

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/Introductory Material

Handling a Real Property Foreclosure

Michael P. Brody

May 2010

Scope of Guide

This Action Guide explains real property foreclosure primarily from the lender's perspective. It is also valuable to borrowers' and foreclosure trustees' counsel for its clear description of foreclosure law and process. It identifies lender's options and guides the reader through appropriate remedies, including alternatives for mixed collateral and contaminated property. It takes the reader step by step through the trustee's sale process and discusses the impact of borrower's bankruptcy. It also takes the reader through judicial foreclosure; explains how to protect rents and property pending foreclosure; and covers postforeclosure judgment issues of sale, redemption, and procedure and strategy in fair-value hearing to establish a deficiency.

Abbreviations	
Civ Proc Before Trial	<u>California Civil Procedure Before Trial (4d ed Cal CEB 2004)</u>
Debt Collection	<u>Debt Collection Practice in California (2d ed Cal CEB 1999)</u>
Enforcing Security Interests	Enforcing Security Interests in Personal Property (Cal CEB Action Guide June 2007)
FIRREA	Financial Institutions Reform, Recovery, and Enforcement Act of 1989
Landlord-Tenant	<u>California Landlord-Tenant Practice (2d ed Cal CEB 1997)</u>
Money Judgments	<u>Enforcing Civil Money Judgments (Cal CEB Action Guide November 2008)</u>
Mortgage Deed of Trust Foreclosure	<u>California Mortgages, Deeds of Trust, and Foreclosure Litigation (4th ed Cal CEB 2009)</u>
Office Leasing	<u>Office Leasing: Drafting and Negotiating the Lease (Cal CEB 1996)</u>
Real Estate Finance	<u>California Real Estate Finance Practice: Strategies and Forms (Cal CEB 2000)</u>
RP Bankruptcy	<u>California Real Estate Bankruptcies: Law and Litigation (Cal CEB 2010)</u>
Secured Transactions	<u>Secured Transactions in California Commercial Law Practice (2d ed Cal CEB 2001)</u>
Shaddock	<i>Safe Harbors for Foreclosing Creditors in Multiple-State Security Contexts: California's Antideficiency Statutes and Choice of Law Doctrine</i> , 10:5 Cal Real Prop J (Fall 1992)
Title Ins	<u>California Title Insurance Practice (2d ed Cal CEB 1997)</u>
Unlawful Detainers	<u>Handling Unlawful Detainers (Cal CEB Action Guide May 2009)</u>
6 Witkin, Procedure, <i>Prov Rem</i>	6 Witkin, California Procedure, <i>Provisional Remedies</i> (5th ed 2008)
4 Witkin, Summary, <i>Neg Instr</i>	4 Witkin, Summary of California Law, <i>Negotiable Instruments</i> (10th ed 2005)
4 Witkin, Summary, <i>Sec Trans Real Prop</i>	4 Witkin, Summary of California Law, <i>Security Transactions in Real Property</i> (10th ed 2005)

About the Author

MICHAEL P. BRODY is a shareholder of Buchalter Nemer, A Professional Corporation, in San Francisco. His practice focuses on real estate lending, workouts and foreclosures, asset disposition, and the treatment of real property in bankruptcy. Mr. Brody is a speaker and author of articles and guides on topics in real estate and bankruptcy law. He is a licensed California real estate

broker. Mr. Brody received his J.D. from the University of California, Berkeley, School of Law (Boalt Hall). He was ably assisted in the 2010 update of this Action Guide by attorney Elizabeth L. Bridges of Buchalter Nemer. Buchalter Nemer is a full-service business law firm representing local, national, and global clients in eight primary areas of practice: Bank and Finance, Business Practices, Financial Restructuring & Insolvency, Litigation, Labor and Employment, Intellectual Property, and Real Estate and Tax.

Acknowledgments

The author and CEB also wish to acknowledge with gratitude the prior contributions of **William J. A. Weir**, a partner in Luce, Forward, Hamilton & Scripps LLP in San Francisco, who, with Mr. Brody, coauthored earlier editions of this Action Guide, substantial portions of which are incorporated into the present edition. Mr. Weir represents lenders in commercial real estate financings and in lender-borrower disputes. He also represents lenders in loan restructurings, foreclosures, deeds in lieu, and borrower insolvencies. He appears on behalf of lenders in state and federal courts. Mr. Weir is a graduate of University of California, Hastings College of the Law.

CEB gratefully acknowledges the valuable contributions to previous editions of this Action Guide by the following consultants:

Robert W. Brown, Jr., is president of the University of West Los Angeles School of Law in Inglewood. A 1977 graduate of University of California, Los Angeles, School of Law, Mr. Brown has worked as in-house counsel for two national banks and as general counsel for major California savings banks. He served on the executive committees of the Real Property Sections of the California State Bar and the Los Angeles County Bar and is a frequent lecturer on real estate and business law.

Charles A. Hansen, a member of the law firm of Wendel, Rosen, Black & Dean LLP of Oakland, specializes in real property secured transactions. A 1977 graduate of University of California, Berkeley, School of the Law (Boalt Hall), he was formerly a principal of Hetland & Hansen, where he was senior litigator. Often retained as a consultant and expert witness in real property matters, Mr. Hansen is an instructor at Boalt Hall and the author of many published articles and CEB products.

CEB Attorney Editor Bonnie Maly and Legal Editors Kenneth Marr and Philip Weverka contributed to this title. Copyediting and production were handled by Paul McBrearty. Composition was handled by CEB's Electronic Publishing staff.

Cutoff Dates and CEB Citation

Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of November 2, 2009, and monitored developments through March 8, 2010.

CEB Citation

This publication may be cited as *Handling a Real Property Foreclosure* (Cal CEB Action Guide May 2010).

This Action Guide supersedes *Handling a Real Property Foreclosure* (Cal CEB Action Guide May 2008).

© The Regents of the University of California

When Evaluating Whether Borrower Has Defaulted

STEP 1. REVIEW STRUCTURE OF REAL PROPERTY LOANS

RECOGNIZE TWO COMPONENTS

Every transaction secured by real property involves two basic components:

Obligation

Usually, there is a promise/agreement by a borrower to repay money plus interest to a lender (see Glossary for more information on *borrower* and *lender*). On nonmonetary obligations, see California Mortgages, Deeds of Trust, and Foreclosure Litigation §1.10 (4th ed Cal CEB 2009), referred to throughout this Action Guide as Mortgage Deed of Trust Foreclosure.

Security

An interest in one or more assets that lender may reach if the obligation is not performed, *i.e.*, an interest in:

- a. Real property; and (sometimes)
- b. Personal property (for how to deal with mixed collateral, see step 9, below; see also Mortgage Deed of Trust Foreclosure, chap 9).

NOTE

Consider whether additional assurances of payment exist, such as guaranties and letters of credit (sometimes loosely described as "additional security").

ANALYZE BOTH COMPONENTS

When a lender-client wants to enforce an obligation secured by real property, carefully analyze the debt and the *security* (see Glossary) before deciding how to proceed.

Traps for the Unwary

a. California's "one-action" and antideficiency limitations (see Mortgage Deed of Trust Foreclosure, chaps 4-5) impose several restrictions on a lender attempting to enforce an obligation secured by real property, *e.g.*:

- (1) Lender may not obtain a personal (money) judgment or recovery against borrower (deficiency) without first exhausting the security (CCP §726(a); Walker v Community Bank (1974) 10 C3d 729, 733, 111 CR 897);
- (2) Any deficiency judgment will be limited to the amount by which the foreclosure judgment exceeds the fair value of the security as of the date of the foreclosure sale or the successful bid at the sale, whichever is higher (CCP §726(b));
- (3) If the debt is a purchase money obligation within the scope of CCP §580b or is contractually *nonrecourse* (see Glossary), no deficiency judgment will be permitted at all; and
- (4) If lender elects nonjudicial foreclosure (trustee's sale), no deficiency judgment will be allowed on the *note* (see Glossary) regardless of whether the property's value at foreclosure fails to satisfy the obligation (CCP §580d).

b. Also, a full credit bid at the trustee's sale restricts lender's postforeclosure damage actions above and beyond a deficiency judgment. See Mortgage Deed of Trust Foreclosure, chaps 2, 4-5, 9. See also Track Mortgage Group v Crusader Ins. Co. (2002) 98 CA4th 857, 120 CR2d 228 (even partial-credit bid can limit lender's damages claim against property insurer to extent that such claim (whether stated under contract or in tort) is based on diminution in lender's recovery on the debt).

NOTE

A security interest in real estate always involves significant enforcement restrictions. A lender should never take real property security without careful analysis of its advantages and disadvantages. In some instances, such analysis reveals that the lender will be better positioned *without* real property security.

PROMISSORY NOTE

WHAT IT IS

Borrower typically signs a *promissory note* (see [Glossary](#)), which documents the obligation.

WHAT IT INCLUDES

The note usually includes at least these terms and the following provisions:

Principal

Amount borrowed (*principal*, see [Glossary](#)) and borrower's promise to pay.

Payee

Whom borrower will pay (the payee) (a promise to pay "to order" indicates that the note is a negotiable instrument subject to the holder in due course doctrine (to determine if lender is holder in due course, see [step 4](#), below)). (See [Glossary](#) for more information on *instrument* and *holder in due course*.)

Interest

Interest rate and when interest starts accruing.

Payments

- a. Amount of any installment payments;
- b. When installment payments are due;
- c. When the entire remaining balance is due (scheduled maturity date); and
- d. Where payments should be made.

Security

The fact that the note is secured by a deed of trust and, if applicable, that the deed of trust contains a due-on-sale clause. (See [Glossary](#) for definitions of *deed of trust* and *due-on-sale clause*.)

Prepayment

Whether the note can be paid off before the scheduled maturity date and, if so, under what conditions, *e.g.*, notice, penalty, timing. (A borrower has no right, absent agreement, to prepay the loan. See [Mortgage Deed of Trust Foreclosure, chap 8](#).)

NOTE

A note providing for installment payments of a specified amount "or more" may be prepaid at any time unless prepayment is otherwise restricted by its terms.

Events and Consequences of Default

Consequences of late payment or default under the deed of trust, *e.g.*:

- a. Charge for late payment and/or default rate interest;
- b. Trigger of cross-default and/or enforcement of cross-collateralization; and
- c. Lender's right to accelerate the maturity of the loan.

Further Research: On note provisions, see California Real Estate Finance Practice: Strategies and Forms, chap 3 (Cal CEB 2000), referred to throughout this Action Guide as Real Estate Finance.

OTHER INSTRUMENTS

CONSIDER MULTIPLE OBLIGATIONS

- a. The *secured obligation* (see Glossary) is not always a promissory note. The obligation may be evidenced by a guaranty, bond, contract, restrictive covenant, or other agreement. See Mortgage Deed of Trust Foreclosure §1.10.
- b. Consider possibility of multiple obligations: So-called "dragnet" provisions in the deed of trust stating that it secures "any and all obligations" of the *trustor* (see Glossary) may have the effect of transforming other contracts into secured obligations. See Union Bank v Wendland (1976) 54 CA3d 393, 126 CR 549 (articulating tests for cross-collateralization); Fischer v First Int'l Bank (2003) 109 CA4th 1433, 1 CR3d 162 (effect of dragnet clause depends on intent of parties).

Further Research: On other instruments and obligations secured by real property, see Mortgage Deed of Trust Foreclosure, chaps 1, 9; Real Estate Finance, chap 6.

DEED OF TRUST

WHAT IT IS

Deed of trust:

- a. Is the document usually used in California to create a security interest in real property. *Mortgages* (see Glossary) are not commonly used. See Mortgage Deed of Trust Foreclosure §§1.32-1.35.
- b. Sets forth the rights and obligations of trustor, *trustee* (see Glossary), and beneficiary.

TRUSTOR

Trustor is the party who:

Owns the Real Property

Owns the estate in real property (*e.g.*, a fee or leasehold) when the security interest is created (usually borrower, but sometimes a surety with or without a separate suretyship agreement).

Signs the Deed of Trust

Executes the deed of trust to create security interest.

NOTE

Security interests can also be created through mortgages and other instruments (for how to determine if a debt was structured another way, see step 2, below).

BENEFICIARY

Beneficiary is the party who:

- a. Is the secured creditor, *i.e.*, party to whom borrower owes performance of the secured obligation; and
- b. May be the original lender as named in the deed of trust or a successor who acquired the beneficial interest on purchasing the loan.

TRUSTEE

Notices and Conducts Sale

Trustee is the party who:

- a. Is granted bare legal title together with a "power of sale" under terms of most deeds of trust (for information on power of sale, see [step 9](#), below); and
- b. Notices and conducts the trustee's sale of the property if the creditor elects to foreclose nonjudicially (see [step 11](#), below); or
- c. Reconveys its interest in the property on full satisfaction of the obligation or other authorization of the beneficiary.

Agent of Lender and Borrower

Trustee is a limited agent of beneficiary and trustor for purposes of effecting nonjudicial foreclosure, not a true trustee with fiduciary duties. [CCP §369\(a\)](#); [CC §2937.7](#). See [Monterey S.P. Partnership v W.L. Bangham, Inc. \(1989\) 49 C3d 454, 460, 261 CR 587](#); [I.E. Assocs. v Safeco Title Ins. Co. \(1985\) 39 C3d 281, 216 CR 438](#); 4 Witkin, Summary of California Law, *Security Transactions in Real Property* §7 (10th ed 2005), referred to throughout this Action Guide as 4 Witkin, Summary, *Sec Trans Real Prop.*

Usually an Institution

Most preprinted deeds of trust name as trustee either:

- a. The title insurance or foreclosure company that printed the form deed of trust (or its subsidiary); or
- b. A subsidiary of the lending institution (a "captive" trustee).

