for the value of such labor or material. This law, with some amendments not material to our discussion, remained in force until the enactment of the revision of 1911 aforesaid.

In the meantime the supreme court has followed the rule established by the cases … and has uniformly declared, with respect to such liens, that if there is a valid contract, the contract price measures the limit of the amount of liens which can be acquired against the property by laborers and materialmen. [Citations omitted.] … In addition to these express declarations there are many cases in which the rights of the parties were adjudicated upon the assumption that this proposition constituted the law of the state. Each one of the large number of decisions regarding the priorities of liens in the unpaid portion of the contract price, each decision respecting the right to reach payments made before maturity under such contract, each decision as to the formal requisites of contracts under the amendment of 1885, and each decision as to the apportionment under sec-

tion 1200 of the Code of Civil Procedure, upon the failure of the contractor to complete the work, constitutes an affirmance of the doctrine that the contract, legally made, limits the liability of the owner to lien claimants. There has been scarcely a session of this court since the enactment of that amendment at which one or more cases have not been presented and decided which, in effect, amounted to a repetition of this doctrine.…

….

We have shown that when [the 1911] act was passed it was the established doctrine of this state that the legislature cannot create mechanics' liens against real property in excess of the contract price, where there is a valid contract, but that it is within the legislative power, in order to protect and enforce the liens provided for in the constitution, and so far as for that purpose may be necessary, to make reasonable regulations of the mode of contracting, and even of the terms of such contracts, and to declare that contracts shall be void if they do not conform to such regulations.…

The portions of the act of 1911 … clearly show that the legislature did not intend thereby to depart from this doctrine, but that, on the contrary, the design was to follow it and to protect lienholders by means of regulations concerning the mode of contracting and dealing with property for the purposes of erecting improvements thereon. The first declaration on the subject is that the liens provided in the chapter shall be "direct liens" (whatever that may mean), and that persons, other than the contractor, shall not be limited by the contract price "except as hereinafter provided." The proviso referred to is found in the following declaration in the same section:

"It is the intent and purpose of this section to limit the owner's liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith with his original contract a valid bond with good and sufficient sureties in the amount and upon the conditions as herein provided."

A plainer declaration of the intention to make the contract price the limit of the owner's liability, where the bond and

> contract have been filed as required by this section, could scarcely be made.…

This lengthy quotation from *Roystone* provides a definitive exposition of the issues at a critical time when the contract era was giving way to the "direct lien" era following the 1911 amendments — in other words, a balancing of interests, formerly thought unconstitutional, that permits owners to be charged twice for the same work. There is not even a hint in this discussion that limiting liability to the amount of the contract could be unconstitutional.

Roystone did not overrule the earlier cases; the court upheld the new payment bond statute through the guise of declaring it to be consistent in intent with 60 years of case law. Experience since 1911 shows that the 50% payment bond has not served the purpose envisioned by the *Roystone* court of substituting for the protections in the old contract cases. This is particularly true in the home improvement context, where payment bonds are a rarity.

The court had occasion to reflect on the significance of *Roystone* with respect to limitations on legislative power in *Pacific Portland Cement Co. v. Hopkins*.[15] Responding to the appellant supplier's arguments, a three-judge department of the full court wrote:

> The final point made is that, since the Constitution gives a lien on property upon which labor is bestowed or materials furnished (Const. art. XX, sec. 15), the legislature has no power to enact a statute which shall limit the lien-claimant's recovery to the unpaid portion of the contract price. Whatever might be thought of this as an original question, it is no longer open or debatable in this court. In the recent case of *Roystone Co. v. Darling* … we reviewed the long line of decisions which had established in this state the soundness of the rule that "if there is a valid contract,

15. 174 Cal. 251, 255-56, 162 P. 1016 (1917).

> the contract price measures the limit of the amount of liens which can be acquired against the property by laborers and materialmen." In the present case, the portion of the contract price applicable to the payment of liens was fixed in accordance with the rule laid down in section 1200 of the Code of Civil Procedure. That the specific method provided by this section is not in conflict with the Constitution was expressly decided in *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 115. The findings show that there was no unpaid portion of the contract price applicable to the payment of claimants who had furnished labor or materials to the original contractor. The conclusion of law that the defendant was entitled to judgment necessarily follows.

This review of the statutory, constitutional, and case law history from the earliest days until the dawning of the "direct lien" era demonstrates that limiting the owner's liability to the unpaid contract price was not only constitutional, but recognized as the expected standard against which variations had to be judged. The constitutional shoe was on the other foot in this era, with the burden of proving constitutionality on those who would limit or condition this well-understood principle.

Scope of Legislative Authority

The Legislature has significant discretion in meeting its constitutional duties. In fashioning its implementation of the constitutional direction to "provide, by law, for the speedy and efficient enforcement" of mechanic's liens, the Legislature is required to balance the interests of affected parties.

The constitutional language "shall have a lien" might appear to directly create a mechanic's lien, and courts have occasionally dealt with the argument that there is a "constitutional lien," somehow distinct from the statutory implementation. In an early case, the court described it as follows:[16]

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16. Spinney v. Griffith, 98 Cal. 149, 151-52, 32 P. 974 (1893).

> This declaration of a right, like many others in our constitution, is inoperative except as supplemented by legislative action.
>
> So far as substantial benefits are concerned, the naked right, without the interposition of the legislature, is like the earth before the creation, "without form and void," or to put it in the usual form, the constitution in this respect is not self-executing.

Cases have distinguished between the constitutional right to the lien and the statutory lien itself.[17] The constitutional provision is "not self-executing and is inoperative except to the extent the Legislature has provided by statute for the exercise of the right."[18] The court in the leading case of *Frank Curran Lumber Co. v. Eleven Co.*[19] explained that the constitution is

> inoperative except as supplemented by the Legislature through its power reasonably to regulate and to provide for the exercise of the right, the manner of its exercise, the time when it attached, and the time within which and the persons against whom it could be enforced. *The constitutional mandate is a two-way street, requiring a balancing of the interests of both lien claimants and property owners*. In carrying out this constitutional mandate the Legislature has the duty of balancing the interests of lien claimants and property owners.[20]

It is this balancing of interests that the Commission has sought in preparing its recommendation, and that the Legisla-

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17. See, e.g., Solit v. Tokai Bank, Ltd., 68 Cal. App. 4th 1435, 1445-47, 81 Cal. Rptr. 2d 243 (1999); Koudmani v. Ogle Enter., Inc., 47 Cal. App. 4th 1650, 1655-56, 55 Cal. Rptr. 2d 330 (1996).

18. Wilson's Heating & Air Conditioning v. Wells Fargo Bank, 202 Cal. App. 3d 1326, 1329, 249 Cal. Rptr. 553 (1988); Morris v. Wilson, 97 Cal. 644, 646, 32 P. 801 (1893).

19. 271 Cal. App. 2d 175, 183, 76 Cal. Rptr. 753 (1969).

20. 271 Cal. App. 2d at 183 (emphasis added).

ture must do whenever significant amendments are made affecting right to a mechanic's lien.

Purpose and Justification of Lien

The mechanic's lien was unknown at common law. The early cases adopted the traditional strict construction approach to the statute.[21] The lien is usually justified on the ground that the lien claimant has increased the value of the owner's property through labor, services, or materials supplied, and it would unjustly enrich the owner if the benefits could be enjoyed without payment.[22] Thus, it is fitting that the laborer and supplier should follow the fruits of their activities into the building (and some land) that has been enhanced.

Traditionally the measure of the lien has been tied to a contract price or the value of the claimant's contribution, however, not a specific measure of the increase in the value brought about by the claimant's enhancements through labor and supplies. Where the owner has paid the amounts owing under the contract, the unjust enrichment argument fades away and provides no support for requiring the owner to pay subcontractors and suppliers who did not receive payments from the contractor with whom they did business.

Original Intent of Constitutional Provision

There is strong evidence that the constitutional language was not meant to permit imposition of double liability on property owners. The language of the mechanic's lien provision placed in Article XX, Section 15, was discussed in some detail, as recorded in the Debates and Proceedings of the Cali-

21. See, e.g., Bottomly v. Grace Church, 2 Cal. 90, 91 (1852).

22. See, e.g., Avery v. Clark, 87 Cal. 619, 628, 25 P. 919 (1891).

fornia Constitutional Convention of 1878-79.[23] The Convention soundly rejected proposed language to make clear that "no payment by the owner … shall work a discharge of a lien." This rejection took place with the certain knowledge that the Supreme Court had consistently held that liens were limited to the contract price under the statutes in force at the time.

In reviewing the constitutional history, one analyst has concluded:

> [T]he delegates clearly left the decision regarding the enforcement of liens for the Legislature to determine by statute. In rejecting the amendment, the delegates preserved the right of [the] Legislature to enact reasonable regulations limiting mechanic's liens, including statutes that grant homeowners a defense based on full payment. When viewed within the context of the Debates and Proceedings, the very system that is now in place was in fact rejected by the delegates of the Constitution Convention.[24]

This constitutional history has been usefully summarized in a law review comment as follows:

> The delegates participating in the debate were obviously aware of the fact that an earlier decision had construed mechanics' liens as limited to the amount found due and owing to the contractor. The drafting committee reported out the provision in the form in which it was ultimately enacted.
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> A Mr. Barbour introduced an amended version which would have made the liens unlimited and would also have made the owner personally liable for them. There was some

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23. For further discussion and excerpts from the Debates and Proceedings relevant to mechanic's liens, see Second Supplement to Commission Staff Memorandum 2000-9 (Feb. 11, 2000), Exhibit pp. 9-11, 20-24.

24. Keith Honda, Mechanics Lien Law Comments [Draft], p. 7 (Feb. 10, 2000) (attached to Second Supplement to Commission Staff Memorandum 2000-9 (Feb. 11, 2000), Exhibit p. 11).

> talk of revising the offered amendment to eliminate the feature of personal liability while retaining unlimited lien liability. Such a revision was never made, so the delegates never had the opportunity to vote on the simple issue of limited versus unlimited liens. The proponents of the Barbour amendment indicated that their primary interest was in aiding the laborer; materialmen were included as potential lienors without any real reason for including them advanced. No one contended that it was proper that an innocent homeowner should be subjected to "double payment." Instead, the proponents of the amendment assumed that the honest owner would be fully aware of the law and be able to protect himself. The principal argument in support of the Barbour amendment was that it would prevent "collusion" between "thieving contractors and scoundrelly owners who connive to swindle the workman out of his wages." … The opponents of the amendment used some rather strong language in asserting their position. One called the amendment a "fraud" and "infirm in principle." At all events, the amendment was voted down. Since most of the speakers seemed to be of the opinion that unlimited liens would not be permitted under the constitution unless expressly authorized therein, the fact that the Barbour amendment was defeated would seem to indicate an intention on the part of the delegates that unlimited liens should not be allowed. This cannot be stated with certainty, however, since one of the delegates was of the opinion that the provision as ultimately enacted would leave the question of limited or unlimited liens up to the legislature. Thus, there remains the possibility that the delegates adopted his view, and decided to dump the question into the legislators' laps. It can be stated categorically that, since no one thought that innocent homeowners should be subjected to "double payment," the delegates did not give their stamp of approval in advance to the present scheme of mechanics' liens.[25]

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25. Comment, *The "Forgotten Man" of Mechanics' Lien Laws — The Homeowner*, 16 Hastings L.J. 198, 216-18 (1964) [footnotes omitted]. Research has not revealed a single case, among nearly 900 mechanic's lien cases reported since 1879, that refers to the constitutional *Debates and Proceedings*. Fewer

A contrary interpretation of the debates is possible, since the Legislature in 1880 amended Code of Civil Procedure Section 1183 to provide that the lien "shall not be affected by the fact that no money is due, or to become due, on any contract made by the owner with any other party."[26] It is possible to conclude from the transcript that the debate resulted in a stand-off, with the extent of the lien left to later legislative determination. But even this interpretation of the original intent does not provide support for the position that the Legislature is powerless to limit, condition, or redirect certain mechanic's lien rights as a result of balancing competing interests. Both interpretations of the constitutional debates support the Legislature's power to limit liens for important policy reasons.

Limits on Legislative Power

Some authorities argue that restricting or eliminating the mechanic's lien right where the owner has paid the contractor in full would be unconstitutional.[27] Other authorities disagree.[28]

Since the particular question of limiting the homeowner's liability to amounts remaining unpaid under the contract has not been decided in modern times, those who believe this approach would be unconstitutional rely on quotations from

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than 10 cases have discussed the "double payment" problem, and none of them reviewed the original intent of the framers of the constitutional mechanic's lien right.

26. 1880 Cal. Code Amends. ch. 67, § 1.

27. See, e.g., Hunt, *Report to Law Revision Commission Regarding Recommendations for Changes to the Mechanic's Lien Law* [Part 2] (February 2000) (attached to Commission Staff Memorandum 2000-9 (Jan. 31, 2000)); see also First Supplement to Commission Staff Memorandum 2000-26 (April 10, 2000); Abdulaziz memorandum (attached to First Supplement to Commission Staff Memorandum 2000-36 (June 15, 2000)).