Limited Duties

Trustee does not sign the deed of trust, so usually has no knowledge that it has been named as trustee in a particular loan transaction, *until* beneficiary contacts trustee to:

- a. Initiate nonjudicial foreclosure process following a default by trustor; or
- b. Reconvey on authorization of beneficiary following full payment of the loan.

Lender Can Designate

Beneficiary/lender can designate a replacement trustee under terms of most deeds of trust or under [CC §2934a](#) (see [step 21](#), below).

Lender Can Be Trustee

- a. Beneficiary can serve as trustee. See [Copsey v Sacramento Bank \(1901\) 133 C 659, 660, 66 P 7](#); [Bank of America v Century Land & Water Co. \(1937\) 19 CA2d 194, 196, 65 P2d 109](#). This may be convenient to accomplish a speedy reconveyance.
- b. Where foreclosure is contemplated, however, strict statutory foreclosure notice requirements deter most prudent beneficiaries from designating themselves as trustee.

Further Research: On role of trustee, see [Real Estate Finance §§4.5, 4.63-4.64, 4.90-4.93](#); [Mortgage Deed of Trust Foreclosure §§1.40-1.42, 2.21-2.26, 2.33, 2.64-2.68, 2.80-2.99](#).

WHAT DEED OF TRUST DOES

"Conveys" Real Property to Trustee

On its face, the deed of trust appears to "grant" or "convey" an estate (*e.g.*, a fee or leasehold) in real property to the trustee to hold in trust for the benefit of both the beneficiary (lender) and the trustor (borrower). See [Real Estate Finance §§4.5, 4.64, 4.90](#).

Creates a Security Interest

Practical effect is simply to create a security interest in favor of lender. See [Hamel v Gootkin \(1962\) 202 CA2d 27, 29, 20 CR 372](#); [Mortgage Deed of Trust Foreclosure §1.35](#).

Recorded in Official Records

- a. Lender usually requires that the deed of trust be recorded in county recorder's records to protect priority over later

lienholders, *encumbrancers* (see [Glossary](#)), and purchasers (for information on priority and recording laws, see [step 8](#), below); but

b. Recordation is not essential to create security interest and make terms of deed of trust effective between the parties. See [CC §1217](#); *Powell v Goldsmith* (1984) 152 CA3d 746, 751, 199 CR 554; [Real Estate Finance §§4.6-4.7](#); 5 Miller & Starr, California Real Estate §11.2 (3d ed 2000), referred to throughout this Action Guide as Miller & Starr.

NOTE

In borrower bankruptcy proceedings (see [step 14](#), below), an unrecorded deed of trust is subject to avoidance as an unperfected interest, leaving the lender with a general unsecured claim. See [Mortgage Deed of Trust Foreclosure §11.81](#).

RECOGNIZE TYPICAL CLAUSES

Deed of trust:

Specifies Underlying Obligation

a. Describes the secured obligation (*e.g.*, the principal amount, date, parties, interest rate) to give notice to those who might obtain later interests in the property.

b. May attempt to secure other debts, *advances* (see [Glossary](#)), and obligations of trustor to beneficiary by including future advance or "dragnet" clauses or through cross-collateralization provisions. See [Real Estate Finance §§4.13, 4.36-4.37, 4.52](#); [Mortgage Deed of Trust Foreclosure, chap 9](#).

Allows Acceleration of Debt

Describes when lender may accelerate the maturity of the debt (*i.e.*, declare all sums to be due immediately), *e.g.*, on:

a. Sale or other transfer of the property (the so-called "due-on-sale" or "due-on-encumbrance" clause, which is not always enforceable) (see [Mortgage Deed of Trust Foreclosure, chap 8](#); for information on enforcing "due-on" clauses, see [step 25](#), below);

b. Borrower's insolvency or bankruptcy (due-on clause may be unenforceable in this respect; see [Mortgage Deed of Trust Foreclosure §11.21](#));

c. Borrower's default in payment of the debt; or

d. Borrower's failure to perform other covenants of the deed of trust, *e.g.*:

(1) Keep the property in good condition and repair;

(2) Keep property taxes paid current;

(3) Maintain hazard insurance on the property;

(4) Make payments when due on debt secured by prior security interests (see [CC §2876](#)).

NOTE

By statute, monetary defaults may be cured and the obligation reinstated regardless of lender's acceleration. See [step 27](#), below.

Further Research: On default and events triggering acceleration of debt payment, see [Real Estate Finance, chap 4](#).

Grants Power of Sale

a. Must contain power-of-sale clause in order for lender to demand that trustee sell the property by private sale, *i.e.*, foreclose nonjudicially;

b. Enables trustee to:

(1) Sell the property to highest bidder at public auction ([CC §§2924g-2924h](#));

(2) Apply proceeds to the secured obligation ([CC §2924k](#));

(3) Distribute any excess proceeds as required by law ([CC §2924k](#)); and

c. May contain provisions that give borrower/trustor rights in addition to statutory protections (see [CC §§2924-2924h](#)).

Further Research: On power-of-sale clauses and their effects, see [Real Estate Finance §4.64](#); [Mortgage Deed of Trust Foreclosure §§1.61, 2.14-2.17, 3.3, 3.19, 8.4, 8.9](#).

Provides Additional Security

Provides additional security for the obligation by giving lender a security interest in:

- a. Rents and profits from the property (see summary of California *Assignment-of-Rents-and-Profits Clause* in [Glossary](#); see also [step 15](#), below, on using a receiver to collect the rents);
- b. The property's hazard insurance, typically requiring that lender be named as loss payee;
- c. Any condemnation proceeds;
- d. Causes of action, awards, and damages due or payable to borrower for injury to the encumbered property; and (sometimes)
- e. Personal property related to the real property, although lender will still have to perfect the interest by filing a UCC-1 form with Secretary of State.

Further Research: For discussion and sample clauses providing additional security, see [Real Estate Finance, chap 4](#); [Mortgage Deed of Trust Foreclosure, chap 6](#).

Has Other Clauses

Typically gives lender the right to protect its security by:

- a. Advancing payments to third parties (*e.g.*, tax collector, insurance carrier, senior encumbrancers) when trustor fails to do so;
- b. Adding those expenditures to the secured obligation; and
- c. Recovering attorney fees and litigation costs.

Further Research: For discussion and sample clauses, see [Real Estate Finance, chap 4](#); [Mortgage Deed of Trust Foreclosure, chap 8](#).

OFTEN CALLED "MORTGAGES"

In California, what we casually refer to as mortgages (*e.g.*, "I took out a second mortgage on my home") are most commonly deeds of trust.

Further Research: For discussion of the few practically significant distinctions between mortgages and deeds of trust (*e.g.*, power of sale in deed of trust unimpaired by running of statute of limitations on the note), see [step 11](#), below; [Mortgage Deed of Trust Foreclosure §§1.34-1.37, 3.18, 7.8, 7.20, 7.31-7.32](#).

GUARANTY

WHEN USED

Commercial lenders often require that the note be guaranteed by a third party. See generally [Real Estate Finance, chap 6](#); [Mortgage Deed of Trust Foreclosure, chap 9](#).

Analyze Before Enforcing

Guaranty gives lender an additional source of recovery, *but* requires careful analysis. The guaranty itself may be unsecured or secured by real or personal property, or by both. For protections for guarantors, see [step 5](#), below.

INDEMNITY

WHEN USED

Lender may require its independent loan brokers by contract to indemnify lender if borrower defaults. A typical indemnity provision allows lender to require the broker to cure the default or repurchase the loan.

Analyze Before Enforcing

Indemnity gives lender an additional source of recovery, *but* requires careful analysis. Indemnitors that are unrelated to the borrower do not have the same antideficiency protections that exist for guarantors (summarized in [step 5](#), below). *Trust One Mortgage Corp. v Invest Am. Mortgage Corp.* (2005) 134 CA4th 1302, 1313, 37 CR3d 83, cited in [Mortgage Deed of Trust Foreclosure](#), chaps 7, 9.

OTHER SECURITY AND SOURCES OF REPAYMENT

CHECK FOR ADDITIONAL SECURITY

Antideficiency laws (see [Mortgage Deed of Trust Foreclosure](#), chaps 4-5) do not preclude resort to additional security (see [Mortgage Deed of Trust Foreclosure §§9.11-9.25](#)), such as:

- a. Personal property collateral;
- b. Indemnity agreements with parties unrelated to borrower;
- c. Insurance; or
- d. Condemnation proceeds assigned to lender under the deed of trust.

NOTE

The full credit bid rule, however, can impair lender's resort to additional security. See [Mortgage Deed of Trust Foreclosure §§2.86, 9.30](#). For effect on additional security, see [step 5](#), below; for effect of *receiver* (see [Glossary](#)), see [step 15](#), below; for postsale recovery plan, see [step 30](#), below.

CHECK FOR LETTER OF CREDIT

A mortgage lender may draw on a letter of credit before or after a judicial or nonjudicial foreclosure without violating "one-action" or antideficiency laws. See [CC §2787](#); [Com C §5114](#); [CCP §§580.5, 580.7](#). See also [Western Sec. Bank v Superior Court](#) (1997) 15 C4th 232, 62 CR2d 243.

Further Research: On perfecting and enforcing letters of credit, see [Real Estate Finance §7.30](#); [Mortgage Deed of Trust Foreclosure §§9.113-9.117](#).

CHECK FOR PLEDGED INSTRUMENTS OR DEPOSIT ACCOUNTS

Consensual Liens

a. *Security Agreement:*

(1) Personal property including the following may all be pledged to a lender either through a deed of trust or a separate security agreement:

- (a) Negotiable instruments (defined in [Com C §3104](#));
- (b) Certificated securities (defined in [Com C §8102](#)); and
- (c) Deposit accounts (defined and discussed in [Com C §§9102\(a\)\(29\), 9104, 9304, 9310\(b\)\(8\), 9312, 9314](#)).

(2) If an interest in such personalty is not granted in the deed of trust, check to see if a separate security agreement exists.

b. *Perfection:*

- (1) A valid security interest in personal property need not be "perfected" to be enforceable against a borrower (Com C §9201); but
- (2) To maintain *priority* (see Glossary) in most types of collateral with respect to other lien claimants and, if applicable, a bankruptcy trustee, the security interest must be properly perfected under the Uniform Commercial Code in the state where the debtor is located (Com C §§9301-9306); and
- (3) If a security interest in the property exists, counsel should confirm that the interest is properly perfected.

NOTE

Filings with the Secretary of State lapse after 5 years unless properly continued. See Com C §9515.

c. *Enforcement:*

- (1) Nonjudicial and certain statutorily permitted enforcement of rights in personal property in which lender has a consensual *lien* (see Glossary) does not violate CCP §726 or other antideficiency laws; and
- (2) Is permitted independently of foreclosure on real estate collateral. See Com C §9604.

Nonconsensual Liens

a. *Statutory Basis:*

- (1) Financial institutions may also have statutory liens or rights in a debtor's deposit accounts and other property held by the institution, including:
 - (a) "Banker's lien" (CC §3054); and
 - (b) Setoff rights (CCP §431.70).
- (2) These rights need not be "perfected" to be effective against another lien claimant or bankruptcy trustee.

b. *Enforcement:*

- (1) Lenders holding real property security must be extremely wary of exercising their statutory rights in deposit accounts. Setting off funds in which lender has no security interest has been held a violation of the security-first requirement of CCP §726 and has resulted in the waiver of a lender's real property collateral. See Security Pac. Nat'l Bank v Wozab (1990) 51 C3d 991, 275 CR 201.
- (2) It is undecided whether assertion of a banker's lien on property not the subject of a consensual security agreement constitutes violation of CCP §726; however, extreme caution is advisable. See Mortgage Deed of Trust Foreclosure, chaps 4, 9.

CHECK LIABILITY

If client was not original payee, review endorsement(s) on note. (See Glossary for more information on *endorsement*.)

Endorser's Liability

Holder (see Glossary) who endorsed note over to your client is liable to your client for the note's payment if borrower fails to pay. Com C §3415(a). See Mortgage Deed of Trust Foreclosure §9.118.

Exception

If prior holder endorsed note "without recourse," he or she escapes endorser liability (see Com C §3415(b)) but still can be liable for fraud in misrepresenting the value of the property. See Metz v Malley (1957) 155 CA2d 848, 852, 318 P2d 843.

Advantage to Lender

Endorsers usually are denied *purchase money* (see Glossary) and CCP §726 protections (see step 5, below).

Example 1: Holder of note may bring a separate action against the endorser without violating CCP §726 one-action rule (see Glossary). Nuetzel v Mackie (1927) 80 CA 768, 774, 253 P 166. But see CC §2845 (surety can require creditor to first exhaust remedies against primary obligor).

Example 2: Holder of the note may foreclose nonjudicially on a purchase money obligation and, if proceeds are insufficient to satisfy the debt, may sue the endorser, despite CCP §§580b and 580d (for more information on antideficiency protections for borrowers and protections for third parties, see step 5, below). See Stephenson v Lawn (1957) 155 CA2d 669, 671, 318 P2d 132.

CHECK FOR MORTGAGE INSURANCE

If loan was federally insured or guaranteed, contact the appropriate agency to determine what process must be followed to recover on the guaranty or insurance. For notification to FHA or VA, see step 19, below.

CHECK FOR LIABILITY OF SUCCESSOR

If trustor/borrower has transferred the real property, determine if new owner assumed the loan (*i.e.*, agreed in writing to perform the loan obligations).