28. See, e.g., Honda, *supra* note 24; Letter from James Acret to Keith M. Honda (Aug. 25, 1999) (quoted in Honda, *id*. at 2-5).

the cases concerning the special status of the mechanic's lien. Great reliance is placed on two California Supreme Court cases decided in the last 25 years: *Connolly Development, Inc. v. Superior Court*[29] and *Wm. R. Clarke Corp. v. Safeco Insurance Co.*[30]

Connolly was a 4-3 decision upholding the constitutionality of the mechanic's lien statute against a challenge based on the claim that the imposition of the lien constituted a taking without due process. Strikingly, however, *Connolly* is not relevant to the question of whether a good-faith payment exception to double liability for mechanic's lien claims would be constitutional — the constitutionality of the mechanic's lien statute itself was the issue in the case. In upholding the statute, *Connolly* employed a balancing of interests in determining whether the taking without notice could withstand constitutional scrutiny. For the purposes of the Commission's proposal, *Connolly* is of interest because it illustrates that balancing of creditors' and debtors' rights must occur in considering mechanic's lien issues. This case is not relevant to the issue of whether the Legislature can constitutionally balance the interests of homeowners and mechanic's lien claimants through a rule protecting the owner from double payment liability.

In *Wm. R. Clarke Corp. v. Safeco* a divided court struck down pay-if-paid clauses in contracts between contractors and subcontractors. *Clarke* involved *contractual* waivers of an important constitutional right which were found to be *against* legislated public policy. The analysis undertaken in *Clarke* is clearly distinct from that required to determine whether a new public policy established by statute, in which the Legislature has balanced the competing interests, can properly be bal-

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29. 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976) (upholding mechanic's lien statute against due process attack).

30. 15 Cal. 4th 882, 938 P.2d 372, 64 Cal. Rptr. 2d 578 (1997) (pay-if-paid contract provision void as against public policy).

anced against the lien right. In *Clarke* the owner had not paid and the surety company was trying to avoid paying. These equities differ markedly from the situation addressed in the Commission's proposal, concerning cases where the owner has already paid in good faith.

Most relevant to an understanding of the extent of the Legislature's power to shape the implementing statute and to condition and limit the broad constitutional language are the following:

Roystone, quoted at length earlier, is probably the most significant decision because it held the 1911 payment bond reform valid and attempted to harmonize the new reforms with the contract rule that had prevailed for 60 years. Justice Henshaw's lone concurring opinion in *Roystone*[31] — to the effect that it is "wholly beyond the power of the Legislature

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31. 171 Cal. 526, 544, 154 P. 15 (1915). Justice Henshaw appears to have believed that even the 50% bonding provision was suspect:

> The owner may have paid the contractor (and he is not prohibited from so doing) everything that is due, and in such case this language would limit the right of the recovery of the lien claimant to what he could obtain under the bond. In short, he would have no lien upon the property at all. Here is as radical a denial of the constitutional lien as is found in any of the earlier statutes. The inconsistency between this language and other parts of the act is too apparent to require comment. Yet, as this seems to have been the deliberate design of the legislature, it is perhaps incumbent upon this court under its former decisions to give that design legal effect. If the legislature in fact means to give claimants the rights which the constitution guarantees them, as it declares its desire to do in section 14 [of 1911 Cal. Stat. ch. 681] …, it alone has the power to do so by language which will make it apparent that a lien claimant may still have recourse to the property upon which he has bestowed his labor if the interposed intermediate undertaking or fund shall not be sufficient to pay him in full. This court is, however, justified, I think, in waiting for a plainer exposition of the legislature's views and intent in the matter than can be found in this confused and confusing statute.

Id. at 546. Missing from this concurring opinion is any notion of balancing the rights of the owner.

to destroy or even to impair this lien" — was an extreme minority opinion even then.

Martin v. Becker[32] contains some strong language about the sanctity of the mechanic's lien: "[T]he lien of the mechanic in this state … is a lien of the highest possible dignity, since it is secured not by legislative enactment but by the constitution.… Grave reasons indeed must be shown in every case to justify a holding that such a lien is lost or destroyed." This language is directed toward the exercise of judicial authority in a case where the court was called upon to determine whether the right to a mechanic's lien was lost when the claimant had also obtained security by way of a mortgage. Although the court's sentiments may be sound, they are irrelevant to the standards for reviewing a legislative determination of the proper balance between competing interests.

Judicial recognition that the state has a strong policy favoring laws giving laborers and materialmen security for their liens[33] addresses only one element in the Legislative balancing process and does not determine the outcome where the Legislature determines that homeowners need protection from having to pay twice for the same home improvements through no fault of their own.

In *English v. Olympic Auditorium, Inc.*,[34] the court wrote: "Should the lien laws be so interpreted as to destroy the liens because the leasehold interest has ceased to exist, such interpretation would render such laws unconstitutional." But in this case there was no double payment — there was not even a single payment. The court ruled that mechanic's liens remained on a structure built by the lessee whose lease had terminated, notwithstanding the lease provision making any

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32. 169 Cal. 301, 316, 146 P. 665 (1915).

33. E.g., *Connolly*, 17 Cal. 3d at 827.

34. 217 Cal. 631, 640, 20 P.2d 946 (1933).

construction a fixture inuring ultimately to the lessor's benefit.

Young v. Shriver[35] has been cited for the language "we presume that no one will say that the right to the remedy expressly authorized by the organic law can be frittered away by any legislative action or enactment." But this is a case where the court rejected a mechanic's lien claim for the labor of plowing agricultural land, taking into account the technicalities of distinguishing between the first plowing and later plowings. The court did not find plowing at any time to be an "improvement" within the constitutional or statutory language.

Hammond Lumber Co. v. Barth Investment Corp.[36] repeats the *Martin v. Becker* language in a case concerning a technical question of whether a building had actually been completed for purposes of a 90-day lien-filing period. The court wrote: "The function of the legislature is to provide a system through which the rights of mechanics and materialmen may be carried into effect, and this right cannot be destroyed or defeated either by the legislature or courts, unless grave reasons be shown therefor." This case did not involve an issue of the scope of the Legislature's power to "destroy or defeat" the lien upon a showing of grave reasons.

Hammond Lumber Co. v. Moore[37] resolved the issue whether the Land Title Law, enacted by initiative, violated the mechanic's lien provision in the constitution. The court found that the lien recording requirement was not unduly burdensome, and in dicta speculated that "the second sentence of section 93, by denying the creation of a lien unless the notice is filed, violates the forepart of article XX, section 15, of the

35. 56 Cal. App. 653, 655, 206 P. 99 (1922).

36. 202 Cal. 606, 610, 262 P. 31 (1927).

37. 104 Cal. App. 528, 535, 286 P. 504 (1930).

Constitution, granting a lien." But that issue was not before the court, and similar procedural requirements have been accepted in the mechanic's lien law for years without challenge.

The source of some interesting language cited in a number of later cases is *Diamond Match Co. v. Sanitary Fruit Co.*:[38]

> The right of mechanics, materialmen, etc., to a lien upon property upon which they have bestowed labor, or in the improvement of which material which they have furnished have been used, for the value of such labor or materials, is guaranteed by the Constitution, the mode and manner of the enforcement of such right being committed to the Legislature.... Manifestly, the legislature is not thus vested with arbitrary power or discretion in attending to this business. Indeed, rather than power so vested in the legislature, it is a command addressed by the constitution to the law-making body to establish a reasonably framed system for enforcing the right which the organic law vouchsafes to the classes named. Clearly, it is not within the right or province of the legislature, by a cumbersome or ultratechnical scheme designed for the enforcement of the right of lien, to impair that right or unduly hamper its exercise. Every provision of the law which the Legislature may enact for the enforcement of the liens ... must be subordinate to and in consonance with that constitutional provision....
>
> But, while all that has been said above is true, it will not be denied that it is no less the duty of the legislature, in adopting means for the enforcement of the liens referred to in the constitutional provision, to consider and protect the rights of owners of property which may be affected by such liens than it is to consider and protect the rights of those claiming the benefit of the lien laws. The liens which are filed under the lien law against property, as a general rule, grow out of contracts which are made by and between lien claimants and persons (contractors) other than the owner of the property so affected, and such liens may be filed and so

38. 70 Cal. App. 695, 701-02, 234 P. 322 (1925).

> become a charge against property without the owner having actual knowledge thereof. The act of filing, as the law requires, constitutes constructive notice to the owners and others that the property stands embarrassed with a charge which will operate as a cloud upon the title thereof so long as the lien remains undischarged and that the property may be sold under foreclosure proceedings unless the debt to secure which the lien was filed is otherwise sooner satisfied. The filing of the claim in the recorder's office is intended to protect the owner of the property against double payment to the contractor or payment for his services and the materials he uses in the work of improvement in excess of what his contract calls for. The notice is also intended for the protection of those who may as to such property deal with the owner thereof — that is, third persons as purchasers or mortgagees.

In this case, the court held the claimant to the statutory requirement that the owner's name be stated correctly on the lien claim, since otherwise no one examining the record index would know that the claim had been filed as to the owner's property.

There is also a presumption in favor of the validity of statutes which may be applied to uphold legislative balancing of different interests in the mechanic's lien context. Legislative discretion was discussed in *Alta Building Material Co. v. Cameron* as follows:[39]

> The following language in *Sacramento Municipal Utility Dist. v. Pacific Gas & Elec. Co.*, 20 Cal. 2d 684, 693, [128 P.2d 529] is applicable: "The contention that the section in question [Code Civ. Proc. § 526b] lacks uniformity, grants special privileges and denies equal protection of the laws, is also without merit. None of those constitutional principles is violated if the classification of persons or things affected by the legislation is not arbitrary and is based upon some difference in the classes having a substantial relation to the

39. 202 Cal. App. 2d 299, 303-04, 20 Cal. Rptr. 713 (1962).

purpose for which the legislation was designed. [Citations.] … Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. [Citations.] A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it." [Citations omitted.]

While the essential purpose of the mechanics' lien statutes is to protect those who have performed labor or furnished material towards the improvement of the property of another (*Nolte v. Smith*, 189 Cal. App. 2d 140, 144 [11 Cal. Rptr. 261], inherent in this concept is a recognition also of the rights of the owner of the benefited property. It has been stated that the lien laws are for the protection of property owners as well as lien claimants (*Shafer v. Los Serranos Co.*, 128 Cal. App. 357, 362 [17 P.2d 1036]) and that our laws relating to mechanics' liens result from the desire of the Legislature to adjust the respective rights of lien claimants with those of the owners of property improved by their labor and material. (*Corbett v. Chambers*, 109 Cal. 178, 181 [41 P. 873].) … [Quotation from *Diamond Match Co.* omitted.]

Viewing section 1193 within the framework of these principles, we are unable to state that the Legislature acted arbitrarily and unreasonably in making the classification which it did.

The section does not require a pre-lien notice by those under direct contract with the owner or those who perform actual labor for wages on the property. The logical reason for this distinction is that the owner would in the usual situation be apprised of potential claims by way of lien in connection with those with whom he contracts directly, as well as those who perform actual labor for wages upon the property.

However, as to materials furnished or labor *supplied* by persons not under direct contract with the owner, it may be difficult, if not impossible, for the owner to be so apprised

> and the clear purpose of section 1193 is to give the owner 15 days' notice in such a situation that his property is to be "embarrassed with a charge which will operate as a cloud upon the title thereof so long as the lien remains undischarged, and that the property may be sold under foreclosure proceedings unless the debt to secure which the lien was filed is otherwise sooner satisfied." (*Diamond Match Co. v. Sanitary Fruit Co., supra*, p. 702.)

The court in *Alta Building Material* distinguished the Supreme Court case of *Miltimore v. Nofziger Bros. Lumber Co.*,[40] a 4-3 decision holding unconstitutional a statutory rule giving priority to laborers over material suppliers in satisfaction of mechanic's lien claims against the proceeds from the sale of the liened property.[41] Although *Miltimore* is short on detail, the *Alta Building Material* court concluded that *Miltimore* involved classifications "as to substantive matters," whereas Section 1193 at issue in *Alta Building Material* involved a procedural matter — "the right itself is not denied or impaired."

Balancing Interests

There have been a number of schemes implementing the constitutional direction since 1879, and several statutory provisions have been challenged for being unconstitutional as measured against the language of the constitution. Throughout the years, the courts have rejected most constitutional challenges to aspects of the statutes, recognized a number of exceptions to the scope of the constitutional provision, and generally have deferred to the Legislature's balancing of the interests. Of course, the Legislature can't ignore the constitu-

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40. 150 Cal. 790, 90 P. 114 (1907).

41. Subcontractors and original contractors were ranked third and fourth under Code of Civil Procedure Section 1194, as amended by 1885 Cal. Stat. ch. 152, § 4.

tional language, but the case law does not yet indicate the limit of statutory balancing of the respective interests.

In early cases, the fundamental property rights of the owner received frequent judicial attention. For example, in the course of striking down the statute requiring payment of construction contracts in money, the court in *Stimson Mill Co. v. Braun*[42] explained:

> The provision in the constitution respecting mechanics' liens (art. XX 20, sec. 15) is subordinate to the Declaration of Rights in the same instrument, which declares (art. I, sec. 1) that all men have the inalienable right of "acquiring, possessing and protecting property," and (in sec. 13) that no person shall be deprived of property "without due process of law." The right of property antedates all constitutions, and the individual's protection in the enjoyment of this right is one of the chief objects of society.

In considering whether it was constitutionally permissible to make procedural distinctions between different classes of lien claimants, the Supreme Court explained in *Borchers Bros., v. Buckeye Incubator Co.*:[43]

> The problem is therefore presented whether the Legislature's procedural distinction in section 1193 of the Code of Civil Procedure, requiring notice by a materialman but not by a laborer, is so arbitrary and unreasonable that there is no substantial relation to a legitimate legislative objective.
>
> The constitutional mandate of article XX, section 15, is a two-way street, requiring a balancing of the interests of both lien claimants and property owners. First, this argument could appropriately be presented to the Legislature and not to the courts. Second, in carrying out this constitutional mandate, the Legislature has the duty of balancing the interests of lien claimants and property owners.

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42. 136 Cal. 122, 125, 68 P. 481 (1902).

43. 59 Cal. 2d 234, 238-39, 379 P.2d 1, 28 Cal. Rptr. 697 (1963).

Examples of "Balanced Interests"

Situations where the Legislature has balanced competing interests are evident in the cases discussed above. Other mechanic's lien balancing acts include: the limitation of lien rights to licensed contractors; the statutory notice of nonresponsibility that frees an owner from liability for tenant improvements, even though they benefit the owner; the priority of future advances under a prior deed of trust; the exemption for public works.

With respect to this history of balancing interests, one expert has concluded:

> In each of these cases, the legislature has made a policy decision that the constitutional right to a mechanics lien should yield to legitimate interests of property owners.
>
> In one case, the legislature decided that a property owner should be protected against liens for work ordered by a tenant even though construction ordered by a tenant is just as valuable as any other construction. In another case, the legislature decided that it was more important to encourage construction financing by institutional lenders than to protect mechanics lien rights. In the last case, the legislature simply decided that public agencies should be exempt from mechanics lien claims.[44]

Licensed Contractor Limitation

Since 1931, unlicensed contractors have been precluded from recovering compensation "in any action in any court of this state for the collection of compensation" for activities required to be licensed.[45] In *Alvarado v. Davis*,[46] the court denied enforcement of a mechanic's lien by an unlicensed

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44. Letter from James Acret to Keith M. Honda (Feb. 11, 2000) (attached to Second Supplement to Commission Staff Memorandum 2000-9 (Feb. 11, 2000), Exhibit p. 18).

45. See 1931 Cal. Stat. ch. 578, § 12.

46. 115 Cal. App. Supp. 782, 783 (1931).

contractor based on the licensing requirement enacted in 1929, even before the statute provided an explicit bar.[47]

The current rule is set out in Business and Professions Code Section 7031. The courts have affirmed the intent of the Legislature "to enforce honest and efficient construction standards" for the protection of the public.[48] The severe penalty in the nature of a forfeiture caused some unease when courts were faced with technical violations of the licensing statute, giving rise to the substantial compliance doctrine.[49] The Legislature acted to rein in the substantial compliance doctrine by amendments starting in 1991 restricting the doctrine to cases where the contractor has been licensed in California and has acted reasonably and in good faith to maintain licensure, but did not know or reasonably should not have known of the lapse.[50]

In *Vallejo Development Co. v. Beck Development Co.*,[51] the court reaffirmed the authority of the licensing rules:

> California's strict contractor licensing law reflects a strong public policy in favor of protecting the public against unscrupulous and/or incompetent contracting work. As the California Supreme Court recently reaffirmed, "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services.... The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character,

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47. See 1929 Cal. Stat. ch. 791, § 1.

48. See Famous Builders, Inc. v. Bolin, 264 Cal. App. 2d 37, 40-41, 70 Cal. Rptr. 17 (1968).

49. See, e.g., Latipac, Inc. v. Superior Court, 64 Cal. 2d 278, 279-80, 411 P.2d 564, 49 Cal. Rptr. 676 (1966).

50. Bus. & Prof. Code § 7031(d)-(e); see also Bus. & Prof. Code § 143 (general bar to recovery by unlicensed individuals and prohibition on application of substantial compliance doctrine).

51. 24 Cal. App. 4th 929, 938, 29 Cal. Rptr. 2d 669 (1994).

> understand applicable local laws and codes, and know the rudiments of administering a contracting business."

The constitutional mechanic's lien provision predates the licensing regime by 50 years. The decisions do not question the propriety of this major limitation on the constitutional lien. Even though a disfavored forfeiture can result from application of the licensing rules, the mechanic's lien right bows before the policy of protecting the public implemented in the licensing statute.[52]

Public Works

The statutes make clear that the mechanic's lien is not available in public works.[53] A "public work" is defined as "any work of improvement contracted for by a public entity."[54] The constitutional mechanic's lien provision does not contain this limitation.

The statutory rule appears first in 1969.[55] However, by 1891 the California Supreme Court had ruled that the constitutional mechanic's lien provision could not apply to public property as a matter of public policy. In *Mayrhofer v. Board of Education*,[56] a supplier sought to foreclose a lien for materials furnished to a subcontractor for building a public schoolhouse.

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52. The scope of the licensing rules is limited. The bar only applies to those who are required to be licensed for the activity they are conducting. Thus, for example, a person who is hired as an employee to supervise laborers in constructing a house is not a contractor. See, e.g., Frugoli v. Conway, 95 Cal. App. 2d 518, 213 P.2d 76 (1950). Although there is no case deciding the issue, it is assumed that unlicensed contractors who are not required to be licensed because they only contract for jobs under $500 (see Bus. & Prof. Code § 7048) are still entitled to the mechanic's lien law remedies because the bar of Business and Professions Code Section 7031 would not apply to them.

53. Civ. Code § 3109.

54. Civ. Code § 3100; see also Civ. Code §§ 3099 ("public entity" defined), 3106 ("work of improvement" defined).

55. 1969 Cal. Stat. ch. 1362, § 2 (enacting Civ. Code § 3109).

56. 89 Cal. 110, 26 P. 646 (1891).

Although the constitutional provision is unlimited in its use of "property" to which the lien attaches for labor or materials furnished, the court found that "the state is not bound by general words in a statute, which would operate to trench upon its sovereign rights, injuriously affects its capacity to perform its functions, or establish a right of action against it." [57] The court termed it "misleading to say that this construction is adopted on the ground of public policy," thus distinguishing this limitation on the scope of the mechanic's lien from other balancing tests. Rather, the interpretation follows from the original intent of the language to provide remedies for private individuals; it would be an "unnatural inference" to conclude otherwise.[58] Constitutional provisions for the payment of state debts through taxation and restrictions on suits against the state bolster the conclusion that general provisions like the mechanic's lien statute and its implementing legislation do not apply to the state and its subdivisions.[59]

Special Protections of Homeowner and Consumer Interests

Modern California law provides a number of special protections for homeowners.[60] This special treatment evidences legislative concern for this fundamental class of property and suggests the propriety of balancing that interest with the mechanic's lien right. This is not entirely a modern development. Just as the mechanic's lien is the only creditor's remedy

57. *Id*. at 112.

58. *Id*. at 113.

59. *Accord* Miles v. Ryan, 172 Cal. 205, 207, 157 P. 5 (1916).

60. See, e.g., Bus. & Prof. Code § 10242.6 (prepayment penalties); Civ. Code §§ 2924f (regulation of powers of sale), 2949 (limitation on due-on-encumbrance clause), 2954 (impound accounts), 2954.4 (late payment charges).

with constitutional status, the homestead exemption is also constitutionally protected.[61]

The California codes are replete with consumer protection statutes that condition the freedom of contract and other fundamental rights. Particularly relevant here is the Contractors' State License Law,[62] which contains numerous provisions limiting activities of contractors in the interest of consumer protection.

Other Constitutional Rulings

A few cases have held different aspects of the mechanic's lien statute unconstitutional and are noted below. These cases do not shed much light on the constitutionality of modern reform proposals addressing the double liability problem. In fact, as the older cases tended to favor contract rights over the rights of mechanic's lien creditors, they lend support to the Commission's proposal to protect good-faith payments under the homeowner's contract with the prime contractor.

Gibbs v. Tally[63] invalidated the mandatory bond provision in Code of Civil Procedure Section 1203, as enacted in 1893, as an unreasonable restraint on the owner's property rights and an unreasonable and unnecessary restriction on the power to make contracts.

Stimson Mill Co. v. Braun[64] held the requirement of payment in cash in the 1885 version of Code of Civil Procedure Section 1184 was unconstitutional as an interference with property and contract rights.

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61. See Cal. Const. art. XX, § 1.5 ("The Legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families.")

62. Bus. & Prof. Code §§ 7000-7191

63. 133 Cal. 373, 376-77, 65 P. 970 (1901) (distinguished in *Roystone*).

64. 136 Cal. 122, 125, 68 P. 481 (1902).

The allowance of attorney's fees as an incident to lien foreclosure under the 1885 version of Code of Civil Procedure Section 1195 was invalidated in *Builders' Supply Depot v. O'Connor*.[65]

The most relevant case is *Parsons Brinckerhoff Quade & Douglas, Inc. v. Kern County Employees Retirement Ass'n*,[66] cited in a recent Legislative Counsel's opinion.[67] Assembly Member Mike Honda requested an opinion from the Legislative Counsel on the following question:

> Would a statute be unconstitutional if it provides the owner of residential real property who pays a contractor in full for a work of improvement on the property with a defense against a mechanics' lien filed by a subcontractor who has bestowed labor on, or furnished material for, that work of improvement?

The Opinion concluded that such a statute would be unconstitutional. While it cites a broad statement in the case law concerning the legislative power in relation to the constitution,[68] the Opinion does not mention the limitations on the constitutional provision resulting from balancing competing policies, such as the contractor licensing rules, nor does it consider the constitutional history as reflected in the *Debates and Proceedings*. The Opinion does not mention the early case law, nor the statutes from 1885 to 1911, under which good-faith payment to the prime contractor without notice of other claims acted as a shield against mechanic's liens.

Although the Opinion recognizes that the Legislature has "plenary power to reasonably regulate and provide for the

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65. 150 Cal. 265, 88 P. 982 (1907).

66. 5 Cal. App. 4th 1264, 7 Cal. Rptr. 2d 456 (1992).

67. See Legis. Counsel Opinion #13279, May 11, 1999 (attached to Second Supplement to Commission Staff Memorandum 2000-9 (Feb. 11, 2000), Exhibit pp. 25-30) [hereinafter "Opinion"].

68. *Diamond Match Co.*, *supra* note 38.

exercise of this right, the manner of its exercise, the time when it attached, and the time within which and the persons against whom it could be enforced" it concludes:

> However, on the other hand, we think that a statute that provides the owner of residential real property with a defense against a mechanics' lien by a subcontractor whenever the owner pays a contractor in full would effectively deny the subcontractor the right to enjoy the benefits of the lien because a payment in full to the contractor does not necessarily protect the subcontractor's right to be paid.

The Commission does not believe this conclusion follows from the analysis.

The Opinion does not consider the requirement of legislative balancing between the interests of potential lien claimants and owners, as recognized in the lengthy text it quotes from the *Borchers* case. The Opinion does not analyze the interests involved in implementing the constitutional duty. The Opinion recognizes that failure to follow parts of the existing statutory procedure result in the loss of the lien right, but fails to consider how the defense of full payment might be implemented through similar notices, opportunities to object, demands, good-faith determinations and the like.

As the lengthy history of mechanic's liens in California prior to 1911 clearly shows, such a scheme can be and has been constitutionally implemented.

Probably the most meaningful point in the Opinion is the citation to *Parsons Brinckerhoff Quade & Douglas, Inc. v. Kern County Employees Retirement Ass'n*.[69] The Opinion cites this case for the proposition that "the Legislature, in carrying out its constitutional mandate … may not effectively deny a member of a protected class the benefits of an otherwise valid lien by forbidding its enforcement against the

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69. 5 Cal. App. 4th 1264, 7 Cal. Rptr. 2d 456 (1992).

property of a preferred person or entity." But *Parsons* involved the conflict between a special debtor's exemption statute and the mechanic's lien law. To uphold the exemption would mean that the fund would receive a windfall. This is not the situation where the homeowner has paid in full under the contract with the prime contractor. The proposal does not impose a categorical exemption of homeowners from liability under home improvement contracts. In the absence of such a proposal, *Parsons* is not on point.