If New Owner Assumed the Loan

a. New owner who assumed the loan is now the principal debtor and is liable for deficiency judgment to extent one is available under the law and the loan documents (see Security-First Nat'l Bank v Chapman (1939) 31 CA2d 182, 186, 87 P2d 724; for antideficiency protections for borrowers and third parties, see step 5, below; for availability for nonrecourse notes, see step 9, below).

NOTE

Lender can enforce the assumption agreement even if not a party to it. See Bogart v George K. Porter Co. (1924) 193 C 197, 200, 223 P 959.

b. Original borrower:

(1) Remains liable as a surety for such deficiency unless expressly released (Everts v Matteson (1942) 21 C2d 437, 447, 132 P2d 476); but

(2) Can require lender to first seek to satisfy such deficiency from the assets of the assuming grantee. See Hamburger v Ellingson (1934) 139 CA 311, 314, 33 P2d 850.

NOTE

For this reason, lenders documenting an assumption when no release will be given to the original borrower should consider obtaining suretyship waivers from a guarantor.

Exception: Original borrower is not liable on the loan if lender agrees to a release or novation, which releases borrower from further liability. Lender's consent to transfer of the property under a due-on-sale clause does not, by itself, release original borrower from liability on the note.

c. If original borrower was protected from deficiency judgment because the loan was purchase money (for information on purchase money deficiency bar, see step 5, below):

(1) The assuming grantee probably enjoys purchase money protection as well; *except*

(2) If original loan was seller-financed, the purchase money protection *might* be lost on assumption.

If New Owner Did Not Assume the Loan

If new owner did not assume the loan:

a. New owner is not personally liable on the loan or vulnerable to deficiency judgment (Treat v Craig (1901) 135 C 91, 92, 67 P 7);

b. Original borrower remains the obligor and liable for any deficiency judgment that may be recovered (for antideficiency protections for borrowers and third parties, see step 5, below; for availability for nonrecourse loans, see step 9, below); and

c. The real property remains subject to the deed of trust, despite the change of ownership.

Further Research: For statutory and case authority on liability of successor owners, including assuming grantees, see Mortgage

Deed of Trust Foreclosure §§9.122-9.136.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/When Evaluating Whether Borrower Has Defaulted/STEP 2. EVALUATE WHETHER OBLIGATION TO LENDER IS SECURED BY AN INTEREST IN REAL PROPERTY

STEP 2. EVALUATE WHETHER OBLIGATION TO LENDER IS SECURED BY AN INTEREST IN REAL PROPERTY

COLLECT DOCUMENTS AND IDENTIFY ALL DEBTS
AND ALL SECURITY

WHAT TO COLLECT FROM LENDER

Have lender-client provide you with:

- a. *Original* of the promissory note (unless already in the possession of lender's captive trustee, in which case obtain a complete copy of it);
- b. Recorded deed of trust securing the note;
- c. Any additional notes or other documents indicating secured advances made to borrower;
- d. Copy of any assignment or assumption documents relating to the note, the deed of trust, or the encumbered property, whether recorded or not;
- e. Substitution of trustee, if any (see [step 21](#), below);
- f. Requests for special notice, if your client has them (see [CC §2924b\(a\)](#));
- g. Client's title insurance policy (*i.e.*, a lender's policy) insuring the priority of the deed of trust, and any subsequent title guaranties, endorsements, and reports;
- h. Any other documents or correspondence relating to:
 - (1) The loan, *e.g.*, a modification of the note;
 - (2) The security, *e.g.*, notices from other lienholders, partial releases, *subordination* agreements (see [Glossary](#)); or
 - (3) The default(s);
- i. Any personal guaranties and additional security agreements;
- j. Any appraisals of the real property;
- k. Any environmental reports concerning the property;
- l. Loan payment records, including records of how payments were applied;
- m. Lender's foreclosure file, which may yield information on borrower defenses, *e.g.*, that borrower notified lender of bankruptcy filing or tried to make payments; and
- n. Lender's loan file, which can contain useful information about borrower, *e.g.*, for serving papers.

NOTE

Be certain to match the deed of trust to the note and to the property description in the loan file, then tie in all other documents.

Further Research: See checklist in [Mortgage Deed of Trust Foreclosure §10.2](#) for additional documents to review on a construction loan or loan secured by income property.

WHAT TO DO IF LENDER IS MISSING LOAN DOCUMENTS

Determine if Debt Structured Another Way

a. Review lender's documents to determine if the obligation was structured in less common form, *e.g.*:

- (1) *Installment land sale contract, i.e.*, contract by which buyer pays for real property in installments over more than 1 calendar year and seller retains title to the property until price is paid in full;
- (2) *Note secured by mortgage*, rather than by deed of trust;
- (3) *Unliquidated contractual obligation* secured by deed of trust or mortgage; or
- (4) *Deed absolute on its face (e.g., granting fee title to creditor)* but intended to serve as security instrument.

NOTE

Other forms, *e.g.*, option, negative pledge, may also serve as disguised secured transactions. See *Coast Bank v Minderhout* (1964) 61 C2d 311, 38 CR 505. But see *Taboe Nat'l Bank v Phillips* (1971) 4 C3d 11, 92 CR 704.

b. For help in evaluating validity and enforcement options of atypical secured obligations, see *Mortgage Deed of Trust Foreclosure* §§4.32-4.35, 5.45-5.53; 4 Witkin, Summary, *Sec Trans Real Prop* §§10-33.

If Client Has Copy but Not Original of the Note

Explain to client that:

- a. Without the original note, the trustee and the court have no assurance that the note has not been canceled or transferred to someone else (see Com C §§3203-3204);
- b. If the note *was* transferred to someone else, the real property security went with it, even if the deed of trust was not specifically assigned (see CC §2936; *Mortgage Deed of Trust Foreclosure* §§1.24-1.27); and
- c. Before foreclosing on such security, the trustee may (or, if proceeding by judicial foreclosure, the court will) require that beneficiary post a lost-instrument bond, which is expensive, to protect against claims by a transferee who has possession of the note (see CC §3415(b); *Mortgage Deed of Trust Foreclosure* §2.34). Institutional lenders can usually persuade a title company trustee to accept an indemnity in the form of an affidavit of lost note rather than posting a bond.

If Client Does Not Have Original Recorded Deed of Trust

If lender has the signed original of the note but not the deed of trust:

- a. Trustee still may, but usually does not, require posting of a lost-instrument bond, under provisions of the deed of trust that require delivery of the note and deed of trust; but
- b. Try to negotiate away the bond requirement with the argument that there is no significant risk for the trustee, because:
 - (1) The security follows the note (CC §2936);
 - (2) Your client holds the note that is the critical document evidencing the obligation;
 - (3) Original document is in the public record; and
 - (4) The original deed of trust is not significant, because a separate unrecorded assignment of trust deed may exist regardless of who holds the original deed of trust.

NOTE

Clients (and some lawyers) have trouble understanding why the trustee cannot rely on the county recorder's records in determining who is the beneficiary of the deed of trust. To understand the application of CC §2936, review *Mortgage Deed of Trust Foreclosure* §§1.24-1.27.

IDENTIFY ALL OBLIGATIONS AND ALL SECURITY

In most instances, the obligation and security will be easily recognizable: a debt evidenced by a promissory note that is secured by

a deed of trust on a single piece of real property. Be alert, however, to more complex transactions, *e.g.*:

a. Multiple obligations:

- (1) Several promissory notes or single note with additional advances by lender;
- (2) Promissory note with other debts (intentionally or perhaps unintentionally) sharing the same security because of a "dragnet" clause in the deed of trust;
- (3) Promissory note and a separate agreement to provide goods or services benefiting lender or the collateral (*e.g.*, provide offsite improvements benefiting lender as an adjacent landowner or complete a parking structure benefiting office building subject to lender's deed of trust); or
- (4) Wraparound or all-inclusive note that includes an underlying obligation of the lender to a third party (typically serviced by a portion of the income received from the wrap note).

b. Multiple security, including combinations of any of the following:

- (1) One or more deeds of trust (when lender holds both senior and junior deeds of trust, review *Simon v Superior Court* (1992) 4 CA4th 63, 5 CR2d 428 (lender who originated loans secured by consecutive deeds of trust and held trustee's sale under senior barred by CCP §580d from pursuing deficiency judgment on junior); *Evans v California Trailer Court, Inc.* (1994) 28 CA4th 540, 33 CR2d 646 (lender's foreclosure of senior mortgage barred deficiency claim under its junior mortgage, but did not bar fraud and bad-faith waste claims; full credit bid at senior sale not bar to tort claims on junior loan));
- (2) Assignment of rents (whether in deed of trust or separate document);
- (3) Proceeds from third parties, such as from insurance or condemnation, claims involving the property;
- (4) Personal property used in connection with the real property security (*e.g.*, fixtures, furnishings, and equipment—"FF&E") or not connected (pledged stock or deposit account); for dealing with mixed collateral, see step 9, below; and
- (5) Also consider other sources of repayment, although not true security for the debt, *e.g.*, guaranties (secured or unsecured), mortgage insurance, letters of credit.

Further Research: On multiple obligations and multiple security, see generally Mortgage Deed of Trust Foreclosure §§5.20, 9.1-9.41.

REVIEW DOCUMENTS AND COLLECT INFORMATION

VERIFY THAT CLIENT IS CURRENT PAYEE

Verify that client is the current holder of the promissory note:

a. If not the original payee, make sure that he or she acquired the payee's interest (see Mortgage Deed of Trust Foreclosure §§1.24-1.30) through:

- (1) Negotiation, *i.e.*, endorsement and delivery (review any endorsements on or attached to the note); or
- (2) Properly perfected assignment, on which either endorsement or delivery may not necessarily be required; and

b. Verify that client has not transferred payee's interest to another.

NOTE

Be alert to the possibility of a transfer if client does not have possession of the original note and client's financial records seem incomplete or disorganized, *e.g.*, if client is an institutional creditor undergoing a merger or the estate of a deceased individual creditor.

VERIFY THAT DEED OF TRUST WAS RECORDED

Ascertain whether the deed of trust was recorded in the official records of the county in which the real property is located, *e.g.*:

- a. Check for county recorder's stamp and notation on the original of the deed of trust;
- b. Review client's title insurance policy, if any; or
- c. Obtain copy of the recorded deed of trust from the county recorder's office.

If Deed of Trust Was Not Recorded

- a. Obtain a current title report or property profile to ascertain present state of title.
- b. Evaluate with lender whether to record the deed of trust as soon as possible to:
 - (1) Preserve priority of lender's security interest (for information on priority and recording laws, see [step 8](#), below); and
 - (2) Establish lender as secured creditor before debtor files bankruptcy (see 11 USC §544; *Taxel v Chase Manhattan Bank (In re Deuel)* (BAP 9th Cir 2006) 361 BR 509; [Mortgage Deed of Trust Foreclosure §11.81](#)); but
 - (3) Recognize that delayed recordation of the deed of trust may enable the debtor or a bankruptcy trustee to avoid lender's security interest as a preference. See 11 USC §547; [Mortgage Deed of Trust Foreclosure §§11.82-11.85](#).
- c. In deciding whether to record, consider, *e.g.*:
 - (1) Current appraised value of collateral;
 - (2) Existence of interests (*e.g.*, encumbrances or deeds) recorded after the date of execution of your client's deed of trust;
 - (3) Whether it is feasible to attack such interests as not being BFEs or BFPs (as defined in [step 8](#), below); and
 - (4) Fact that recordation is not essential to validity of client's security interest (see [CC §1217](#)).

In Rare Instance, Lender May Treat Obligation as Unsecured

Lender *may* be able to treat the obligation like an unsecured debt (sue borrower directly on the note without first foreclosing on the security, despite the restrictions of [CCP §726](#)) *if*:

- a. Note does not reflect that it is secured by a deed of trust; and
- b. Lender is a holder in due course who acquired the note without knowledge of the security.

Further Research: See [Mortgage Deed of Trust Foreclosure §§1.29-1.30](#). On [CCP §726](#) and other possible exceptions to it, see [step 5](#), below.

DETERMINE IF MORATORIUM OR SPECIAL NOTICES APPLY TO foreclosure ON SECURITY

During the trustee sale (nonjudicial foreclosure) process, some secured loans are subject to temporary waiting periods or special notices designed to protect tenants or residential owners. See [steps 25-26](#).

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/When Evaluating Whether Borrower Has Defaulted/STEP 3. EVALUATE WHETHER BORROWER HAS DEFAULTED

STEP 3. EVALUATE WHETHER BORROWER HAS DEFAULTED

ASCERTAIN BORROWER'S MISCONDUCT

Determine from lender and lender's papers what borrower did or failed to do that supposedly constitutes an event of default, *e.g.*:

- a. Missed a payment; or
- b. Failed to pay property taxes on the real property security.

COMPARE WITH DEFINITION OF DEFAULT

Review note and deed of trust to determine whether borrower's behavior is an event that entitles lender to accelerate the debt. For information on acceleration of debt, see [step 1](#), above.

If Monetary Default

Caution lender not to begin foreclosure after minor delay in payment.

Example: If lender declares default during the grace period (before late charge can be imposed), foreclosure may be invalidated. See *Baypoint Mortgage Corp. v Crest Premium Real Estate Inv. Retirement Trust* (1985) 168 CA3d 818, 825, 214 CR 531.

If Nonmonetary Default

- a. *Nonmonetary defaults* (*e.g.*, failure to maintain or insure the real property; see [Glossary](#)) involve higher risk of litigation; so
- b. Advise lender to be cautious in foreclosing solely on basis of a nonmonetary default that does not materially impair the security or put it at increased risk. Determine if lender wishes to "monetize" a nonmonetary default by protectively advancing funds required by third parties, *e.g.*, paying for property insurance. For failure to pay third parties, see [step 25](#), below.