Conclusion on Constitutionality of Reforms

The Commission's review of the constitutional issues leads to the conclusion that the proposal to protect good-faith payments by owners under home improvement contracts would be constitutional. This follows from a review of the constitutional intent, case law history, statutory development, balancing tests, and the opinions of experts in the field on both sides of the issue (including Commission consultants), as well as a general sense of what is permissible consumer protection in the present era.

The Commission's review of scores of cases has not led to any clear idea of what the governing standard might be. Most judicial discourse on the nature of the constitutional provision, the role of the Legislature in implementing it, and other affirmations of the sanctity of the mechanic's lien appear in cases involving technical issues or establishing the basis for a liberal, remedial interpretation of the statute. By and large, the cases are not concerned with limiting legislative power or rejecting legislative determinations of the proper balance of interests based on larger policy concerns.

The standard recitations pertaining to the force of the constitutional language suggest a general inclination of the courts to honor the protection of mechanics, suppliers, laborers, subcontractors, and contractors. But at the same time, it must be

recognized that the concrete results in these cases have been largely to uphold statutory qualifications and policy balancing, notwithstanding the breadth of the constitutional language.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

REVISED RECOMMENDATION

Stay of Mechanic's Lien Enforcement Pending Arbitration

March 2002

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*, 31 Cal. L. Revision Comm'n Reports 333 (2001). This is part of publication #212 [*2001-2002 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

JOYCE G. COOK, Chairperson
ASSEMBLY MEMBER HOWARD WAYNE, Vice Chairperson
DAVID HUEBNER
FRANK M. KAPLAN
SENATOR BILL MORROW
EDMUND L. REGALIA
WILLIAM E. WEINBERGER

March 14, 2002

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) 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 is submitted pursuant to Resolution Chapter 78 of the Statutes of 2001.

Respectfully submitted,

Joyce G. Cook
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[1] 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 statute to delete the last sentence of subdivision (a) (concerning joinder of a lien claim otherwise within the juris-

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

diction of the municipal court), and to simplify the procedure for preserving a contractual right to arbitrate and obtaining a stay pending arbitration.

Jurisdiction and Joinder of Claims

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

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.[4] 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,[5] making it impossible for the plaintiff to delay litigation until completion of arbitration, except where

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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).

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).

arbitration was completed very quickly.[6] 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.[7]

By itself, however, an application for a stay is not sufficient to stay the action.[8] 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.[9] 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.[10]

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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 dis-

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 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.

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covery 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").

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

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

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

REPORT

Mechanic's Lien Law Reform

February 2002

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

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

JOYCE G. COOK, Chairperson
ASSEMBLY MEMBER HOWARD WAYNE, Vice Chairperson
DAVID HUEBNER
SENATOR BILL MORROW

February 11, 2002

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

This report provides an overview of the Law Revision Commission's study of mechanic's lien law to date, with emphasis on various approaches to addressing the problem of double liability in home improvement projects.

The Commission concludes that a thorough review and revision of the mechanic's lien law (Civ. Code §§ 3082-3267) and related provisions, including parts of the Contractors' State License Law (Bus. & Prof. Code §§ 7000-7191), should be undertaken in order to modernize, simplify, and clarify the law, making it more user-friendly, efficient, and effective for all stakeholders.

This report was prepared pursuant to Resolution Chapter 78 of the Statutes of 2001 and a specific request from the Assembly Committee on Judiciary.

Respectfully submitted,

Joyce G. Cook
Chairperson

MECHANIC'S LIEN LAW REFORM

Contents

MECHANIC'S LIEN LAW REFORM

SCOPE AND STATUS OF STUDY

The Law Revision Commission commenced its study of the mechanic's lien laws in 1999, in response to a request from the Assembly Judiciary Committee to undertake a "comprehensive review of this area of the law, making suggestions for possible areas of reform and aiding the review of such proposals in future legislative sessions."[1] For the most part, the Commission's study of mechanic's lien issues to date has been devoted to the double liability problem faced by homeowners whose prime contractors fail to pay subcontractors and suppliers.[2] The Commission has been focusing on mechanic's liens in the home improvement area because the Legislature has shown special interest in this subject in recent years,[3] and because public commentary at Commission meetings has gravitated to this issue.

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1. See Letter from Assembly Members Sheila James Kuehl (Chair) and Rod Pacheco (Vice Chair), to Nat Sterling, June 28, 1999 (attached to Commission Staff Memorandum 99-85 (Nov. 16, 1999)).

In the following discussion, Commission staff memorandums are referred to in the following format: "Mem. 2000-26 pp. 3-4" for pages in a memorandum, "Mem. 2000-26, Ex. pp. 1-2" for pages in an exhibit, and "Mem. 2000-26 Supp. 2 pp. 1-2" for pages in a supplement.

2. For the Commission's conclusions and recommendation on this aspect of the mechanic's liens study, see *The Double Payment Problem in Home Improvement Contracts*, 31 Cal. L. Revision Comm'n Reports 281 (2001).

3. See ACA 5 (Honda) and AB 742 (Honda) in the 1999-2000 Session; AB 568 (Dutra), as introduced and as amended March 27, 2001, and AB 543 (Vargas), as amended April 16, 2001, in the 2001-2002 Session. Both AB 568 and AB 543 were amended in the Assembly on May 2, 2001, to remove the substantive provisions and add the following intent language:

> It is the intent of the Legislature to revise and reorganize the mechanics' lien and stop notice provisions in Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the Civil Code, and related provisions,

Preliminary work has also been done on a general review and redraft of the mechanic's lien law[4] and related provisions

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with the purpose of modernizing and simplifying the statutes and addressing problems, such as the potential for double payment by homeowners.

The Assembly Committee staff analysis of AB 568, as amended March 27, 2001, includes the following commentary:

> This bill, as proposed to be amended, sets forth a statement of legislative intent regarding the need for revisions of the law governing mechanic's liens and related provisions. As discussed below, the author agreed to amend the bill into legislative intent language at this time in order to create a potential vehicle for related recommendations that are expected to come later this session from the California Law Revision Commission (CLRC or Commission).
>
> *Procedural History*. The introduced version of this bill contained various provisions designed to address problems with mechanic's liens in the home improvement area, and included a homeowner's relief recovery fund. On March 27, 2001, the bill was amended to delete those provisions and replace them with a joint check approach to the problem.
>
> At the request of the Chair, the author agreed to delete the current contents of the bill and replace them with the legislative intent language set out above, in order to serve as a vehicle for recommendations on the subject that are expected to be issued later this year by CLRC. The author also agreed to bring the bill back to this Committee for further hearing at such time that substantive provisions are added to the measure.
>
> *Pending CLRC Study of Mechanic's Lien Laws*. On June 28, 1999, the then chair and vice-chair of this Committee sent a letter to CLRC requesting the Commission to undertake a "comprehensive review of [the law in the area of mechanic's liens and related provisions], including making suggestions for possible areas of reform and aiding the review of such proposals in future legislative sessions." The Commission is currently conducting this study. While its initial focus has been mechanic's liens in the home improvement area, given the particular interest in this subject during the last legislative session, the study is not limited to home improvement contracts. As CLRC has indicated, the entire mechanic's lien statute is ripe for revision and reorganization. (See CLRC Staff Memorandum 2001-18, "Mechanic's Liens: Overview of Reform Proposals," at p. 2 (Jan. 24, 2001).)

The analysis of AB 543 contains similar language. Both of these bills passed the Assembly and are pending in the Senate as of the date of this report.

4. The mechanic's lien is governed by Civil Code Sections 3082-3267. Generally speaking, and as used in this report, "mechanic's lien law" should be taken to include stop notice rights and bond remedies, which are all governed by Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the Civil Code.

in the Contractors' State License Law.[5] This work is continuing as Commission resources permit.[6]

The Commission has conducted its study of mechanic's liens pursuant to its general authority to consider creditors' remedies, including liens, foreclosures, and enforcement of judgments, and its general authority to consider the law relating to real property.[7]

This preliminary report summarizes the main points of discussion in past Commission meetings, and provides references to Commission meeting materials where additional detail may be found, particularly the valuable comments received from Commission consultants, meeting participants, and others who sent letters and email.[8]

GENERAL STATUTORY REFORM

The basic mechanic's lien law has been amended 66 times since its recodification in the Civil Code in 1969.[9] The earlier statute, as recodified in the Code of Civil Procedure in 1951,[10] was amended 39 times. All told, since its original codification in the 1872 Code of Civil Procedure, the mechanic's lien statute has been affected by 148 enacted bills.

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5. See Bus. & Prof. Code §§ 7000-7191.

6. Substantial Commission time and staff resources have been and will continue to be devoted to large, statutorily mandated projects to recommend repeal of provisions made obsolete by the Trial Court Employment Protection and Governance Act, the Lockyer-Isenberg Trial Court Funding Act of 1997, and the implementation of trial court unification. See Gov't Code §§ 70219 (repealed by 2001 Cal. Stat. ch. 745, § 113), 71674. In addition, recent and impending budget cuts will limit the productivity of the Commission's staff.

7. For the text of the most recent legislative authorization, see 2001 Cal. Stat. res. ch. 78, set out as Appendix 2 to the *2001-2002 Annual Report*, 31 Cal. L. Revision Comm'n Reports 1, at 37 (2001).

8. See Appendix *infra* at 389.

9. 1969 Cal. Stat. ch. 1362.

10. 1951 Cal. Stat. ch. 1159.

Today's mechanic's lien statute still contains language dating back to the 1872 codification and before. The 1951 and 1969 recodifications continued much of the pre-existing language, and were not intended to be substantive reforms.[11] This process has taken its toll on a body of law that one California Supreme Court justice labeled "confused and confusing" nearly 90 years ago.[12]

Commentators predictably have different views on the soundness of the existing statute and the scope and desirability of statutory reform. At the Commission's first meeting on mechanic's lien issues, several speakers urged the Commission to "go back to square one" and conduct a thorough review and revision of the mechanic's lien law and related provisions, on the grounds that they are confusing, complicated, and at odds with modern conditions. Others argued that, while some improvements could be made, the statute is basically sound and represents the accumulated improvements from many years' work.[13]

Drafting Approach

The Commission has started the process of redrafting the mechanic's lien law. Depending on the breadth and depth of the revision process, this may be an extended project. There is a strong argument that the mechanic's lien law is in such a poor condition that it would be better to start with a clean

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11. See 1951 Cal. Stat. ch. 1159, § 5 (legislative intent as "only a formal revision of the law … [not] an alteration in the public policy … nor in the meaning or substance thereof"); 1969 Cal. Stat. ch. 1362, § 10 (legislative intent "to revise and restate … shall not be construed to constitute a change in … preexisting law").

12. Roystone Co. v. Darling, 171 Cal. 526, 546, 154 P. 15 (1915) (Henshaw, J. concurring).

13. See Minutes of November 1999 Meeting.

slate.[14] However, the Commission has tentatively concluded that it would be better to start with the existing statute and revise it in place. The Commission is concerned that it would not be productive to become mired in a lengthy comprehensive revision of the mechanic's lien law that ultimately could not be enacted. A consensus on the need for reform is easier to build by a detailed review of the existing statute, than by throwing it out and starting with a blank slate or with a model statute.

The Commission's past experience in revising major statutes[15] demonstrates that stakeholders and other interested persons can profitably work together on an overall revision by taking the existing law apart on a section-by-section basis and putting it back together, omitting obsolete provisions, reconciling contradictory provisions, adding new clarifications, and making other useful reforms.

By modernizing the drafting, eliminating archaic and unnecessary language, reorganizing and simplifying the structure of

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14. See, e.g., James Acret's "Draft of Simplified Mechanic's Lien Statute" (Mem. 2001-41, Ex. pp. 1-7). For reactions to this proposal, see Mem. 2001-41 Supp. 1 (Gordon Hunt) & Mem. 2001-41 Supp. 2 (Sam Abdulaziz). Mr. Acret has described the mechanic's lien statute as an "unruly beast that cannot easily be beaten into submission. This writer believes that the mechanics lien statute should be rewritten from scratch rather than redlined. That approach got us to where we are now!" See Letter from James Acret to Stan Ulrich, May 17, 2001 (Mem. 2001-53 Supp. 1, Ex. p. 2). In contrast, Rodney Moss writes that the "problem is that an enormous case law has developed over the years based upon the mechanic's lien law as drafted and those clarifications have become part of the lien law. I do not believe the history of the lien law can be disregarded in any attempt to update and refine the lien law." See Letter from Rodney Moss to Stan Ulrich, May 18, 2001 (Mem. 2001-53 Supp. 1, Ex. p. 3).

15. E.g., the Family Code, the Probate Code, the Eminent Domain Law, the Enforcement of Judgments Law, the Administrative Procedure Act. See, respectively, *1994 Family Code*, 23 Cal. L. Revision Comm'n Reports 1, 5 (1993); *New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001 (1990); *Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601 (1974); *Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980); *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995).

the statute, and using shorter, clearer sections, the statutes can be greatly improved even if no major substantive changes are made. In addition, a simpler and better-organized statute facilitates implementation of policy revisions and technical adjustments in future years as the need arises.[16]

Rectifying General Definitions

Many, if not most, of the definitional provisions in the mechanic's lien statute are poorly drafted, confusing, and disorganized. For example, Civil Code Section 3097, purporting to define "preliminary 20-day notice (private work)," is the longest section in the mechanic's lien statute. It is twice as long as the entire mechanic's lien statute in the 1872 Code of Civil Procedure. Section 3097, amended over 15 times since 1969, is almost a mini-practice guide in itself, containing substantive and procedural material that should be relocated with related substantive sections. Many other supposed definitions are really substantive rules that should be integrated with related provisions.[17]

Some terms are defined and never used, such as "materialman" (Section 3090) and "subdivision" (Section 3105). Others are defined, but largely unused in later provisions, such as "site" (Section 3101), which is ignored in favor of references to land, real property, or jobsite. Some are defined and used only once, such as "notice of nonresponsibility" (Section 3094). Archaic language, such as the references to flumes and aqueducts in the definition of "work of improvement" (Section 3106) should be eliminated or subsumed in general language. Many other examples could be listed.

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16. See, e.g., Mem. 2001-92.

17. See, e.g., Civ. Code §§ 3083 (bonded stop notice), 3084 (claim of lien), 3092 (notice of cessation), 3093 (notice of completion).

Public Contracts

There is no mechanic's lien right in public works.[18] Mandatory bonding and the stop notice remedy provide protection for contractors, laborers, and suppliers on public construction projects. A general body of law concerning stop notices and payment bonds in public works is contained within the mechanic's lien law in the Civil Code.[19] Tentatively, the Commission is considering separating the public and private construction provisions by removing the public works sections from the Civil Code mechanic's lien statute.

The provisions concerning public works could be relocated in the Public Contract Code, which was created in 1982 by pulling sections together from a number of other codes, including the Education Code, Government Code, Streets and Highways Code, and Water Code. This type of reorganization of the mechanic's lien statute would be consistent with the intent of Public Contract Code Section 100, which reads, in part: "The Legislature finds and declares that placing all public contract law in one code will make that law clearer and easier to find."

Contractor and supplier remedies relating to public construction contracts go hand in hand with the provisions governing the contract terms and bidding process. Under the existing scheme, the stop notice procedure seems to be consolidated in the Civil Code, but there are many other bond provisions in the Public Contract Code and elsewhere. These provisions should be reorganized to facilitate use by courts, attorneys, and affected parties.

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18. See, e.g., Civ. Code § 3109 ("This chapter does not apply to any public work.").

19. See, e.g., Civ. Code §§ 3179-3214 (stop notices for public works — 25 sections), 3247-3252 (payment bonds for public works — six sections).

Completion Issues — Senate Bill 938

The Assembly Judiciary Committee has deferred consideration of Senate Bill 938 (Margett) (2001-2002 legislative session), relating to giving notice of completion, pending receipt of the Commission's report.[20] This bill would require the owner, within 10 days after a notice of completion or cessation is filed, to give notice to subcontractors and suppliers who have given a preliminary notice. Failure to do so would negate the shortening of the lien-filing period normally resulting from such filings, meaning that the 90-day period would apply. As discussed above, the Commission has not completed its comprehensive review of the mechanic's lien statute. The Commission has not considered the issues addressed in SB 938 or formulated a proposal encompassing the notice of completion.[21]

Accordingly, the Commission respectfully requests that consideration of SB 938 (or other bills) not be deferred in anticipation of the Commission's completion of a comprehensive mechanic's lien recommendation.

ADDRESSING THE DOUBLE LIABILITY PROBLEM

The following discussion summarizes the various proposals that have come before the Commission in its consideration of the double liability problem. The Commission's proposal for addressing this issue is set out in a separate Recommendation on *The Double Liability Problem in Home Improvement Contracts* (February 2002),[22] and will not be repeated here. In that

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20. See Assembly Judiciary Committee Analysis of SB 938 (Mem. 2001-53, Ex. pp. 2-6).

21. Nor does the Commission have a position on SB 938. The Commission cannot advocate the passage or defeat of bills pending in the Legislature or the approval or veto of bills on the Governor's desk. See Gov't Code § 8288.

22. This final recommendation follows an earlier Tentative Recommendation on *The Double Payment Problem in Home Improvement Contracts* (September

recommendation, the Commission proposes to protect homeowners from double liability in small home improvement contracts to the extent that payments have been made in good faith to the prime contractor.

As an aid to the Legislature in its potential consideration of future proposals, this report provides an overview of a variety of approaches that have been tried in other jurisdictions, are discussed in the literature, or were suggested by persons who have participated in the Commission's study. Thus, this report reviews the alternatives that were rejected by the Commission as a means to remedy the double liability problem in home improvement contracts. They are grouped in several categories: (1) incremental reforms, (2) reallocating the risk, (3) recovery and reimbursement funds, (4) payment bonds, (5) escrows and withholding, and (6) other approaches.

(1) Incremental Reforms

Some commentators have argued that existing California law is satisfactory or, if any specific problems can be identified, only minor adjustments would be needed to address them. From this perspective, the fact that the existing statute has been amended scores of times is not a defect, but an indicator that existing law has reached a state of balance and refinement through its repeated adjustment over the years (although it is generally admitted that some of the statutory language and the statutory organization are confusing).

In this view, the best approach would be to fine-tune the statute by making whatever incremental reforms are needed to address concrete issues and seek to perfect the statutory balance among stakeholders. This perspective rejects major revisions as potentially destructive of the balance that has

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2001), and a Discussion Draft on *Consumer Protection Options Under Home Improvement Contracts* (December 2001).

resulted from 90 years of enactments, amendments, and recodifications following enactment of the direct lien in 1911.[23]

Suggested incremental reforms include requiring better notices to homeowners, increasing the amount of the contractor's license bond, using stepped license bonds, mandating general liability insurance, and requiring the use of joint checks. Each of these proposals is discussed below.

The Commission has not rejected the idea of making some of these incremental reforms, but has concluded that they are not adequate to address the double liability problem. Nevertheless, one or more of these reforms may be appropriate as part of an overall mechanic's lien law reform package.

Better Notice

In home improvement contracts, Business and Professions Code Section 7018.5 requires the prime contractor to give a special notice to the homeowner ("Notice to Owner"). This notice is intended to give the owner a general idea of rights and remedies under the contract. The existing mechanic's lien system also depends on the preliminary 20-day notice given to the owner (and others) by potential lien claimants after work commences or materials are furnished, as prescribed by Civil Code Section 3097. This notice is a crucial step in the process whereby claimants establish and preserve their right to enforce their mechanic's lien and stop notice rights.

Ideally, these notices would provide homeowners with sufficient information to understand their rights, remedies, and risks, and thus enable them to protect their interests sensibly and cheaply by selecting the optimum course of action. In view of the complexity of the mechanic's lien and stop notice remedies and the inherent potential complexity of a construction project, it is perhaps not surprising that the

23. 1911 Cal. Stat. ch. 681.

existing notices do not achieve this goal. No commentators have come forward to defend the language of the current notices.

The Commission believes that the notices and forms used under the mechanic's lien law and Contractors' State License Law should be clearer and more direct, even though the effect of these improvements might be marginal. Statutory notices are usually troublesome, becoming stale because of the burden of amending the statute to make revisions. Consequently, the Commission recommends that, to the extent possible, the specific content of notices and forms should be delegated to regulation by the Contractors' State License Board (CSLB).

A number of suggestions for ways to improve the notices are set out in Commission meeting materials.[24] The most highly developed notice scheme, based in part on the CSLB's then proposed Home Improvement Protection Plan ("HIPP 2000"), would (1) change the name of the notice given by the prime contractor at the start of a project from "Notice to Owner" to "Mechanic's Lien Warning," (2) require the prime contractor to obtain written confirmation from the owner that the warning had been received, (3) make failure to give the notice and get confirmation a violation of the Contractors' State License Law, subjecting the prime contractor to discipline, (4) make injuries arising out of the failure to give the warning compensable from the contractor's license bond, and

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24. See Mem. 2000-9, Hunt Report Pt. 2, Ex. pp. 32-40 (CSLB's HIPP 2000 draft of Aug. 1999); Mem. 2000-9 Supp. 1 (CSLB revised HIPP draft of Jan. 2000); Mem. 2000-37 p. 6, & Ex. pp. 9-17 (Abdulaziz drafts); Mem. 2000-47 Supp. 2, Ex. pp. 23-32 (Abdulaziz drafts) & Ex. pp. 33-37 (staff versions). Release forms are discussed, e.g., in Mem. 99-85, Hunt Report Pt. 1 pp. 13-16; Mem. 2000-37, Ex. pp. 22-23 (Gallagher); Mem. 2000-78, Ex. pp. 1-2 (Acret). See also Mem. 2000-37 Supp. 2 pp. 3-4 (LACN).

(5) include a checklist to assist the owner in determining whether all important steps have been taken.[25]

Consumer education in general, bolstered by the use of informative, understandable notices given in a timely fashion, are desirable as a cheap and efficient way to avoid problems from the outset of a home improvement project. Commentators who oppose more substantive changes in the law have argued that if homeowners are adequately informed of their rights and remedies under the law, they can protect their interests without the need to enact any new consumer protections or change the current balance among the various stakeholders.

Improving notices should be fairly simple to implement, because the Contractors' State License Board has the authority and responsibility to protect homeowners and is in a position to prepare the appropriate notice forms and to help educate homeowners and contractors. However, it is unrealistic to think that notice alone is a sufficient response to the double liability problem. The law is too complex to be described briefly and understandably. Recent experience in attempting to rewrite the notices under the existing statute is not encouraging. Even if it were possible, notice alone does not overcome the trouble and expense of deciding what steps to take, particularly where common sense dictates that an owner who makes progress payments as they come due has fulfilled the contractual obligation. Few homeowners, particularly on smaller projects, would be likely to bother with bonding or joint control agencies, even if they understood how to go about it.

Requiring written confirmation of notice from homeowners might help in some cases, and could help address the problem raised in CSLB correspondence concerning whether many prime contractors give the required notice. But common

25. See Mem. 2000-37, Ex. pp. 9-17 (Abdulaziz drafts).

experience with signing preprinted forms suggests that the confirmation may end up being just another piece of paper to be signed with other items, without any real effect.

Increased License Bond

The contractor's license bond could be increased to a level that would provide more protection for homeowners. The basic licensed contractor's bond is set at $7,500.[26] Material and equipment suppliers are not licensed, and provide no bond.[27] Minor works contractors (under $500) are not required to be licensed.[28] The license bond amount appears to be a only a minor barrier to entry into the construction business. Contractors who get in financial trouble will generate claims and have unsatisfied obligations far exceeding the license bond.[29]

License bonds at lower amounts do not need to be underwritten and are economically feasible to the surety companies because of the number of bonds written. An increase from $7,500 to $10,000 would probably not require additional underwriting, and would raise home improvement contractor license fees to the level set in 1994 for swimming pool contractors.

Eight years ago the general license bond was raised from $5,000 to $7,500.[30] Adjusted for inflation, this amount would be over $8,800 in 2001 terms. One commentator has proposed

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26. Bus. & Prof. Code § 7071.6(a). Swimming pool contractors need a $10,000 bond. *Id*. § 7071.6(b).

27. See Bus. & Prof. Code § 7052.

28. Bus. & Prof. Code § 7048.

29. See, e.g., Mem. 2000-47 Supp. 1, Ex. p. 11 (Gallagher letter giving examples of four double payments arising out of one contractor's bankruptcy, ranging in amount from $49,254 to $170,425).

30. 1994 Cal. Stat. ch. 26, § 206.7.

increasing the general $7,500 license bond to $10,000.[31] This $2,500 increase would be more than the adjustment needed to keep pace with inflation, but there is no magic number, and if a 50% increase was justified in 1994, another 33% increase now is probably not out of line. The Lumber Association of California and Nevada has proposed raising the license bond to $20,000.[32]

Increasing the license bond amount for home improvement contractors to $10,000-15,000 or even higher should be relatively simple and would not impose a significant cost on licensed contractors. Bonds at this level should also not impose impracticable levels of underwriting costs and burdens on the surety industry. One marginal benefit of higher license bond levels would be to discourage some financially unsound individuals from entering the contractor ranks. Existing license bond levels are nearly meaningless as funds for homeowner protection. The coverage is minuscule as compared to the potential liability of a contractor who defaults on a number of jobs. Raising the amount high enough to provide a meaningful fund for recovery of double payments would impose costs on all contractors, even though they are not at risk. If the amount is set too high, responsible but unproven contractors might not be able to qualify because sureties would impose greater underwriting requirements above a certain level. This, in turn, would increase the percentage of unlicensed contractors and subcontractors operating in the underground economy.