Further Research: For strategies on defaulted commercial real estate loans that address notice of default, enforcing nonrecourse carve-out guaranties, prepayment restrictions, late charges, and the finality of judicial foreclosure, see Loubier & del Castillo, *The New Age of Real Estate Loan Defaults*, 31 CEB Real Prop L Rep 6 (January 2008).

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/When Evaluating Whether Borrower Has Defaulted/STEP 4. EVALUATE WAIVER, LULLING, OR OTHER BORROWER DEFENSES AND POSSIBLE 'LENDER LIABILITY' CLAIMS

STEP 4. EVALUATE WAIVER, LULLING, OR OTHER BORROWER DEFENSES AND POSSIBLE "LENDER LIABILITY" CLAIMS

CHECK FOR WAIVER OR LULLING

Interview lender-client and review any correspondence with borrower for evidence that lender or lender's agents:

- a. Expressly waived the default (*e.g.*, by a letter extending the payment deadline); or
- b. Misled or lulled borrower by conduct (*e.g.*, by accepting late payment in the past). See *Auerbach v Great W. Bank* (1999) 74 CA4th 1172, 88 CR2d 718 (borrower defrauded by lender's requirement for preworkout agreement, including keeping loan payments current, as condition for negotiating modification, when lender never intended to modify loan). But see *Secrest v Security Nat'l Mortgage Loan Trust 2002-2* (2008) 167 CA4th 544, 84 CR3d 275 (CC §2922 requires writing to create, renew, or extend mortgage; borrower's performance by payment under oral modification held insufficient exception to statute of frauds).

If Evidence of Waiver

If lender may have waived default by accepting less than perfect performance in the past, decide with lender whether to refrain from declaring default until after giving borrower:

- a. Written notice that strict compliance will be required in future; and
- b. A reasonable opportunity to comply after receipt of lender's notice.

Further Research: *Lopez v Bell* (1962) 207 CA2d 394, 397, 24 CR 626. See Mortgage Deed of Trust Foreclosure §§10.21, 12.141.

NOTE

While technically appropriate, this notice may not always be advisable, because the tacit (or express) acknowledgment of the waiver may give rise to a claim of modification (or be evidence of it). Evaluate carefully before taking these steps.

EVALUATE OTHER BORROWER DEFENSES AND "LENDER LIABILITY" CLAIMS

Borrower Defenses

- a. If the mortgage lender seeks a deficiency judgment, borrower can require lender to go through the judicial foreclosure process:
 - (1) Which can be long and expensive; and
 - (2) Which may end with no free assets of borrower's to satisfy the judgment.
- b. If the mortgage lender seeks only to recover the value of the real property or is oversecured, lender can proceed on the short, inexpensive trustee sale foreclosure process. However, this will terminate lender's right to a deficiency from borrower.
- c. Imperfections in the loan documents have constituted good defenses, so the documents must be carefully examined and evaluated for weaknesses.
- d. Violations of consumer laws in the lending process or in the loan documents may prevent or limit enforcement by foreclosure. See, *e.g.*, Fin C §§4970-4979.8, which regulates certain residential real property secured loans.
- e. Numerous federal and state laws provide borrowers with remedies for predatory lending practices. For discussion, see Mortgage Deed of Trust Foreclosure §§12.50-12.116.

Lender Liability Claims

- a. Enforceable lender-liability claims are infrequent; but

b. Claims with merit are effective as either:

- (1) Defense to foreclosure; or
- (2) Claim to be prosecuted against lender.

NOTE

Lender must look carefully at its conduct in administering the loan, because the court examines the entire relationship between lender and borrower—not just the documents—to determine the legal duties of the lender. Assignee of originating lender must review loan origination process, loan documents, and prior loan administration for evidence of lender liability and potential defenses to loan terms.

Further Research: See Mortgage Deed of Trust Foreclosure, chaps 7, 12.

Jury Trial Waivers

Unless statutory law expressly allows it, the prospective waiver of the borrower's jury trial rights (customary in commercial loan documents) violates the California Constitution, and therefore lender cannot rely on such a waiver to prevent an aggressive borrower from dragging it into a jury trial. Arbitration clauses that include a waiver of jury trial rights, however, are enforceable. Grafton Partners LP v Superior Court (2005) 36 Cal4th 944, 32 CR3d 5.

DETERMINE IF LENDER CAN AVOID BORROWER'S CLAIMS

If borrower is disputing the default or the amounts claimed by lender, determine if lender is protected from borrower's claims by:

- a. Title 12 USC §1823(e), an amendment to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), or the *D'Oench* doctrine (originating with *D'Oench, Dubme & Co. v FDIC* (1942) 315 US 447, 86 L Ed 956, 62 S Ct 676) (possibly preempted by FIRREA), which protect failed lending institutions and their successors and subsidiaries from certain borrower defenses;
- b. Holder in due course status (see below, this step); or
- c. Contractual provisions (including prior releases, indemnity provisions, and estoppels) or attorney opinion letters.

REVIEW FIRREA AND *D'OENCH* DOCTRINE

When They Apply

FIRREA and *D'Oench* doctrine apply if lender is a subsidiary of or successor to a failed savings and loan or bank.

Shields Lender From Borrower Defenses

Title 12 USC §1823(e) and the *D'Oench* doctrine have been raised to protect successors to a failed institution from borrower defenses based on side agreements between borrower and the failed institution.

Example: Securities broker sells bonds to bank and later, when bond issuer fails, provides promissory note to bank to enable it to avoid reflecting the worthless bonds as a loss in its records. Bank provides broker with written promise not to collect the note. When bank's successor sues on the note, broker is estopped to raise the side agreement as a defense. *D'Oench, Dubme & Co. v FDIC, supra.* But see *O'Melveny & Myers v FDIC* (1994) 512 US 79, 129 L Ed 2d 67, 114 S Ct 2048 (implies federal common law under *D'Oench* case was superseded by 1989 enactment of FIRREA).

Further Research: For discussion of the *D'Oench* doctrine and the effect of FIRREA, see Mortgage Deed of Trust Foreclosure §12.35.

DETERMINE IF LENDER IS HOLDER IN DUE COURSE

Determine whether:

- a. Lender qualifies as a holder in due course (for information on how a lender qualifies, see below);
- b. The note is a negotiable instrument (for determining negotiability of note, see below); and
- c. Borrower's claim is a personal defense (see below).

Advantage

Holder in due course acquires a *negotiable note* (see [Glossary](#)) free of personal defenses that borrower may have. [Com C §§3305-3306, 3601](#).

How Lender Qualifies

To qualify as a holder in due course, lender must:

a. Be a holder of a negotiable note ([Com C §1201\(20\)](#)), *i.e.*, have possession of a negotiable note, which is issued or endorsed:

- (1) To your client;
- (2) To client's order;
- (3) To bearer; or
- (4) In blank (*i.e.*, simply signed by the previous holder); and

b. Have acquired the note ([Com C §3302\(1\)](#)):

- (1) For value;
- (2) In good faith; and
- (3) Without notice of default or other irregularities in the note.

NOTE

In securitized lending context, failure of conforming assignment documentation could be an impediment to asserting status as holder in due course. *In re Foreclosure Cases* (ND Ohio Oct. 31, 2007, No. 1-07CV2282) 2007 US Dist Lexis 84011 (plaintiff mortgage registration service denied judicial foreclosure of home mortgages when plaintiff relied on proprietary electronic index to evidence mortgagor interests; assignment of mortgage through public records held requirement for standing). But see *Neal v Juarez* (SD Cal, July 23, 2007, No. 06cv0055) 2007 US Dist Lexis 98068, 2007 WL 2140640, *aff'd* (9th Cir 2008) 301 Fed Appx 683 (unpublished opinion) (failure to deliver original note to foreclosure trustee is not sufficient grounds to invalidate nonjudicial foreclosure proceeding); *Bouyer v Countrywide Bank* (ND Cal, June 25, 2009, No. C 08-5583) 2009 US Dist Lexis 53940 (possession of original note by foreclosing party is not prerequisite to trustee sale).

Exception

If your client is a consumer finance lender and this loan was made to finance consumer's purchase of goods for personal, family, or household use, your client probably does not qualify as holder in due course. See 16 CFR pt 433; *Johnson v Long Beach Mortgage Loan Trust* (2006) 451 F Supp2d 16, 55 (distinguishing mortgage loan agreement for consumer "goods and services" under 16 CFR pt 433.2 from residential purchase mortgage).

What Constitutes Notice

Lender's status as a holder in due course is not affected by documents recorded in the public records (*e.g.*, a notice of default or lis pendens) if lender had no actual knowledge of the default or other defect when he or she acquired the note.

Further Research: [Com C §3302](#); [Cameron v Security First Nat'l Bank](#) (1967) 251 CA2d 450, 458, 59 CR 563. See [Real Estate Finance §3.4](#); [Mortgage Deed of Trust Foreclosure §1.25-1.27, 12.37](#).

How to Determine if Note Is Negotiable

To be negotiable, the note must ([Com C §3104\(1\)](#)):

- a. Be signed by the *maker* (see [Glossary](#));
- b. Contain an unconditional promise to pay a certain sum and no other promise, obligation, or power given by the maker, except as authorized by the Commercial Code;
- c. Be payable on demand or at a definite time; and

d. Be payable to order or to bearer.

Further Research: For additional discussion of negotiability, see Secured Transactions in California Commercial Law Practice §§3.13, 3.34-3.39, 4.30 (2d ed Cal CEB 2001), referred to throughout this Action Guide as Secured Transactions.

Effect on Deed of Trust

If the note is negotiable, holder in due course also takes the deed of trust free of personal defenses. *Hayward Lumber & Inv. Co. v Naslund* (1932) 125 CA 34, 40, 13 P2d 775. See Mortgage Deed of Trust Foreclosure §1.25.

What Is a Personal Defense?

Personal defenses include *all* defenses *except*:

- a. Infancy or other lack of capacity;
- b. Fraud in the inception (factum) as distinct from fraud in the inducement; in this context, see *C.I.T. Corp. v PANAC* (1944) 25 C2d 547, 154 P2d 710; see also *Rosenthal v Great W. Fin. Svc.* (1996) 14 C4th 394, 58 CR2d 875; *Wurtz v Holloway* (1996) 46 CA4th 1740, 54 CR2d 512.
- c. Duress or illegality that renders the obligation void;
- d. Discharge in insolvency proceedings; and
- e. Any other discharge (*e.g.*, payment) of which the holder had notice when note was acquired.

Further Research: See Com C §3305; Real Estate Finance §§3.4-3.6; Mortgage Deed of Trust Foreclosure §§1.30, 12.37; 4 Witkin, Summary of California Law, *Negotiable Instruments* §§27-31 (10th ed 2005), referred to throughout this Action Guide as 4 Witkin, Summary, *Neg Instr*.

© The Regents of the University of California

When Selecting Appropriate Remedy

STEP 5. REVIEW RESTRICTIONS ON ENFORCEMENT AGAINST REAL PROPERTY SECURITY

AVOID HASTY ACTION

Counsel your lender-client that:

- a. Self-help measures, such as setoff of borrower's funds, must be avoided; and
- b. Careful analysis and planning are necessary to avoid inadvertent loss of the real property security or, potentially, the obligation itself. See, e.g., Security Pac. Nat'l Bank v Wozab (1990) 51 C3d 991, 275 CR 201, discussed below; Mortgage Deed of Trust Foreclosure, chap 4.

REVIEW FAIR DEBT COLLECTION PRACTICES ACT

As to consumer debt collection, recall that a lawyer's conduct can be regulated under the Fair Debt Collection Practices Act (15 USC §§1692-1692p). See Heintz v Jenkins (1995) 514 US 291, 131 L Ed 2d 395, 115 S Ct 1489.

SECURITY-FIRST AND ONE-ACTION/ONE-FORM-OF-ACTION RULE

REVIEW CCP §726 ONE-ACTION RULE

Code of Civil Procedure §726, the "one-action rule," actually includes three underlying principles of limitation:

- a. Only *one action* in court is permitted;
- b. *One form of action* (judicial foreclosure) is the action required; and
- c. Lender must exhaust its *security first*.

NOTE

The use of "one-action rule" as shorthand for these three principles of CCP §726 has made it more difficult to understand the scope of CCP §726 (such as when a lender bank acts to set off borrower's deposit account entirely remote from any judicial action and is nonetheless held to have violated CCP §726). To avoid confusion, in this Action Guide the three limiting principles of CCP §726 will be collectively referred to as CCP §726 or the "CCP §726 rule"; we will distinguish between the underlying principles only when we discuss them individually.

Effect

Generally, CCP §726 makes foreclosure the sole remedy for a lender whose debt is secured by real property, *because*:

- a. *One-action aspect*: Lender may bring only one lawsuit to enforce its real property security and collect its debt (Security Pac. Nat'l Bank v Wozab (1990) 51 C3d 991, 997, 275 CR 201);
- b. *One-form-of-action aspect*: Proper form of action is judicial foreclosure; and
- c. *Security-first aspect*: Lender must exhaust its security before attempting to enforce the underlying debt against borrower or borrower's unpledged assets (Security Pac. Nat'l Bank v Wozab (1990) 51 C3d 991, 999, 275 CR 201). Some judicial remedies may be permissible; see step 18, below.

NOTE

If lender plans to seek a deficiency judgment against borrower (because the debt exceeds the value of the security), lender must

use a judicial foreclosure form of action. See CCP §§580d, 726(b); for how lender's use of courts triggers one-action sanctions, see below.

Effect of Trustee's Sale

Trustee's sale is not an action under CCP §726. If the debt is nonrecourse by its terms or lender is willing to forgo a deficiency judgment but has other claims against borrower, consider:

- a. *First*, completing a trustee's sale to exhaust the security (satisfying the security-first requirement); and
- b. *Second*, pursuing a judicial remedy on the other claims (*i.e.*, claims not barred by CCP §580d).

NOTE

This approach preserves both the real estate collateral and the right to a judicial remedy that might be subject to CCP §726 (for how lender's use of courts triggers one-action sanctions, see below). For information on mixed collateral foreclosure, see step 9, below; for planning for a postsale recovery, see step 30, below.

Further Research: See Mortgage Deed of Trust Foreclosure §§4.6-4.11, 5.13-5.23.

CCP §726 RULE AS DEFENSE

Can Be Raised by Borrower

If lender sues borrower personally to collect the debt, borrower can raise CCP §726 (security-first requirement) as affirmative defense and require that lender exhaust its security in a single judicial foreclosure before pursuing borrower for any deficiency. Walker v Community Bank (1974) 10 C3d 729, 734, 111 CR 897. See Mortgage Deed of Trust Foreclosure §§4.12, 4.23-4.24.

Typically Cannot Be Raised by Guarantor

If lender seeks to enforce a personal guaranty, the guarantor might be able to require lender to exhaust the security for the primary obligation first, because CC §2845 permits a surety to require creditor to pursue other available remedies before proceeding against guarantor, and CC §2850 requires that the principal's collateral be exhausted before recourse to the guarantor's collateral, *but*:

- a. Guarantors typically waive the benefits of CC §§2845 and 2850, so they cannot raise these security-first defenses (see Security-First Nat'l Bank v Chapman (1939) 31 CA2d 182, 190, 87 P2d 724); *unless*
- b. Guarantor establishes that it is, in effect, the alter ego of the debtor (*e.g.*, a general partner who guarantees the debt of his or her partnership).

Further Research: See United Cal. Bank v Maltzman (1974) 44 CA3d 41, 53, 118 CR 299; Mortgage Deed of Trust Foreclosure §§4.29, 9.89-9.112.

NOTE

When a guaranty is itself secured by real property, the guarantor has the full protection of CCP §726 and *antideficiency protections* (see Glossary) regarding its obligation under the guaranty and the real property securing that obligation.

CCP §726 RULE AS SANCTION

Lender Can Lose Its Security

If borrower does not raise CCP §726 as an affirmative defense, borrower can invoke it as a sanction against lender with the result that lender will be deemed to have *waived* its security (Security Pac. Nat'l Bank v Wozab (1990) 51 C3d 991, 1004, 275 CR 201) *if*:

- a. Lender violates the security-first rule (*e.g.*, by setting off the secured debt against unencumbered assets of borrower);
- b. Lender omits collateral from an action on a debt secured by real property, and proceeds to final judgment on that action (see, *e.g.*, option 4 in step 9, below); or
- c. Lender makes any other attempt to satisfy the obligation by proceeding against borrower personally before foreclosing.

Effect of Losing the Security

Even if lender loses the real property security as a result of the affirmative defense, he or she can still seek to enforce any money judgment obtained in the action against borrower, including executing against the same real property, *but*:

- a. Lender's judgment lien will be subordinate to homestead rights and encumbrances that were junior to lender's deed of trust (see *Security Pac. Nat'l Bank v Wozab* (1990) 51 C3d 991, 1004, 275 CR 201; *Mortgage Deed of Trust Foreclosure §§9.90, 9.98*); and
- b. Borrower may argue on the basis of CCP §§701.630 and 729.080(e) that lender is not permitted to execute against the property formerly subject to lender's deed of trust.

Debt May Be Extinguished

Code of Civil Procedure §726 usually results in loss of lender's security and not elimination of the balance of the debt; dictum in *Wozab* indicates that in appropriate circumstances a lender could lose both security and the right to proceed on the underlying debt. See *Security Pac. Nat'l Bank v Wozab* (1990) 51 C3d 991, 1006, 275 CR 201. See also discussion of *Aplanap* in Example 1, below (loss of both security and debt may follow from improper judicial action).

Example: If a bank takes funds from borrower's account to satisfy a portion of borrower's mortgage debt and refuses borrower's demand to return the funds, the bank may forfeit its mortgage *and* be precluded from collecting the balance of the debt. See *Security Pac. Nat'l Bank v Wozab, supra*.

HOW LENDER'S SELF-HELP TRIGGERS SANCTION

Lender will be subject to the CCP §726 sanction for any extrajudicial conduct, such as offset against borrower's unencumbered assets, that violates the *security-first principle*. For information on a lender's losing security, see above. The security-first principle is described above.

HOW LENDER'S USE OF THE COURTS TRIGGERS ONE-ACTION SANCTION

Lender can incur the sanction for violating the one-action principle of CCP §726 only in the context of a judicial proceeding. See CCP §22; *Security Pac. Nat'l Bank v Wozab* (1990) 51 C3d 991, 998, 275 CR 201. The one-action principle is described above.

Filing a Lawsuit Not Enough

Lender does not incur the one-action sanction merely by *filing* a lawsuit against borrower (*Kirkpatrick v Westamerica Bank* (1998) 65 CA4th 982, 76 CR2d 876 (sanction not triggered, because creditor amended before final judgment to add judicial foreclosure count); *Brice v Walker* (1920) 50 CA 49, 194 P 721), but it is unclear how much further lender can proceed without triggering the sanction.

Prejudgment Events Might Trigger Sanction

- a. The Ninth Circuit Bankruptcy Appellate Panel has construed California law to mean that the sanction will not be triggered by any event less than final judgment. See *Madigan v Potrans Int'l, Inc. (In re Madigan)* (BAP 9th Cir 1991) 122 BR 103, 106 (entry of default is not enough);
- b. However, until California courts provide further guidance, it would be unwise to assume that the question is settled. See *Mortgage Deed of Trust Foreclosure §§4.18, 4.20*.
- c. Until the law is clarified:
 - (1) Proceed with caution if lender is involved in, threatened with, or planning to initiate a judicial proceeding against borrower; and
 - (2) Advise lender that a prejudgment event in the proceeding could possibly trigger the one-action sanction, particularly if the event gives lender access to borrower's funds or other assets.

Example 1: A setoff imposed by the court during the litigation. See *Aplanap v Forte* (1990) 225 CA3d 609, 275 CR 144 (lender obtained judicial setoff whereby relatively small jury award in favor of borrower and against lender was set off against secured obligation; trustee's sale set aside and balance of debt extinguished). *Aplanap* was decided before *Security Pac. Nat'l Bank v Wozab* (1990) 51 C3d 991, 275 CR 201; however, although the *Wozab* decision limits the consequences of *nonjudicial* setoff, its reasoning is not inconsistent with *Aplanap* regarding a dual sanction for judicial setoff.

Example 2: Prejudgment attachment obtained outside the limits of CCP §§483.010, 483.012. See *Shin v Superior Court* (1994) 26

CA4th 542, 31 CR2d 587 (before enactment of §483.012, lender obtained attachment order in Korean court on account of note secured by California property; CCP §726 violation released California property owned by several co-makers, even though lender's action in Korea had proceeded against only one co-maker). See also *Prestige Ltd. Partnership – Concord v East Bay Car Wash Partners (In re Prestige Ltd. Partnership – Concord)* (9th Cir 1999) 164 F3d 1214.

Example 3: In the view of some courts and commentators, a receiver's disbursement of rents or profits to lender before completion of foreclosure may trigger one-action sanctions or reinstate the debt (see discussion on effect of receiver in step 15, below).

Not Triggered by Provisional Remedies in Certain Actions

A lawsuit or judicial remedy will not trigger the one-action sanction if it is viewed by the courts as:

- a. A duly authorized provisional remedy within the pending action; or
- b. An action that is separate and independent of the secured obligation and not an action to recover the debt or enforce a secured right within the meaning of CCP §726.

Example 1: An order compelling turnover of possession of the real property to the lender before foreclosure has been held not to violate CCP §726. *Title Guar. e³ Trust Co. v Monson* (1938) 11 C2d 621, 81 P2d 944. Similarly, under CCP §564(d), a specific performance action to appoint a rents receiver will not violate CCP §726 even if it is not joined with a judicial foreclosure claim; but do not risk violating CCP §726 by obtaining a final judgment in the specific performance action (although CCP §564(b)(11) could be read to permit a final judgment before trustee's sale is conducted, it is not sufficiently clear on this point).

Example 2: A preforeclosure action for claim and delivery has been held not to violate CCP §726. *Harper v Gordon* (1900) 128 C 489, 61 P 84 (decided under former CCP §726 governing both real and personal property).

Example 3: An action against borrower for damages for bad-faith waste probably does not trigger the sanction of CCP §726 (but lender must avoid satisfying the debt through a full credit bid to establish damages). See *Cornelison v Kornbluth* (1975) 15 C3d 590, 603, 125 CR 557; *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 44 CR2d 352; for information on the effect of full credit bid, see step 30, below.

Further Research: On application of one-action rule as a sanction, see Mortgage Deed of Trust Foreclosure §§4.11, 4.23-4.28. On application of rule to ancillary actions, see Mortgage Deed of Trust Foreclosure §§4.12-4.22.

EXCEPTIONS TO SECURITY-FIRST AND CCP §726 RULE

ANCILLARY ACTIONS

Certain judicial proceedings against borrower may not be precluded by CCP §726. See above.

WORTHLESS SECURITY

Code of Civil Procedure §726 rule does not bar an action to recover the debt from borrower personally when beneficiary's security has become *legally* worthless, *e.g.*:

Senior Lien Extinguished Lender's Lien

When lender's security interest has been extinguished as result of foreclosure by senior lienholder (see *Roseleaf Corp. v Chierighino* (1963) 59 C2d 35, 39, 27 CR 873; Mortgage Deed of Trust Foreclosure §§4.42-4.46); or

Trustor Does Not Own Property

When trustor never owned the real property in which he or she purported to grant a security interest (see *Otto v Long* (1900) 127 C 471, 59 P 895); or

Nonexistent

When the security does not exist, *e.g.*:

- a. The real property described in the loan documents does not exist (see *Dyer Law e³ Collection Co. v Abbott* (1921) 52 CA 545, 199

P 340); or

b. Growing crops in which lender holds a security interest are subsequently destroyed (see *Cohen v Marshall* (1925) 197 C 117, 239 P 1050).

Further Research: See Mortgage Deed of Trust Foreclosure §§4.36-4.41.

CONTAMINATED PROPERTY

If the real property security is contaminated by hazardous substances, lender may be permitted exemptions from CCP §726 and antideficiency rules (see Mortgage Deed of Trust Foreclosure §§4.54-4.57, 5.60), *e.g.*, the ability to:

- a. Apply to a court for an order authorizing lender to enter the real property to inspect for hazardous substances when lender has a reasonable belief that contamination is threatened or has occurred (see CC §2929.5);
- b. Enforce environmental covenants of borrower (see CCP §736; for dealing with contaminated property, see step 9, below); and
- c. After a separate judicial determination of impairment in excess of 25 percent of the value of all collateral, waive the real property security and sue on the debt (see CCP §726.5(a); for dealing with contaminated property, see step 9, below).

NOTE

Code of Civil Procedure §726 protections cannot be waived by borrower. The protections of CCP §726 cannot be waived when the loan is made or renewed. CC §2953. See Mortgage Deed of Trust Foreclosure §§4.60-4.66.

Further Research: For a thorough discussion of the CCP §726 rule and case law, see Mortgage Deed of Trust Foreclosure, chap 4.

ANTIDEFICIENCY PROTECTIONS FOR BORROWERS AND SIMILAR PROTECTIONS FOR THIRD PARTIES

EFFECT OF ANTIDEFICIENCY RULES

California's antideficiency rules restrict creditors' rights to obtain deficiency judgments against borrowers on obligations secured by real property.

DEFICIENCY JUDGMENT DEFINED

Generally, a deficiency judgment is a personal judgment against borrower for the difference between:

- a. Unpaid balance of debt (including lender's expenses); and
- b. Proceeds of foreclosure sale (*Toby v Oregon Pac. R.R.* (1893) 98 C 490, 493, 33 P 550).

Can Include Other Actions

Other money judgments sought against borrower may be treated as deficiency judgments subject to the antideficiency rules, *e.g.*:

- a. Recovery sought by a junior encumbrancer whose security was destroyed by the foreclosure of a senior encumbrance (for sold-out juniors, see below; see also Mortgage Deed of Trust Foreclosure §§5.10-5.12); *Brown v Jensen* (1953) 41 C2d 193, 259 P2d 425; and
- b. Actions to recover damages from debtor for ordinary waste, absent a showing of borrower's bad faith (see *Cornelison v Kornbluth* (1975) 15 C3d 590, 603, 125 CR 557; Mortgage Deed of Trust Foreclosure §§2.119-2.120, 5.57-5.59); for information on bad-faith waste by trustor, see step 30, below.

Excludes Tort Actions

Antideficiency rules generally do not prohibit an action to recover damages for borrower's tortious conduct, as opposed to an action on the secured obligation, *e.g.*:

- a. Fraud action against borrower is permitted unless deemed to be an attempt to plead around antideficiency rules (see discussion of conflict in authority under common law fraud recoveries in step 30, below); and

b. Action to recover damages for borrower's bad-faith waste is permitted (for information on trustor bad-faith waste, see [step 30](#), below).