Stepped License Bonds

Another way to make license bonds more effective would be to provide for increases in the license bond amount depending on how much business the contractor does annu-

31. See Mem. 2000-37, Ex. pp. 7-8 (Abdulaziz).

32. See Mem. 2000-37 Supp. 2 p. 4.

ally in the home improvement field. Step bonding would scale the license bond protection more appropriately to the volume of business, providing a larger fund to compensate those injured by contractor violations or failures, and also imposing higher standards on larger contractors through the surety underwriting process.

The Commission concluded that step bonding could be a useful improvement of the home improvement business in the long term, but that the proposal did not directly address the double liability issue. In general, the Commission does not believe that license bonds in affordable amounts would be sufficient to cover the double payment losses when a contractor (large, medium, or small) goes bankrupt or abandons a number of projects, leaving subcontractors and suppliers unpaid.

Liability Insurance

All licensed contractors (or only home improvement contractors) could be required to maintain a $100,000 general liability insurance policy.[33] The Department of Insurance has argued that the contractor's license bond is an "illusory" protection and that the public is misled into thinking they are protected by the bond when in fact they could rarely recover.[34]

Liability insurance would relieve pressure on the license bond, leaving a greater fund for dealing with double payment problems. Insurance requirements might also help improve the overall integrity of the contractor pool, leading to better consumer protection. But it isn't clear how liability insurance

33. See Mem. 2000-37 pp. 8-10 (discussing background of insurance proposal in one version of SB 1524 (Figueroa) in 1999-2000 legislative session); *id.* Ex. p. 8.

34. See Senate Committee on Business and Professions, Consultant's Analysis of SB 1524, as amended April 3, 2000.

would address the double payment problem, so the Commission has not pursued this proposal.

Joint Checks

Joint checks issued to the prime contractor and subcontractor (or some other combination of potential lien claimants) are a commonly recommended approach to avoiding double payment problems.[35] Joint checks are not a certain protection, however, even if the release form requirements of Civil Code Section 3262 are met, because endorsement may take place without any payment from the co-payee, or the check back to the endorser may bounce, leaving the lien claimant unpaid.[36]

Joint checks should work as a way of making sure that the joint payees, by their endorsements, signify that they have been paid the amount due in agreed proportions under their contract. Common sense dictates that a subcontractor should not be able to endorse the check and then come after the homeowner if the prime contractor does not actually pay the subcontractor. The subcontractor, as a responsible businessperson, can take whatever protective steps are needed or assume the risk of nonpayment. To endorse a joint check and give a release, and then assert lien rights following nonpayment makes no sense. Regardless of whether the release form

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35. This approach was recognized in Bentz Plumbing & Heating v. Favalaro, 128 Cal. App. 3d 145, 151-52, 180 Cal. Rptr. 223 (1982); see also Post Bros. Constr. Co. v. Yoder, 20 Cal. 3d 1, 569 P.2d 133, 141 Cal. Rptr. 28 (1977); Re-Bar Contractors, Inc. v. City of Los Angeles, 219 Cal. App. 2d 134, 32 Cal. Rptr. 607 (1963); Crystaplex Plastics, Ltd. v. Redevelopment Agency, 77 Cal. App. 4th 990, 92 Cal. Rptr. 2d 197 (2000) (forged endorsement); Acret, *Representing the Prime Contractor*, in California Mechanics' Liens and Related Construction Remedies § 7.43 (Cal. Cont. Ed. Bar, 3d ed. 1999) ("Because of the 1993 revisions to [Civil Code Section 3263], it is doubtful that mere endorsement of a joint check constitutes a release of lien, stop notice, and bond claims.").

36. See also Mem. 99-85, Hunt Report Pt. 1, pp. 13-16 (releases).

mechanism is fixed generally,[37] endorsement of a joint check by a licensed contractor or a material supplier should act as a complete release to the extent of the payment. In Arizona, when a material supplier endorses a check he "will be deemed to have been paid the money due him, up to the amount of the joint check so long as there is no other agreement between the owner or general contractor and the materialman as to the allocation of the proceeds."[38]

Joint checks have the advantage of being a familiar practice and easy to understand. If the practice were bolstered by a rule making endorsement equivalent to release pro tanto of mechanic's lien rights, joint checks could be emphasized in notice forms required to be given to the homeowner. Joint checks provide an easy way to avoid double payment problems in comparatively simple projects. Amendments along these lines should be a part of the general review of the mechanic's lien statute, as the issue is not necessarily limited to home improvement contracts or small construction jobs. However, *mandating* the use of joint checks would create more problems than it would solve, and would be unenforceable. In a more complex project, joint checks would become burdensome, because the owner would have to write a large number of checks to cover each subcontractor. The protection would tend to break down when sub-subcontractors and lower-tier suppliers are involved. It may even be difficult to write a single check jointly to the prime contractor, subcontractor, and supplier without creating difficulties.

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37. See, e.g., Mem. 2000-78, Ex. 1-2 (Acret proposal on release forms).

38. See case cited in G. Lefcoe, Real Estate Transactions 1050 n.25 (1993). For additional discussion of joint checks, see Mem. 2000-26, Ex. 1 (Loumber); Mem. 2000-37, Ex. 24 (Gallagher). For language concerning joint checks in the "Notice to Owner," see Mem. 2000-9, Ex. pp. 34, 36; Mem. 2000-37, Ex. p. 12.

(2) Reallocating the Risk

The market functions most efficiently if risks associated with doing business are allocated rationally. The party to a transaction should have a reasonable way to assess and allocate risk, and the assumption of a level of risk should be compensated fairly. The mechanic's lien provides a mechanism for shifting to the homeowner the risk that would normally fall on the subcontractor or supplier. It is difficult, time-consuming, or expensive for the homeowner to effectively minimize the risk. The subcontractor and supplier, on the other hand, should be more knowledgeable and experienced in these matters, and can spread the risk over a number of jobs. Yet they are enabled by the mechanic's lien to forgo the usual degree of care expected in commercial transactions. Blind reliance on mechanic's lien rights tempts subcontractors and suppliers into not using standard credit practices, since they can always rely on the lien (which, in fact, may turn out to be worthless).[39]

Some of the more interesting proposals address this problem head-on by making structural adjustments that would invoke normal market functions to correct the double payment problem, as well as the associated problem of subcontractors and suppliers simply not getting payment at all. These proposals include direct payment options, a defense based on good-faith payment, and requiring privity as a condition to lien rights.

Direct Payment

Under a direct payment scheme, subcontractors and suppliers would not have lien rights unless they request payment directly from the owner. This simple concept puts the respon-

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39. See also Mem. 2000-9, Ex. p. 1 *et seq*. (Honda analysis of mechanic's lien marketplace in connection with ACA 5 and AB 742); Mem. 2000-9 Supp. 2, Ex. pp. 15-18 (Acret).

sibility for assessing and assuming risk on the subcontractor or supplier where it logically belongs. They would choose whether to rely on the creditworthiness of their customer, or request direct payment in order to preserve lien rights. The underlying assumption of the direct payment concept is that subcontractors and suppliers are in a position to make a rational assessment of their customer's reliability and decide whether to assume the risk of failure or nonpayment by their customer. If they are not comfortable assuming that type of business risk, they can follow the direct payment procedure or do what the current system expects the inexpert homeowner to do — i.e., resort to joint control or bonding protections or fashion some other type of business-based remedy.[40]

Subcontractors and suppliers are in a far better position than the homeowner to judge the contractor's reliability and fiscal soundness. They are far more likely to have an ongoing relationship with the contractor, so they can more readily assess whether requiring direct payment is advisable. This approach makes the home improvement construction market more rational.

The confusing preliminary notice would be unnecessary under the direct payment scheme. In the usual case, where the subcontractors and suppliers are content to rely on their customer, the homeowner would be spared the blizzard of notices and could pay the prime contractor as progress payments fall due without further worries.

If a subcontractor or supplier decides to use the direct payment option, the resulting notice would make more sense because it would apply to a concrete situation and describe an action to be taken.

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40. For proposals and commentary on the direct pay approach, see Mem. 2000-37 pp. 13-18; *id*. Ex. pp. 19-25 (Gallagher); Mem. 2000-37 Supp. 2, Ex. pp. 1-2 (Gallagher); Mem. 2000-47 p. 1; *id*. Ex. pp. 1-3 (staff draft statute); Mem. 2000-47 Supp. 1, Ex. pp. 12-13 (Abdulaziz); Mem. 2000-78, Ex. pp. 9-13 (Gallagher).

Permitting subcontractors and suppliers to request payment directly from the homeowner would disrupts the customary relation between the prime contractor and the subcontractor and other business customers. By choosing direct payment, the subcontractor would in effect be saying that the prime contractor isn't financially reliable. Direct payment also has the potential of exposing the prime contractor's mark-up to the homeowner, which presumably the prime contractor would not want. For this reason, it is likely that general contractors would oppose statutory implementation of a direct payment regime.

Another problem with providing a statutory direct payment alternative is that it could become the norm, instead of the exception, and would thus burden the owner with paperwork that should have been funneled through the prime contractor. Material suppliers have remarked that they would be likely to give direct payment notices routinely to protect their lien rights, rather than rely on the creditworthiness and reliability of their contractor-customer. On the other hand, another commentator has argued that subcontractors and suppliers would be reluctant to ask for direct payment if they wanted to continue working in the home improvement business.[41] In other words, it is suggested that there might be a blacklist of subcontractors and suppliers who exercised the direct payment option, and that prime contractors as a group might be unwilling to give business to them.

Protection of Good-Faith Payments

A homeowner's full payment in good faith to the prime contractor could be recognized statutorily as a discharge of the claims against the owner's property and a defense against

41. See Mem. 2000-78, Ex. pp. 4-5 (Streltzer).

further mechanic's lien claims from anyone not in privity with the owner.[42]

This approach directly addresses the double payment problem, protecting owners from the possibility of having to pay subcontractors or suppliers for amounts that have been paid in good faith under the contract terms.[43] In mechanic's lien law, this approach is known as the New York rule, limiting the lien to the unpaid amount:

> If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens ….[44]

The Commission considered this option early in its study, but tabled it, and other risk allocation ideas, until all the other options could be reviewed. Ultimately, the Commission returned to the good-faith payment protection as the best approach to protecting consumers under small-scale home improvement contracts. The Commission's proposal is explained in the Recommendation on *The Double Liability*

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42. See Mem. 2000-9 Supp. 2, Ex. p. 15; Mem. 2000-26 pp. 12-14; Mem. 2000-37 pp. 10-12; see also Mem. 2000-37 Supp. 1, Ex. pp. 3-4 (Moss); Mem. 2000-47 Supp. 1, Ex. p. 13 (Abdulaziz); Mem. 2000-63 Supp. 1, Hunt Report Pt. 3, pp. 2-3.

43. For historical background and discussion of constitutional issues, see Mem. 2000-26 generally (staff analysis); Mem. 2000-26 Supp. 1 (Abdulaziz); Mem. 2000-9 Supp. 2, Ex. pp. 6-14 (Honda).

44. N.Y. Lien Law § 4 (Westlaw 2000).

Problem in Home Improvement Contracts,[45] and will not be repeated here.

Privity Requirement

Returning the law to the era before enactment of the "direct lien" in 1911, this proposal would grant lien rights only where there is a direct contractual relationship (privity) between the owner and the claimant. This approach is even simpler than the full payment defense because it would prevent attachment of the lien in the first place and would not depend on a determination of whether good faith payments have been made to the prime contractor.[46]

Requiring privity as a precondition for lien rights is a simple approach based on familiar contract principles. In reaction, subcontractors and suppliers could be expected to create a clearinghouse of information on reliable contractors and would use other mechanisms to protect their interests and ameliorate the risk of doing business. The marketplace would be expected to respond by developing appropriate mechanisms as in other fields of commerce.

However, requiring privity would impose an additional burden on subcontractors and suppliers, by forcing them to deal with the owner in addition to their customer. Similarly, a privity requirement would impose additional burdens on the owner. The owner presumably wants the prime contractor to deal with subcontractors, or the owner probably would not have sought the services of the prime contractor in the first

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45. This final recommendation follows an earlier Tentative Recommendation on *The Double Payment Problem in Home Improvement Contracts* (September 2001), and a Discussion Draft on *Consumer Protection Options Under Home Improvement Contracts* (December 2001).

46. See Mem. 2000-63 Supp. 1 pp. 1-2 (Acret proposal). For historical background and constitutional issues, see Mem. 2000-26 generally (staff analysis); see also Mem. 2000-26 Supp. 1 (Abdulaziz); Mem. 2000-9 Supp. 2, Ex. pp. 6-14 (Honda). The concept underlying a privity requirement could also be implemented statutorily as part of the direct payment proposal discussed *supra*.

place. The prime contractor's markup is justified because of the time and expense of managing the project, including engaging and supervising subcontractors. Imposing a privity precondition to mechanic's lien rights would subvert this relationship and would cause significant disruption in the construction marketplace.