NOTE

Remember, though, that lender should avoid satisfying the debt through a full credit bid at the trustee's sale, if he or she plans to seek damages for borrower's fraud or bad-faith waste or for a related third party tort. See *Alliance Mortgage Co. v Rothwell* (1995) 10 CA4th 1226, 44 CR2d 352 (full credit bid will bar mortgagee's fraud action against third parties unless bid entered in reliance on fraud); *Western Fed. Sav. & Loan Ass'n v Sawyer* (1992) 10 CA4th 1615, 13 CR2d 639 (full credit bid bars claim against borrower for fraud and misrepresentation); for information on effect of full credit bid, see [step 30](#), below. See also *Mortgage Deed of Trust Foreclosure* §§2.121-2.124.

TRUSTEE'S SALE DEFICIENCY BAR

If lender elects to foreclose by trustee's sale (as opposed to judicial foreclosure), he or she is prohibited from obtaining a deficiency judgment. CCP §580d. See *Mortgage Deed of Trust Foreclosure* §§2.10, 4.35, 5.4-5.12.

Reason

The prohibition on deficiency judgments is a statutory trade-off for the expeditious and inexpensive remedy of trustee's sale, and because postsale redemption (see [step 44](#), below) is not allowed following nonjudicial foreclosure.

Effect on Additional Security

As in other cases where a deficiency is prohibited, CCP §580d does *not* prohibit resort to additional security, *e.g.*, rents held by a receiver, insurance proceeds, or a lien on personal property. See *Freedland v Greco* (1955) 45 C2d 462, 466, 289 P2d 463.

NOTE

To preserve lender's option to pursue additional security after the trustee's sale, lender must avoid extinguishing its debt at the sale through a full credit bid. For effect of full credit bid, see [step 30](#), below. See also *Mortgage Deed of Trust Foreclosure* §§2.84-2.87.

Cannot Be Waived by Borrower

The antideficiency protection of CCP §580d cannot be waived when the loan is made (*Freedland v Greco* (1955) 45 C2d 462, 289 P2d 463) and most likely cannot be waived thereafter (see *Mortgage Deed of Trust Foreclosure* §§5.64-5.70).

PROTECTIONS FOR GUARANTORS

Understand Relationship to Debt and Security

a. Lender's rights against a guarantor are significantly different from rights against:

- (1) Borrower (under the note); and
- (2) The real property security (under the deed of trust); but

b. Action taken against one can significantly affect lender's rights against the other two.

Example 1: If lender holding recourse obligation first forecloses by trustee's sale, he or she is then estopped from obtaining relief against the guarantor (see *Union Bank v Gradsky* (1968) 265 CA2d 40, 41, 71 CR 64; compare *Union Bank* with CC §§2847-2848, 2856), because by electing nonjudicial foreclosure, lender waived right to recover deficiency judgment (CCP §580d) and therefore destroyed guarantor's right to obtain recovery from borrower under subrogation or reimbursement principles.

Example 2: A lender foreclosing judicially might waive its rights against the guarantor if it fails to join the guarantor in that action. See *Mortgage Deed of Trust Foreclosure* §9.97.

Check for Waivers by Guarantor

Most protections available to guarantors can be effectively waived; most guaranties contain extensive waivers. See CC §2856. But see *WRI Opportunity Loans II, LLC v Cooper* (2007) 154 CA4th 525, 65 CR3d 205 (holding that §2856 does not authorize waiver of usury defense, which stands as matter of public policy). See also *Mortgage Deed of Trust Foreclosure* §§9.110-9.112; *Real Estate*

Finance, chap 6. In testing effectiveness of waivers, consider the analysis of *Cathay Bank*, although the case was abrogated by CC §2856. *Cathay Bank v Lee* (1993) 14 CA4th 1533, 18 CR2d 420.

Example: Guarantor's defense to claims by lender following trustee's sale (see *Union Bank v Gradsky* (1968) 265 CA2d 40, 71 CR 64, discussed above) can be waived expressly or by conduct. See *Mariners Sav. c³ Loan Ass'n v Neil* (1971) 22 CA3d 232, 236, 99 CR 238. But see *Krueger v Bank of America* (1983) 145 CA3d 204, 193 CR 322. See CC §2856, making effective express predefault waivers of all guarantor defenses, regardless of specific reference to statutory or decisional law, and providing model language for *Gradsky* waiver.

Determine if True Guaranty

Guarantor will be protected by antideficiency laws, regardless of waivers, if guaranty is a sham, *i.e.*, where:

- a. There is identity of interest between borrower and guarantor; or
- b. Guaranty is merely an attempt to obtain waiver of CCP §726 or antideficiency protections.

Example 1: When borrower is a partnership of which guarantor is a *general* partner, guarantor is already liable as a borrower and has CCP §580d protection. See *Union Bank v Dorn* (1967) 254 CA2d 157, 61 CR 893; *Torrey Pines Bank v Hoffman* (1991) 231 CA3d 308, 318, 323, 282 CR 354 (living trust as borrower; CCP §580d barred enforcement of guaranty given by trust principals); *Cadle Co. II v Harvey* (2000) 83 CA4th 927, 100 CR2d 150 (guaranty of purchase money note). But see *Talbott v Hustwit* (2008) 164 CA4th 148, 78 CR3d 703 (trust settlors were true guarantors of trust's loan obligations; third party served as trustee and settlors were secondary, not primary, trust beneficiaries; CCP §580a protection denied).

Example 2: Individual who guarantees debt of his corporate alter ego will likely be afforded full borrower protections. See *Valinda Builders v Bissner* (1964) 230 CA2d 106, 40 CR 735 (lender involved in structuring alter ego transaction; borrower-guarantor given protection of CCP §§580b, 726). See also *River Bank Am. v Diller* (1995) 38 CA4th 1400, 45 CR2d 790.

Further Research: See Mortgage Deed of Trust Foreclosure, chap 9.

PURCHASE MONEY DEFICIENCY BAR

Lender is barred from obtaining deficiency judgment on a purchase money debt secured by real property regardless of foreclosure method chosen. CCP §580b. This is true even if lender is "sold out" in a senior foreclosure. See below.

Purchase Money Defined

Borrower qualifies for purchase money protection from deficiency judgments if debt is (CCP §580b):

- a. *Seller-financing:* A note taken back by the seller of any type of real property and secured by that property (see *Roseleaf Corp. v Chierighino* (1963) 59 C2d 35, 41, 27 CR 873); or
- b. *Financing for Home Purchase:* A loan by a third party to finance the purchase of residential property of 1-4 units, if:
 - (1) The property was occupied entirely or in part by the borrower-buyer after purchase; and
 - (2) The loan was secured by a deed of trust or mortgage on that property.

Exception for "Nonstandard" Purchase Money Debts

Courts may allow deficiency judgments on "nonstandard" purchase money debts that don't come within the purposes of CCP §580b, *e.g.*:

- a. Some situations where seller has *subordinated* its deed of trust to the lien of buyer's construction financing (see *DeBerard Props., Ltd. v Lim* (1999) 20 C4th 659, 85 CR2d 292; *Spangler v Memel* (1972) 7 C3d 603, 614, 102 CR 807; compare *DeBerard* and *Spangler* with *Thompson v Allert* (1991) 233 CA3d 1462, 1466, 285 CR 367); and
- b. Seller-financing transaction where the loan is unsecured or secured by a deed of trust on *other* property owned by buyer rather than the property sold (see *Roseleaf Corp. v Chierighino* (1963) 59 C2d 35, 41, 27 CR 873).

NOTE

Keep in mind that the same reasoning may apply in other cases when the lender's risks have been magnified by some nonstandard feature of the transaction.

Further Research: See Mortgage Deed of Trust Foreclosure, chap 5.

Effect

Code of Civil Procedure §580b effectively makes standard purchase money loans nonrecourse, *i.e.*, makes resort to security the *only* remedy, so lenders in purchase money situations must be particularly careful about the adequacy and priority of the security.

Does Not Bar Resort to Additional Security

Lender *can* resort to additional security (*e.g.*, insurance proceeds) after foreclosing on a purchase money deed of trust (*Redingler v Imperial Sav. & Loan Ass'n* (1975) 47 CA3d 48, 50, 120 CR 575), but must avoid full credit bid at foreclosure sale. For effect of full credit bid, see step 30, below.

Purposes

Reasons given for barring deficiency judgments in purchase money situations are:

- a. Discourages overvaluation of real property security (by placing risk of inadequate security on the seller) (*Roseleaf Corp. v Chierighino* (1963) 59 C2d 35, 42, 27 CR 873);
- b. Stabilizes property values (*Roseleaf Corp. v Chierighino* (1963) 59 C2d 35, 42, 27 CR 873); and
- c. Mitigates harshness (see *Palm v Schilling* (1988) 199 CA3d 63, 69, 244 CR 600).

How Borrowers Can Lose Purchase Money Protection

Purchase money secured debt *might* be converted to *nonpurchase money* (see Glossary) by:

- a. Refinancing, *but* consider issues pro and con, including:
 - (1) *Type*: whether seller-financing or owner-occupied/third-party lender;
 - (2) *Intent of parties at origination*: if refinancing contemplated in documents and later completed with same lender, *e.g.*, conversion to fixed rate; and
 - (3) *Purpose*: if original obligation or otherwise, *e.g.*, replacement loan, debt consolidation, or home improvement loan.
- b. Substitution of security.
- c. Subsequent subordination of the vendor's deed of trust to buyer's construction financing (for an exception to nonstandard purchase money debts, see above).

NOTE

Resolving conflict among the courts of appeal on whether the protections of CCP §580b may be waived in exchange for new consideration received after the original purchase money loan, the supreme court held that the plain language of the statute and public policy will not permit enforcement of §580b waivers even if the waiver language is unambiguous and the waiver is delivered after default in a commercial loan context. *DeBerard Props., Ltd. v Lim* (1999) 20 C4th 659, 85 CR2d 292.

Further Research: See Mortgage Deed of Trust Foreclosure §§5.43, 5.70-5.71, 6.71, 7.7, 7.82.

Handling Purchase Money Issue

If CCP §580b is a problem for your client:

- a. Become familiar with its ascribed purposes (see above), because courts justify exceptions by analyzing whether application of the deficiency bar will advance those policies. See discussion in Mortgage Deed of Trust Foreclosure §§5.31-5.36.
- b. Understand that CCP §580b does not necessarily extinguish the uncollected debt (although it eliminates the *remedy* of suit for deficiency judgment), *so look to*:
 - (1) *Other security*: Consider foreclosing by trustee's sale on client's deed of trust and then foreclosing nonjudicially on any additional real or personal property securing the debt (see Mortgage Deed of Trust Foreclosure §§9.12-9.23); or

(2) *Other parties*: Consider pursuing parties secondarily liable (e.g., endorsers or guarantors of the note) (see Mortgage Deed of Trust Foreclosure §§9.88-9.136); and

(3) *Lender's offset rights against claims by borrower*: See Lange v Aver (1966) 241 CA2d 793, 50 CR 847 (CCP §580b does not extinguish debt).

NOTE

Before relying on or pursuing a guarantor of a purchase money obligation, review Riddle v Lushing (1962) 203 CA2d 831, 834, 21 CR 902; Mortgage Deed of Trust Foreclosure §§9.102-9.112; Real Estate Finance §§6.36-6.37; for protections for guarantors, see above.

FAIR-VALUE LIMITATION

Judicial Foreclosure

The fair-value rule of CCP §726(b) limits the deficiency judgment that may be obtained following judicial foreclosure to the lesser of:

- a. Amount by which the debt exceeds the fair value of the property as of date of sale; or
- b. Amount by which the debt exceeds the successful bid at the sale.

Junior Encumbrancer Bidding at Trustee's Sale

Fair-value limitation (CCP §580a) applies when a junior encumbrancer is the successful bidder at a senior creditor's trustee's sale and then pursues a money judgment for the balance due on the junior's "sold-out" note. See Bank of Hemet v U.S. (9th Cir 1981) 643 F2d 661.

NOTE

Before relying on collection against a guarantor outside the procedure of judicial foreclosure, fair value, and deficiency, review Mortgage Deed of Trust Foreclosure §§9.95-9.106.

Further Research: On fair-value rules, see generally Mortgage Deed of Trust Foreclosure §§5.16-5.23.

Must Begin the Proceeding Within 3 Months

Code of Civil Procedure §§726(b) and 580a require that the lender or a junior encumbrancer who purchases at a senior's foreclosure sale begin the proceeding to determine the deficiency within 3 months after the foreclosure. See Citrus State Bank v McKendrick (1989) 215 CA3d 941, 263 CR 781 (CCP §580a applies to junior purchasing at senior's sale). But see Florio v Lau (1998) 68 CA4th 637, 80 CR2d 409 (former Com C §9501 relieved creditor foreclosing mixed collateral from 3-month requirement).

SOLD-OUT JUNIORS

If foreclosure is threatened on a deed of trust senior to your client's deed of trust, your options depend on whether your client's deed of trust secures a purchase money obligation.

Nonpurchase Money Loans

A junior encumbrancer whose security is destroyed when the senior encumbrancer forecloses is allowed to bring an action on a nonpurchase money note directly against borrower. See Mortgage Deed of Trust Foreclosure §§4.42, 4.45, 5.10-5.12, 5.21-5.23.

Purchase Money Loans

When the holder of a *standard* purchase money note loses his or her security as a result of a senior lender's foreclosure, such "sold-out" junior creditor is barred from suing the trustor on the note and is often without an effective remedy. See Brown v Jensen (1953) 41 C2d 193, 197, 259 P2d 425. However, the creditor may recover on other collateral. See Mortgage Deed of Trust Foreclosure §§5.3, 5.10-5.12, 5.39.

If Client Holds Junior Purchase Money Deed of Trust

- a. If the property is worth significantly more than the unpaid balance of the senior encumbrance, advise client to consider the

following to protect his or her interest:

- (1) Bidding at the senior's foreclosure sale;
- (2) Negotiating to refinance the property;
- (3) Purchasing senior lender's position before foreclosure; or
- (4) Reinstating or redeeming the senior encumbrance.

b. If client holds both junior and senior deeds of trust on the same property, see Hulse, *The Lender with Two Mortgages on the Same Property: Risks and Strategies*, 44 Real Prop, Trust & Estate LJ 495 (Fall 2009).

Further Research: On strategies for junior lienholders, see Mortgage Deed of Trust Foreclosure §§2.5-2.6, 2.34, 2.55, 2.58, 2.64, 2.83, 3.32-3.33, 3.60, 3.94, 5.10-5.12, 5.21-5.23, 5.39-5.44, 7.57, 8.11, 8.78-8.79, 9.42, 9.57; Hansen, *Wielding the Two-Edged Sword: What Every Attorney Needs To Know About Real Property Secured Transactions, Part II*, 22 CEB Real Prop L Rep 159 (Aug. 1999).

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/When Selecting Appropriate Remedy/STEP 6. DETERMINE AMOUNT OF DEBT

STEP 6. DETERMINE AMOUNT OF DEBT

DETERMINE WHAT IS OWED UNDER LOAN DOCUMENTS

HAVE CLIENT CALCULATE

Direct client to do the following, with help from accountant as needed:

- a. Calculate the total amount of interest and principal that is due and unpaid;
- b. Determine the principal balance of the debt; and
- c. Separately set out principal and interest and periods of delinquencies.

CONFIRM AMOUNTS

Examine the documents listed in [step 2](#), above, to confirm amounts due your client, including:

Principal

Outstanding principal amount of the debt.

Interest

- a. Outstanding interest; and
- b. Postdefault or penalty interest.

Penalties

- a. Late charges; and
- b. Prepayment penalties.

For information on *usury* (see [Glossary](#)) and liquidated damage restrictions, see below.

Advances

Additional amounts loaned to borrower or sums paid by lender to third parties to protect the security, *e.g.*, to pay taxes or cure defaults on *senior liens* (see [Glossary](#)) (for information on other clauses, see [step 1](#), above).

Attorney Fees

a. *Must be authorized:* Lender cannot recover attorney fees from borrower unless *expressly* authorized by contract or statute ([CCP §1021](#); [Aozora Bank Ltd. v 1555 N. Cal. Blvd. \(2004\) 119 CA4th 1291, 15 CR3d 340](#) (lender succeeded in proving bad-faith waste by borrower but was denied recovery of attorney fees because bad-faith waste carve-out did not expressly allow attorney fees)), but:

- (1) Client's note and deed of trust probably authorize lender's recovery of attorney fees on most actions; and
- (2) [Civil Code §2924c](#) requires payment of attorney fees as condition to reinstatement.

b. *Judicial foreclosure:* Attorney fees can be recovered only in amount set by the court and only if authorized by the deed of trust, despite the authorizing language of [CCP §730](#), [CCP §580\(c\)](#); [Hotaling v Montiehb \(1900\) 128 C 556, 61 P 95](#).

c. *Trustee's sale:* Attorney fees that can be recovered from borrower for processing a nonjudicial foreclosure are strictly limited by [CC §2924c](#) and [2924d](#), but those sections do not preclude recovery of fees incurred in, *e.g.*:

- (1) Seeking appointment of a rents receiver;
- (2) Obtaining relief from borrower's bankruptcy stay (fees are arguably recoverable under *Travelers Cas. & Sur. Co. of Am. v PG&E Co.* (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199; see Mortgage Deed of Trust Foreclosure §§11.94-11.95);
- (3) Successfully defending an action to enjoin the trustee's sale (see *Buck v Barb* (1983) 147 CA3d 920, 925, 195 CR 461; see also *Caruso v Great W. Savings* (1991) 229 CA3d 667, 280 CR 322, *Passanisi v Merit-McBride Realtors, Inc.* (1987) 190 CA3d 1496, 1509, 236 CR 59); or
- (4) Defending a postsale attack on nonjudicial foreclosure or certain postforeclosure activities. *Jones v Union Bank* (2005) 127 CA4th 542, 25 CR3d 783 (in creditor's successful defense of challenge to nonjudicial foreclosure, neither the caps in CC §2924c and CC §2924d nor CCP §580(d)'s antideficiency provisions barred lender's recovery of attorney fees, because fees were incurred after foreclosure).

Further Research: On payments and related disputes, including interest, penalties, attorney fees, and loan acceleration, see Real Estate Finance, chap 3 (from a drafting perspective); Mortgage Deed of Trust Foreclosure, chaps 7-8 (from an enforcement perspective).

DETERMINE IF OBLIGATION IS NONMONETARY

IF NONMONETARY

If secured obligation that is breached is *nonmonetary*:

- a. Determine if there is a material, provable default;
- b. Determine if the obligation can be monetized without resort to the court, *e.g.*, advancing funds to cure the default by paying taxes, insurance, or repairs;
- c. Determine if there is a separate notice requirement or period to cure; and
- d. Comply with all contractual provisions.

ASCERTAIN IF OBLIGATION CAN BE MONETIZED

a. If obligation can be *monetized*, then:

- (1) Monetize the obligation, for example, by advancing necessary funds to third parties;
- (2) Make demand for payment of monetized amount; and
- (3) Begin foreclosure after failure to pay.

b. If obligation cannot be *monetized*, then:

- (1) Make demand for performance, setting specific time limits.
- (2) If no performance, bring action for judicial foreclosure and ask in complaint that court value the obligation.

DETERMINE IF ACCELERATION IS APPROPRIATE

CHECK OBLIGATION DUE DATE

Review maturity date(s) of the loan to determine if due date of loan or other obligation has been reached.

If Due

- a. Check to see if there are any provisions containing cross-defaulting or cross-collateralization.
- b. Once all obligations are due, make *written* demand for payment in full, setting forth the amount of all elements of the obligation

for which demand is made.

c. If payment period is agreed to in loan documents, or if agreements require payment within the time specified, be sure there has been no waiver of these provisions. Check to determine if borrower has any basis to assert that it was lulled into believing the time requirements would not be enforced.

If Not Due

If all obligations are not due, consider if obligations can be accelerated:

- a. If obligation can be accelerated, determine if acceleration is automatic or if notice is required (see *Beal Bank v Crystal Props. (In re Crystal Props.)* (9th Cir 2001) 268 F3d 743, which strictly construed contractual notice requirements; default tied to acceleration not enforceable until notice of acceleration given);
- b. Give notice of acceleration in the form required;
- c. Determine if there are any cross-default provisions or cross-collateralization documents; and
- d. Once all obligations are due, make demand; see above.

Further Research: On enforcing loan acceleration provisions, see Mortgage Deed of Trust Foreclosure §§8.2-8.24.

CONSIDER USURY AND LIQUIDATED DAMAGE RESTRICTIONS

DO NOT EXCEED

Do not demand postdefault interest, late charges, and prepayment penalties:

- a. In excess of usury limitations (see below); or
- b. Amounting to unreasonable *liquidated damages* (see Glossary). See discussion of liquidated damages, below.

Effect on Foreclosure

Borrower can:

- a. Enjoin a foreclosure that is based on a claim for usurious interest or other unlawful charges;
- b. Seek return of *all* interest previously paid on a usurious note, plus penalty damages; and
- c. Seek a judgment to cancel *all* future interest on the usurious loan.

Further Research: CC §§1916-2, 1916-3(a) (West 1985). On usury law, see generally Real Estate Finance §§1.58, 3.37-3.44; Lind, *A Real Estate Attorney's Guide to California Usury Laws*, 19 CEB Real Prop L Rep 271 (Oct. 1995); 8 Miller & Starr, chap 21; Rabin & Brownlie, *Usury Law in California: A Guide Through the Maze*, 20 UC Davis L Rev 397, 420 (1987).

CALIFORNIA USURY LIMITATIONS

Determine if Exemption Applies

Be aware that most secured creditors and loans are exempt from usury limitations under Cal Const art XV, §1, or specific statutes, *e.g.*:

- a. Most institutional lenders (see, *e.g.*, Fin C §§1504, 1716, 7675, 14000, 18000, 22002, 22050(a); Ins C §1100.1);
- b. Loans made or arranged by a licensed California real estate broker and secured in whole or part by real property lien (Bus & P C §10000; CC §1916.1; Stoneridge Parkway Partners, LLC v MW Hous. Partners III LP (2007) 153 CA4th 1373, 64 CR3d 61);
- c. Pension funds or retirement systems subject to Employee Retirement Income Security Act (ERISA) (CC §1917.220);
- d. Shared-appreciation loans (CC §1917.005; WRI Opportunity Loans II, LLC v Cooper (2007) 154 CA4th 525, 65 CR3d 205);

- e. Licensed securities broker-dealers (Corp C §25211.5); and
- f. Loans made by banks as trustees of a trust (Fin C §1504; Jones v Wells Fargo Bank (2003) 112 CA4th 1527, 5 CR3d 835).

Further Research: For a more complete list of exempt lenders and loans, see Real Estate Finance §§1.21, 3.39-3.40.

Seller-Financing Exempted

- a. Usury law applies to *loans*, not to credit sales. Boerner v Colwell Co. (1978) 21 C3d 37, 45, 145 CR 380.

Example: Usury does not apply when an individual sells real property and finances the purchase by accepting from the buyer a promissory note extending payment over time.

- b. *However*, an extension or modification of the note may be subject to usury limitations, if treated like a loan. See Lakeview Meadows Ranch v Bintliff (1973) 36 CA3d 418, 111 CR 414. But see Ghirardo v Antonioli (1994) 8 C4th 791, 35 CR2d 418 (usury law held not to apply to note given to settle dispute over purchase money obligation).

If Not Exempt

Check interest rate against maximum allowable rate (see below) if the loan is not exempt.

Example: Loan that is neither arranged by broker nor provided as seller financing and is made by an individual who is neither a broker nor in the business of providing financing.

Maximum Interest Rate

- a. *Consumer loans (for personal, family, or household purposes):* 10 percent per year.
- b. *All others:* Interest charged may not exceed higher of:
 - (1) 10 percent per year; or
 - (2) 5 percent per year plus the rate established by the Federal Reserve Bank of San Francisco on advances to member banks under Federal Reserve Act §§13-13A (12 USC §347c), prevailing on the 25th day of the month preceding the earlier of the following:
 - (a) Date that contract to make loan is executed; or
 - (b) Date of making the loan.

Further Research: Cal Const art XV, §1; Real Estate Finance §3.37.

FEDERAL USURY LIMITATIONS

If client has made a small business loan or is a federally regulated institution, check federal usury limitations (which usually preempt state usury laws) under 12 USC §1735f-7.

OTHER LIMITS ON INTEREST

Loans to Vulnerable Borrowers

Lender may be subject to other statutory limits on interest, despite the exemption from usury, if it deals with certain vulnerable borrowers, *e.g.*:

- a. Finance company (see Fin C §§22203, 22303, 24410); or
- b. Lender who makes shared appreciation loans to seniors (see CC §1917.616).

Further Research: Rabin & Brownlie, *Usury Law in California: A Guide Through the Maze*, 20 UC Davis L Rev 397, 412 (1987).

Unconscionable Loans

Even if loan is exempt from usury, the interest rate may be unenforceable if:

- a. The rate is shockingly high (*e.g.*, 200 percent) and not justified by the circumstances in which the loan was made; and
- b. Borrower had no meaningful choice, because of:
 - (1) Oppression (*e.g.*, unequal bargaining power and emotional distress over the need to pay parents' medical expenses); or
 - (2) Surprise (*e.g.*, the rate was hidden in fine print).

Further Research: CC §1670.5; Carboni v Arrosipide (1991) 2 CA4th 76, 83, 2 CR2d 845.

CHECK FOR USURY SAVINGS CLAUSE

A "usury savings" clause (see Real Estate Finance §3.76) stating that legally excessive interest will be deemed a reduction of principal (or providing similar mechanism):

- a. May shield the nonexempt lender from penalties (*Smith v Miller (In re Dominguez)* (9th Cir 1993) 995 F2d 883 (applying California law and giving effect to savings clause)); but
- b. Should not be relied on as protection for intentional usury.

LIQUIDATED DAMAGES DEFINED

"Liquidated damages" means the sum agreed on by parties to a contract as compensation for breach of the contract.

Reasonableness Requirement

Under CC §1671(b), a liquidated damages clause will be valid unless the party challenging it can show that it was unreasonable under the circumstances existing when the contract was made. Compare §1671(b) with CC §1671(c)(2) (residential lease) and CC §§1675-1681 (installment sale contracts).

Factors

- a. Liquidated damages generally are reasonable if based:
 - (1) Only on the amount in default, and
 - (2) *Not* on the entire unpaid principal balance. See Garrett v Coast S. Fed. Sav. S Loan Ass'n (1973) 9 C3d 731, 740, 108 CR 845; Poseidon Dev., Inc. v Woodland Lane Estates (2007) 152 CA4th 1106, 62 CR3d 59.

NOTE

Late charges in mortgage loan documents are enforceable only if they represent a reasonable attempt to estimate lender's actual damages resulting from the default. Ridgley v Topa Thrift S Loan Ass'n (1998) 17 C4th 970, 73 CR2d 378 (disallowed lender's claim for prepayment premium equal to 6 months' interest on principal balance, noting that it could be assessed only after default). The supreme court reiterated the continuing vitality of its prior rulings that late charges assessed against a borrower (that are designed to compel performance of the loan contract and penalize its breach) must satisfy standards for liquidated damages under CC §1671. The court rejected the argument that an intervening amendment of §1671 required deference to contract terms *negotiated* (see Glossary) for a commercial loan. 17 C4th at 981 n5.