(3) Recovery and Reimbursement Funds

About 15 states have some sort of general recovery fund protecting homeowners from double payment "damages." Two states (Utah and Michigan) have funds protecting lien claimants. Recovery funds compensate qualified subcontractors and suppliers who have not been paid. Reimbursement funds repay owners who otherwise would have to pay twice.

Lien Reimbursement Fund

Unpaid liens or lienable claims would be compensable from a fund administered by a state agency, financed by some type of assessment on contracts or contractors. A recovery or reimbursement fund also necessarily entails the cost and delays inherent in any bureaucratic solution. A fund approach was proposed in bills introduced by Assembly Member Honda in the 1999-2000 session.[47]

Crucial factors in setting up a recovery or reimbursement fund include the determination of who should pay into it and the amount of the assessments needed to make the fund self-supporting. A $200 annual fee from each home improvement contractor was set out in AB 2113 in the 1999-2000 session. The Contractors' State License Board estimated that this would generate a $50 million fund. Directly related to the

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47. See AB 742, in Mem. 2000-9, Hunt Report Pt. 2, Ex. pp. 3-5; *id*. pp. 6-17 (Assembly Judiciary Committee analysis of AB 742); *id*. pp. 19-22 (CSLB staff analysis); Mem. 2000-9, Ex. pp. 1-14 (supporting documents on AB 742); AB 2113 in Mem. 2000-26, Ex. pp. 7-16.

issue of assessments is the question of who would be able to make claims against the fund and the standard for qualifying.

A fund can protect victimized homeowners and subcontractors and suppliers without drastically revising the mechanic's lien law or imposing new requirements on the parties. A $200 annual fee assessed from contractors would be nominal. Although costs would presumably be passed on to homeowners, any individual owner's share of the annual fee would be nominal. The assessment would have to be large enough to compensate the intended beneficiaries, but in addition, would have to be sufficient to maintain the bureaucracy necessary to administer the fund. Studies of funds in other states suggest that they are not financially sound or that they do not pay out sufficient claims.[48]

Some commentators have objected that the fund approach is inherently unfair because all contractors would have to pay to indemnify lien claimants and homeowners for the irresponsibility of a few. The assessment, paid only by licensed contractors, would also benefit suppliers who would not pay into the fund. A fund approach would not make prime contractors more responsible. In fact, a fund might foster more abuse, since the fund would be another source of compensation for unpaid subcontractors and suppliers.

The Commission concluded there were too many obstacles to establishing a lien reimbursement fund in California. In light of the 1999-2000 legislative experience with a fund proposal, the Commission did not believe that further work on this approach would be productive.

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48. See, e.g., Mem. 2000-9, Hunt Report Pt. 2, Ex. pp. 19-22 (CSLB staff analysis); Mem. 2000-9 Supp. 2, Ex. p. 4 (Gallagher); Mem. 2000-9 Supp. 2, Ex. p. 18 (Acret); Mem. 2000-26 pp. 11-12. See also CSLB, *Analysis of State Recovery Funds*, (July 1999, 98 pp., rec'd Feb. 7, 2000, Commission file H-820).

Homeowner's Relief Recovery Act

The objection to assessing contractors to support a lien reimbursement fund can be addressed by basing the fund on a percentage assessment on building permits. This approach was proposed by Prof. J. Clark Kelso and the Institute for Legislative Practice.[49] The appropriate percentage assessment should be fairly low and, as a proportional fee, would avoid the pitfalls inherent in a fund based on an annual flat fee.

The Commission is reluctant to propose any scheme based on establishing a new adjudicatory bureaucracy to process claims, regardless of the funding mechanism. Furthermore, homeowner representatives reacted negatively to an assessment on building permits.

(4) Payment Bonds

Commission discussions of bonds have been limited to payment bonds covering the cost of labor and materials already supplied, not performance bonds covering the cost of completion of the project.[50] A payment bond would substitute for the lien against the owner's property. Focusing on payment bonds, as opposed to performance bonds, would limit the cost of any mandatory bonding requirement.

Several types of bonding options exist under current law and practice, including performance bonds, payment bonds, and release bonds. A contractor can get a payment bond to cover payments to subcontractors, for example. Subcontractors can get a bond to guarantee payment to sub-subcontractors and material suppliers. An owner can seek a bond to substitute for the mechanic's lien remedy. Civil Code Sec-

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49. See Mem. 2001-18 Supp. 1. Prior drafts were included in Mem. 2000-47 Supp. 1, Ex. pp. 1-10, and Mem. 2000-78 Supps. 2 & 3. See also Mem. 2000-78 Supp. 5 pp. 1-2 (CAR).

50. See Mem. 2000-9, Hunt Report Pt. 2, pp. 6-10; Mem. 2000-9, Ex. 9-11 (Honda); Mem. 2000-26 pp. 8-10; Mem. 2000-78 Supp. 1, Ex. p. 1 (Wayson).

tions 3235-3236 provide protection against lien claimants where a bond in the amount of 50% of the contract price is recorded, along with the contract, before work commences. But on small projects and in the home improvement area, bonds are not a practical option. The cost of a bond can be 1% to 5%, some subcontractors may have difficulty qualifying, and human nature is to avoid the trouble and expense of a bond until it is too late. Mandating payment bonds would add to the paperwork and expense of home improvement contracts.

As to payment bonds, Prof. George Lefcoe points out:

> Bonding is needed most when it is least likely to be available. Small and undercapitalized contractors do modest-sized jobs for individual property owners on tight budgets. In these situations, few contractors have the credit necessary to get a bond. The costs of such bonds as are available will be prohibitive to the owner and the contractor.[51]

He believes that the recorded bonded contract option under Civil Code Section 3235 "offers the best protection for the owner, but is the least often used because few owners know about it and, in any event, bonding is a costly and bureaucratic exercise for the novice."[52]

The Nolo Guide on mechanic's liens gives little attention to payment bonds, since they are "not a viable option for most small property owners." As to the recorded contract and bond under Section 3235, the Nolo Guide advises:

> Although this approach to reducing mechanics lien risk may seem like a good idea, most general contractors will not qualify for a payment bond equal to 50% of the overall project cost.... [In a $100,000 project example] the cost of

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51. G. Lefcoe, *Mechanics Liens*, in Thompson on Real Property § 102.02(a)(2)(i), at 560 (Thomas ed. 1994).

52. *Id*. § 102.02(a)(2)(iv), at 562.

> the bond would be somewhere in the neighborhood of $10,000, which would be economically unfeasible as well. As a general rule, this owner protection is seldom used except on extremely large projects involving highly bondable general contractors and price tags that allow the cost of the bond to be absorbed in the larger project.[53]

Mandatory Full Payment Bond

Prime contractors could be required to obtain payment bonds in the full amount of the contract price as a condition to engaging in the home improvement business. Recovery against the bond would substitute for the lien. Bonds of this amount would set a high standard for contractors because they are underwritten by surety companies, which conduct a careful review of the financial soundness, capacity, and character of the contractor before issuing a bond. A cap on the principal amount of the bond could be set to make the bonds more affordable and to save costs for homeowners. Capping the bond at a level such as $25,000 or $50,000 would also scale the remedy to cover smaller home improvement contracts where consumer protection is needed most.

Bonding only small jobs would, however, turn the usual bonding scheme on its head. Bonds are routine in public works in California, but are required for jobs *exceeding* a certain level.[54] Past proposals for mandatory bonding have always *excluded* smaller contracts.[55]

While bond premiums should go down if the volume of business for sureties increases through a mandatory bonding requirement, it is still unknown how the surety industry would

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53. S. Elias, Contractors' and Homeowners' Guide to Mechanics' Liens 9/12-9/13 (Nolo Press 1998).

54. Civ. Code § 3247(a) ($25,000 for non-state entities); Pub. Cont. Code § 7103 ($5,000 for "state entities").

55. See, e.g., Hunt, *California Mechanics' Lien Law: Need for Improvement*, 9 Santa Clara Law. 101, 106 (1968); Comment (Nock), *The "Forgotten Man" of Mechanics' Lien Laws — The Homeowner*, 16 Hastings L.J. 198, 201 (1964).

respond to the massive demand that would be created by this type of proposal. Bond premiums could add significantly to the cost of the project, particularly in the smaller home improvement market. Mandatory bonding would be hard to police, because the rogue contractor who is most likely to need the bond is also most likely to ignore the bond requirement. In addition, some percentage of responsible but fiscally unproven contractors would not be able to qualify for the bond. The unbondable contractor problem could be addressed by providing for retention of a percentage of the contract price as an alternative to the bond, but development of this type of scheme just adds another layer of complexity to the statute and creates the potential for confusing the owner and other parties to a small home improvement contract.

These complexities and costs make full payment bonding impracticable. Neither owners nor contractors want to incur the expense or handle the paperwork created in such a scheme.

Blanket Payment Bond

Another option would be to require home improvement contractors to provide a blanket payment bond (not a performance bond) of $50,000 or some other amount as an adjunct to the license bond, to provide a degree of protection against double payment liability by homeowners. This would not be a bond on each project, but a single payment bond, similar in concept to the license bond, but covering all projects the licensed contractor undertakes. Failure to maintain this bond would be equivalent to failing to satisfy licensing requirements.[56] The blanket payment bond could also be stepped up depending on how much business the contractor does in a year.

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56. See Mem. 2000-37 p. 7 & Ex. p. 7.

Blanket bonding in a relatively modest amount should not be too expensive. If mandated in the home improvement industry, the cost and threshold qualifications should drop as a result of economies of scale. Raising standards for home improvement contractors might also help weed out the more irresponsible and financially precarious contractors.

As with all significant improvements in bonding protection, however, bonds in this amount would have to be underwritten and would not be issued by surety companies on a routine basis. Underwriting increases the bond premium and may strain the capacity of the surety industry to respond to demand. It also raises the cost of doing business for all prime contractors and would create barriers to entry into the business of contracting.

Lien Bond Between Contractor and Subcontractors-Suppliers

A "line of credit" form of bond could be created to protect payment to the subcontractors and suppliers where the prime contractor is paid but fails to pay subcontractors and suppliers. The premium on this type of bond should be inexpensive because of its limited nature and small risk to the surety.[57] This lien bond would not be mandatory, to avoid driving responsible but unbondable contractors out of the construction business or underground.

The voluntary lien bond would be coupled with a direct payment feature.[58] This would provide subcontractors and suppliers with a remedy where they are unwilling to extend credit to a prime contractor who has not obtained the lien bond. Generally, lien rights would be enforceable against the bond, but if there is no bond claims would be enforceable against the owner's property after giving a direct payment notice for amounts not yet paid by the homeowner. This

57. See Mem. 2000-78 pp. 9-10; *id*. Ex. pp. 9-13 (Gallagher).

58. See discussion of "Direct Payment" *supra*.

implementation of the direct payment approach would also make it unnecessary for subcontractors and suppliers to give preliminary 20-day notices to preserve lien rights.

While this scheme has some appeal in outline form, the Commission did not pursue it because it involved two new features: a new type of bond and a direct payment procedure. Any new bonding scheme would have to be fleshed out by the surety industry, which would also need to have the capacity to respond to demand, whether created under a voluntary bonding system or a mandatory scheme. As discussed above, the direct payment option is an intriguing, but unproven procedure. Combining these two features might entail a level of complexity that would be self-defeating. In addition, the voluntary bonding feature leaves the homeowner's protection up to market choices made by other parties whose motivations would not likely be consistent with the need for consumer protection. Existing law already permits subcontractors and suppliers to voluntarily seek bonds covering failure of the prime contractor, as well as direct payment from the owner, although these options are not widely used.

Mandatory 50% Payment Bond

A less expensive alternative to mandatory bonding for the full contract price would be to require prime contractors to obtain payment bonds in the amount of 50% of the contract price for contracts under $25,000 (or some other appropriate level). As with full bonding, the 50% bond would substitute for the lien and would provide adequate protection in almost all cases, but without the greater expense of a full bond. The 50% bond is an option under existing law, but appears to be little known and rarely used in home improvement contracts.[59] The threshold amount would be set to cover the bulk

59. See discussion in Mem. 2000-63 pp. 1-12 & Ex. pp. 1-3; Mem. 2000-63 Supp. 1 pp. 3-4 (Hunt).

of cases where experience shows there have been the most double payment problems.

By mid-2001, it appeared to the Commission that the 50% bond would be the most acceptable reform to subcontractors, suppliers, and homeowners. In September 2001, the Commission issued a tentative recommendation[60] proposing limited mandatory bonding, coupled with protection for good-faith payments, as the best balance between the interests of homeowners, subcontractors, and suppliers and the cost of the protections. This proposal required that prime contractors on home improvement contracts obtain a payment bond from a surety insurer in the amount of 50% of the contract price. The bond would protect unpaid subcontractors and suppliers, thereby relieving the homeowner from double liability. The home improvement contract would be filed with the county recorder and the payment bond would be recorded before the home improvement job commences. In essence, this proposal would make the optional procedure in Civil Code Section 3235 mandatory for home improvement contracts.

The mandatory 50% bond would not be required for contracts under $10,000, in view of the inefficiency of bonding on smaller jobs, but blanket payment bonds would be available in the smaller cases. Under the $10,000 contract level, and in any case where the prime contractor fails to obtain the required bond, the homeowner would be protected from double liability to the extent that payments were made in good faith under the contract. Subcontractors and suppliers should easily be able to determine whether the job is bonded by reference to the recorder's files or by checking with the surety company noted on the contract form.

The mechanic's lien and stop notice rights of subcontractors and suppliers would not be affected to the extent that the

60. See Tentative Recommendation on *The Double Payment Problem in Home Improvement Contracts* (Sept. 2001).

homeowner did not pay for labor, supplies, equipment, and materials. If a bond was provided, subcontractors and suppliers would also have the additional remedy of enforcement against the bond.

The Commission received extensive commentary on the tentative recommendation, most of it negative.[61] Commentators found the proposal complicated, unworkable, unfair, and costly. The anticipated consensus broke down over some of the details in the proposal that were intended to make it self-enforcing. If the mandatory 50% bond could be evaded, the intended benefit of the new scheme would be lost. In addition, there was concern about the cost of the bond, the difficulty of obtaining bonds, and the capacity of the surety industry to respond to demand — in short, all of the usual objections to mandatory bond proposals.

In view of the lack of support for this approach, and the apparent lack of any consensus on how to salvage any mandatory bond approach, the Commission abandoned efforts to perfect revisions based on bonding.

(5) Escrows and Withholding

Joint Control

The services of a joint control company are available under existing law. Contractors engaged in home improvement projects could be required to use joint control (escrow) accounts to process payments and releases. The Commission considered joint control in some detail because initially it appeared to be a promising approach. A joint control scheme should have the following features:[62]

- *Mandatory*. Use of the joint control account would have to be mandatory, or very difficult to waive, if it

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61. See Mem. 2001-99 & Supp. 2.

62. For more detail, see Mem. 2000-78 pp. 3-5.

is to have its intended effect of protecting consumers. Sufficiently bonding a job (at least 50% of contract price), however, would provide a sufficient substitute remedy.

- *Threshold*. Contracts below a certain amount would not be subject to the joint control requirement because the protection would be too costly in light of the risk. A minimum contract amount such as $5,000 or $10,000 seems appropriate.
- *Prime contractor responsibility*. The prime contractor would be required to set up the joint control account with a licensed joint control agent, and would be responsible for informing subcontractors and suppliers dealing directly with the prime contractor of the joint control account. The prime contractor would also be required to inform the joint control agent of all parties contracting with the prime.
- *Subcontractor and supplier responsibility*. Parties in privity with the prime contractor would need to make sure that there is a joint control account in place. A mechanism would need to be set up so that sub-subcontractors and suppliers furnishing to subcontractors get information on the joint control account, since they would submit claims to the joint control agent.
- *Homeowner responsibility*. A joint control system would relieve much of the burden on homeowners. Payments would need to be made in a timely fashion to the joint control agent, but no other special action would be needed unless the homeowner wanted to use some other approved substitute remedy such as a bond.
- *Enforcement*. As under existing law, the duties of licensed contractors would be enforceable by CSLB, and joint control companies would be subject to regulation by the Commissioner of Corporations. But the major enforcement mechanism would be that parties wishing to be paid expeditiously would try to ensure that the joint control is in effect, and owners wishing to avoid mechanic's liens would demand assurance that payments were properly made.

Joint control agencies exist now and are used in large projects, but not in small projects. The fees should be lower if there is more volume of business. Use of escrow in real estate transactions and refinancing is presumed; it is not too big a step to apply a simple escrow system to home improvement contracts. Joint control companies are bonded, providing additional protection. The mechanism would benefit subcontractors and suppliers by making sure they get timely payment. Properly implemented, a joint control scheme would cut down on paperwork for everyone concerned.

However, all of the benefits would come at a cost that would be unattractive for jobs under $10,000-20,000, because of the threshold costs. Furthermore, it is difficult to predict how the market would respond, so fees could be higher than envisioned. There would also be enforcement issues, since contractors and owners would have an incentive to cut costs and agree to ignore the requirement. These difficulties ultimately appeared insurmountable and the Commission abandoned further consideration of joint control as an approach to addressing problems with small home improvement contracts.

Check-Writing Services

Check writing services could serve as a simplified and cheaper alternative to joint control. The idea would be to use the services of a neutral party to match releases with payments. One commentator described the concept as follows:[63]

> We would suggest a new procedure that would not require a bonded joint control company but merely a check writing service of some sort. That procedure would be to assure, to the extent possible, that there are no liens on the project. The company proposed would not need to be a joint control company. It would not need to actually hold any of the funds. What it would do is obtain appropriate

63. See Mem. 2000-37 p. 7 & Ex. p. 7 (Abdulaziz proposal).

> releases from everyone who had given preliminary notices, and before allowing an owner to make any payment, the proposed company would secure a release executed. The release would then be held by the service and a check prepared by this service would be written which would be signed by the owner. With our present state of computer technology, we believe that this type of service would be nominal in cost.

Presumably, this type of service is available now and may be available through the Internet. Check writing services should be cheaper than full-service joint control agencies, because they would not need to be bonded and would not make inspections to determine whether payment was due.

Unfortunately, if check writing services are not bonded, there is a risk that they would not be financially reliable and could abscond with the owner's money. Trying to find a cheaper substitute for responsible joint control agencies is probably a self-defeating exercise. If a new statutory procedure is to be mandated, it should significantly reduce or eliminate the risk of double liability for homeowners, as well as the parallel problem faced by subcontractors and suppliers who are not paid by defaulting prime contractors. But the cost of a service goes up as responsibility and reliability are increased and the risk is transferred.

Retainage

The retainage approach would delay payment of a percentage of the contract price (e.g. 10% or 25%) for a period such as 30 or 60 days to clear lien claims. Retention may be based on a percentage of each payment or the last 10% or so of the entire contract amount. The prime contractor would have the option of bonding as a substitute for the retainage, and thus accelerate final payment or permit full payment of all

progress payments when due.[64] California has detailed statutes on "retention proceeds," progress payments, and prompt payment that would have to be revised.[65] Unless retainage were mandated, it would not address the double payment problem, which by definition arises where the owner has not retained payments. For example, in Texas, the owner is required to retain 10% of the contract price of improvements until 30 days after completion.[66] The lien claimant has a lien on the retainage by sending proper notice and filing an affidavit within 30 days after completion.[67] Early California law required 25% of the contract price to be retained.[68]

Retainage would be simple to administer from the owner's perspective (as well as that of the lender). Holding 25% of the contract price for a short period would cover many potential double payments, though not major contractor failures. Contractors who wanted to be paid in full before the retainage period expired would be able to substitute a bond or avoid retainage by setting up joint control, which would continue the protection afforded the owner. Contractors would have an incentive to make sure subcontractors and suppliers were paid so that they could get complete payment promptly.

Prime contractors object, however, that even a 10% retainage requirement would withhold an amount greater than their net profits, which are often less than 5%. This, in turn, would force them to provide credit (or defer paying subcon-

64. See Mem. 2000-26 p. 11.

65. See Civ. Code § 3060 *et seq.*; see also Bus. & Prof. Code § 7159 (home improvement contracts).

66. Tex. Prop. Code § 53.101 (Westlaw 2000).

67. *Id.* §§ 53.102, 53.103.

68. See Mem. 2000-36 p. 12.

tractors and suppliers) until final payment.[69] In other words, prime contractors would become involuntary financiers of an unacceptable portion of the project. This would force them to use bonding or joint controls, with the attendant cost to the homeowner. Retainage would also be difficult to enforce, because it involves payments the homeowner makes to the contractor, and the homeowner may not understand what to do. Homeowners could be influenced to save money by paying without the retention. In view of the enforcement difficulties and the likely objections from significant stakeholder interests, the Commission has not pursued this option as the centerpiece of a remedial scheme.

(6) Other Approaches

Consent to Lien

Since it is the homeowner's property that becomes subject to the mechanic's lien, the law could require specific consent to imposition of a mechanic's lien. Without consent, the subcontractor or supplier would not have a direct lien against the home and payment to the prime contractor would protect the homeowner.[70] This type of procedure would be more like other real property transactions, where the owner voluntarily agrees to a lien to secure a loan.

The Missouri mechanic's lien statute adopts a consent requirement for certain residential improvement contracts,[71] but it appears that one blanket consent can be obtained by the prime contractor covering all subcontractors and suppliers. An alternative would be to require each potential lien claimant to obtain a consent in response to a preliminary

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69. See, e.g., Kirksey & Maute, *Moneymoneymoney: Legal and Ethical Dilemmas in the Construction Payment Process*, 16 Construction Law. 3, 4 (January 1996).

70. See Mem. 2000-26, Ex. p. 3 (Loumber).

71. Mo. Ann. Stat. § 429.013 (Westlaw 2001).

notice or other form of paper given to the homeowner by subcontractors and suppliers.

Requiring explicit consent to lien rights would potentially provide a type of privity and would help focus the homeowner's attention on the potential for double payment liability. Assuming that a blanket consent could not be used to satisfy the requirement, the consent would have some of the same potential benefits as other proposals that would encourage subcontractors and suppliers to assess their real risk and consider the creditworthiness of their customer. It would not have the disruptive potential some see in the direct payment proposal, since the flow of payments would still be through the prime contractor (unless direct payment has been arranged).

While consent requirements would work well in some cases, the Commission concluded that the consent form would often just be another piece of paper the homeowner signs without knowing its significance. For the idea to work, the relatively unsophisticated owner would need to know whether to give consent or work out some other arrangement. In addition, consent would be requested early in the process, before it could be known whether the prime contractor will make timely payments. Finally, requiring consent would add another burden on subcontractors and suppliers to get the signature of the owner and maintain another paper in the files.

Criminal Sanctions — Lien Fraud

The prime contractor's failure to pay subcontractors and suppliers, as well as the subcontractor's failure to pay sub-subcontractors and suppliers, could be criminalized.[72] It is generally recognized, however, that most cases of double payment do not involve criminal conduct, but incompetence,

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72. See Mem. 2000-26, Ex. p. 4 (Loumber); Mem. 2000-78 Supp. 1, Ex. p. 3 (McSweeny).

carelessness, overextension, and other factors that lead to insolvency. Unless the criminal sanction would act as a significant deterrent, it would do nothing to aid homeowners faced with double liability where a contractor defaults.

CONCLUSION

As noted above, the Commission's proposal for addressing the double liability problem is set out in the separate Recommendation on *The Double Liability Problem in Home Improvement Contracts*.[73] Work on the remainder of the mechanic's lien law revision project will continue as Commission resources permit.

73. 31 Cal. L. Revision Comm'n Reports 281 (2001).

APPENDIX OF SOURCE MATERIALS

COMMISSION STAFF MEMORANDUMS

The following is a list of mechanic's lien memorandums (Study H-820) to date prepared by the Commission staff, some of which have been cited in this Report:[74]

Memo	*Supp*	*Title*	*Date*
99-85		Mechanic's Liens: Commencement of Study	11/16/99
99-85	1st	Mechanic's Liens: Commencement of Study (Additional Material)	11/29/99
2000-9		Mechanic's Liens	1/31/00
2000-9	1st	Mechanic's Liens: Update on HIPP Project	1/31/00
2000-9	2d	Mechanic's Liens (Materials Submitted at February 2000 Meeting)	2/11/00
2000-26		Mechanic's Liens: Issues and Other Approaches	4/04/00
2000-26	1st	Mechanic's Liens (Comments of Gordon Hunt)	4/10/00
2000-26	2d	Mechanic's Liens (Materials Submitted at April 2000 Meeting)	4/13/00
2000-36		Mechanic's Liens: Constitutional Issues	6/02/00
2000-36	1st	Mechanic's Liens: Constitutional Issues (Abdulaziz Letter)	6/15/00
2000-37		Mechanic's Liens: Draft Proposals	6/13/00
2000-37	1st	Mechanic's Liens (Letters)	6/16/00
2000-37	2d	Mechanic's Liens (Materials Submitted at June 2000 Meeting)	6/22/00
2000-47		Mechanic's Liens: Full Pay and Direct Pay Drafts	7/14/00
2000-47	1st	Mechanic's Liens (Additional Comments)	7/18/00
2000-63		Mechanic's Liens: Home Improvement Payment Bond	9/29/00
2000-63	1st	Mechanic's Liens (Commentary from Consultants)	10/02/00
2000-63	2d	Mechanic's Liens (Additional Commentary)	10/03/00
2000-78		Mechanic's Liens: Reform Proposals	12/06/00
2000-78	1st	Mechanic's Liens (General Comment Letters)	12/06/00

74. These materials are available from the Commission's website at <http://www.clrc.ca.gov/pub/Study-H-RealProperty/H820-MechanicsLiens/>.

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