- b. Other possible reasonableness factors are:
 - (1) Comparative bargaining power;
 - (2) Whether lender and borrower were represented by counsel when loan was made;
 - (3) Whether provision is embodied in form agreement; and
 - (4) Comparison to late charges permitted by specific statutes, *e.g.*, CC §1803.6 and Bus & P C §10242.5.

Further Research: On late payment fees as liquidated damages, see Real Estate Finance, chap 3 (from a drafting perspective); Mortgage Deed of Trust Foreclosure §8.25 (from an enforcement perspective).

EVALUATE CHARGES CLAIMED BY CLIENT

Prepayment Charge

A charge imposed on borrower as a condition to prepaying the loan:

- a. Does not make the loan usurious (see *French v Mortgage Guar. Co.* (1940) 16 C2d 26, 32, 104 P2d 655);
- b. Is generally enforced by courts unless amount is exorbitant (see *Mortgage Deed of Trust Foreclosure* §8.38); and
- c. May be limited for "higher-priced mortgage loans" (as defined in 12 CFR §226.35(a)) secured by owner-occupied residences and made by California regulated lenders (see *Fin C §4995.1*) or those covered by the federal Truth in Lending Act (TILA) (15 USC §§1601-1667f) (see 12 CFR §226.35(b)(2)).

If Prepayment Caused by Acceleration

- a. If lender accelerates a residential deed of trust for borrower's violation of due-on-sale clause, lender may not collect prepayment fee (see *CC §2954.10*).
- b. Otherwise, lender can enforce prepayment charge when loan accelerates (see *French v Mortgage Guar. Co.* (1940) 16 C2d 26, 32, 104 P2d 655).

NOTE

Review the prepayment clause carefully; it may not be broad enough to cover acceleration under a due-on-sale clause. See *Tan v California Fed. Sav. & Loan Ass'n* (1983) 140 CA3d 800, 809, 189 CR 775.

Yield Maintenance Provisions

Yield maintenance provisions tie the prepayment charge to a formula that calculates the lender's loss using the current market rate of interest. Formulas that apply an index based on federal Treasury obligations ("Treasury-flat" formula) are criticized because the index, which is almost always less than the note rate, may inflate the yield maintenance premium; they are also vulnerable to attack by borrowers as adhesion clauses, complex to the point of incomprehensibility. An unsuccessful challenge was made by the borrower in *River E. Plaza v Variable Annuity Life Ins. Co.* (7th Cir 2007) 498 F3d 718 (Treasury-flat yield-maintenance clause not subject to unreasonable-liquidated-damages analysis, because prepayment is not contractual breach but alternative form of performance). For further discussion, see Talkov, *Exposing the Myth of Mortgage Prepayment Penalties in the Aftermath of River East*, 44 Real Prop, Trust & Estate LJ 585 (Fall 2009). See also *Mortgage Deed of Trust Foreclosure* §8.44.

Further Research: On prepayment charges, see generally *Real Estate Finance, chap 3* (from a drafting perspective); *Mortgage Deed of Trust Foreclosure* §§8.36-8.53 (from an enforcement perspective).

Lump-Sum Late Charge

A flat charge imposed on debtor for failure to make timely payment is generally evaluated by courts:

- a. As liquidated damages subject to reasonableness limitation (see above); and
- b. *Not* as interest subject to usury law.

Further Research: See *Ridgley v Topa Thrift & Loan Ass'n* (1998) 17 C4th 970, 73 CR2d 378; *Garrett v Coast & S. Fed. Sav. & Loan Ass'n* (1973) 9 C3d 731, 738, 108 CR 845 (default interest charged on entire balance is not interest and must meet liquidated damages requirements); *Poseidon Dev., Inc. v Woodland Lane Estates* (2007) 152 CA4th 1106, 62 CR3d 59 (refusing to apply 10 percent late charge to final payment when result would be 125 times greater than if applied to monthly installment); *Mortgage Deed of Trust Foreclosure* §§8.25-8.33.

Home Loan Late Fee

If the note is secured by a single-family, owner-occupied dwelling:

- a. Amount of late charge is enforceable if it does not exceed 6 percent of the installment due or \$5, whichever is greater (*CC §2954.4(a)*);
- b. To enforce late charge, creditor must satisfy notice requirements of *CC §2954.5*;
- c. Late charge on a given installment may not be imposed if payment of that installment is tendered within 10 days after due date, even if an earlier installment remains unpaid (see *CC §2954.4(b)*; *Mortgage Deed of Trust Foreclosure* §§8.31-8.33); but

d. Above restrictions generally do not apply (see CC §§2954.4(e), 2954.5(a)) to:

- (1) Personal property brokers;
- (2) Consumer finance lenders; or
- (3) Commercial finance lenders.

Postdefault Interest

a. Unclear whether default interest imposed on overdue payments (typical in commercial loans) will be scrutinized as, e.g., liquidated damages (see Ridgley v Topa Thrift & Loan Ass'n (1998) 17 C4th 970, 73 CR2d 378).

b. Default interest should, however, not be vulnerable to challenge under usury law (see Southwest Concrete Prods. v Gosh Constr. Corp. (1990) 51 C3d 701, 708, 274 CR 404). If tied to a contingency, such as a lender's notice, default interest is not enforceable without satisfaction of the contingency. Beal Bank v Crystal Props. (In re Crystal Props.) (9th Cir 2001) 268 F3d 743.

Further Research: See Mortgage Deed of Trust Foreclosure §§8.25-8.35.

Double-Dipping

a. A loan provision that imposes a lump-sum late fee *and* accrues interest on that late fee might be vulnerable to attack as:

- (1) Usury (see information on postdefault interest, above);
- (2) Unreasonable liquidated damages (for information on the reasonableness requirement, see step 9, below);
- (3) An unconscionable clause (CC §1670.5); or
- (4) An unlawful penalty or forfeiture (CC §3275).

b. Evaluate with client whether the interest is worth pursuing in light of basis for attacking such a clause.

Further Research: See Mortgage Deed of Trust Foreclosure §8.25.

Compound Interest

Compound interest is usurious if, through compounding more frequently than annually, it exceeds maximum permissible rate. See Heald v Friis-Hansen (1959) 52 C2d 834, 839, 345 P2d 457; Real Estate Finance §3.38.

Shared Appreciation

Shared appreciation is generally exempt from usury (see CC §§1917(b), 1917.005), but terms may be scrutinized for necessary element of genuine risk to lender. See WRI Opportunity Loans II, LLC v Cooper (2007) 154 CA4th 525, 65 CR3d 205.

Contingent Interest

Additional interest that is to be collected on a loan only if the project is profitable may be scrutinized for usury violation. See McConnell v Merrill Lynch, Pierce, Fenner & Smith, Inc. (1978) 21 C3d 365, 376, 146 CR 371; Real Estate Finance §3.38.

STEP 7. DIRECT LENDER TO DETERMINE VALUE AND LIMITATIONS OF SECURITY

OBJECTIVE

You must know the auction value and fair market value of the real property security and any personal property collateral to select appropriate remedy.

ASSIST LENDER IN VALUATION

Discuss with lender:

- a. Any existing appraisal report (consider need for updated appraisal);
- b. Use of a consultant or appraiser to determine current value, deducting fees from sale proceeds (consider privilege issues regarding work product); and
- c. Condition of title and interests senior to lender's, as shown on:
 - (1) Lender's policy of title insurance; and
 - (2) *Trustee's sale guaranty* (see Glossary); and/or
 - (3) *Litigation guaranty* (see Glossary).

Further Research: On preforeclosure investigation, see Mortgage Deed of Trust Foreclosure, chaps 2-3, 8.

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/When Selecting Appropriate Remedy/STEP 8. DETERMINE AMOUNT, PRIORITY, AND STATUS OF OTHER ENCUMBRANCES

STEP 8. DETERMINE AMOUNT, PRIORITY, AND STATUS OF OTHER ENCUMBRANCES

OBJECTIVE

Evaluate other deeds of trust and liens to determine whether:

- a. Client must act quickly to protect security interest, *e.g.*, reinstate senior loan to avoid loss of client's security interest through senior's foreclosure (for effect on intervening interests, see [step 30](#), below);
- b. Client is in danger of losing priority of its security interest because of criminal forfeiture action against the property under federal drug control law (see 21 USC §881(h));
- c. Client is adequately secured (*i.e.*, whether value of the property in excess of senior encumbrances is enough to cover client's unpaid debt); or
- d. Client is secured by little or no security and may be better off as a sold-out junior (for information on sold-out juniors, see [step 5](#), above), so would be free to pursue remedies on the obligation without foreclosing first; and
- e. A receivership to capture the rent stream is appropriate and cost-effective, and if other provisional remedies may be appropriate (see [steps 15-18](#), below).

Collect Information

Determine unpaid balance of senior encumbrances:

- a. Review any notice of default recorded by senior encumbrancer;
- b. If notice of default not filed, principal amount is usually apparent from recorded document, *e.g.*, deed of trust, abstract of judgment; but
- c. It is advisable to obtain beneficiary statement of exact amounts owed from senior encumbrancer (see [step 24](#), below).

REVIEW PRIORITY AND RECORDING LAWS

WHY IMPORTANT

Priority of lender's deed of trust relative to other interests in the property will determine:

- a. Which interests will be eliminated by the foreclosure; and
- b. Which will survive as liens, encumbrances, or matters to which the foreclosure buyer's title will be subject.

FACTORS DETERMINING PRIORITY

Contrary to popular belief, the priority of competing liens or deeds of trust cannot be determined simply by reference to date of recordation, but may be based on any of several factors, such as:

Order of Creation

- a. Basic rule is *First in time, first in right*. See [CC §2897](#).
- b. To determine the relative dates of creation of deeds of trust:
 - (1) Compare the dates on which the deeds of trust were actually signed; but
 - (2) Look to the notary's acknowledgment only as a secondary indicator.

c. *Remember*: Recordation is not essential to *creation* of valid deed of trust or lien. CC §1217.

Special Statutory Priority

For public policy reasons, some interests are granted special priorities, *e.g.*, a seller-financing deed of trust has priority over all other liens created against the purchaser, subject to recording laws. CC §2898; *Powell v Goldsmith* (1984) 152 CA3d 746, 749, 199 CR 554. See also CC §3134 (mechanics' liens relate back to commencement of work of improvement). Judgments obtained in federal criminal forfeiture actions relate back to date of criminal activity, not to date lis pendens was recorded. 21 USC §881(h). See *U.S. v 2659 Roundhill Dr.* (9th Cir 1999) 194 F3d 1020).

Recording Laws

The recording laws (CC §§1107, 1170, 1213-1215, 2934; Govt C §§27280-27336) operate as a major exception to the general first-in-time, first-in-right rule.

a. Under California's race-notice system:

(1) The recording laws provide an opportunity to first-comer (holder of earliest-created interest) to notify the world of his or her interest by filing evidence of it in the public record; but

(2) If first-comer fails to timely record his interest, recording laws step in to protect a latecomer who records first, provided that the latecomer innocently pays value for an interest in the property:

(a) In ignorance of first-comer's interest; and

(b) In reliance on the state of the public record.

b. Such a specially protected latecomer is known as:

(1) A bona fide purchaser (BFP) for value; or

(2) In the context of secured lending, a bona fide encumbrancer (BFE).

c. Recording laws do *not* protect:

(1) Latecomers who do not pay value (*e.g.*, donees); or

(2) Those who have actual or constructive knowledge of the interest of first-comer.

d. Therefore, the recording laws are generally irrelevant to priority battles between parties who knew of each other's interests all along.

Further Research: On contractual priority, recording laws, and priorities of encumbrances, see *Mortgage Deed of Trust Foreclosure* §§6.90-6.98, 9.42-9.87.

IDENTIFY CONTRACTUAL PRIORITY ISSUES

CONTRACTUAL PRIORITY

a. Generally, holders of competing interests in property can agree on any priority they wish.

Example: Seller carrying back a deed of trust can agree to subordinate that deed of trust to a construction loan deed of trust. See, *e.g.*, *Spangler v Memel* (1972) 7 C3d 603, 102 CR 807.

b. However, to be enforceable, subordination agreements generally must be quite specific about the terms of the subordinating interest. See *Mortgage Deed of Trust Foreclosure* §§9.74-9.87.

c. "Automatic subordination" occurs when two interests are created at the same time and the holders of the interests agree to a particular order of recordation (see, *e.g.*, *Middlebrook-Anderson Co. v Southwest Sav. & Loan Ass'n* (1971) 18 CA3d 1023, 1030, 96 CR 338):

(1) Best explained by contract principles, not recording laws, because the parties know about each other and, by definition, are not BFPs or BFEs (defined in discussion of recording laws, above).

(2) The agreement on order of recordation is apparently taken as an implicit agreement on priority.

(3) Most typically, title insurer will have required at least a short-form subordination agreement, rather than relying on automatic subordination.

Priorities Between Fee Mortgagees, Lessees, and Leasehold Mortgagees

a. Identify all leases claiming an interest in the real property securing your client's loan.

(1) Determine each tenant's priority against your client's deed of trust, applying race-notice laws discussed above.

(2) Review title products (see, *e.g.*, California Title Insurance Practice, chaps 4-5, 9, 15 (2d ed Cal CEB 1997), referred to throughout this Action Guide as Title Ins) and lender files to determine whether priorities and/or contractual rights and remedies have been adjusted by contract, *e.g.*, by agreement between lender, borrower, and tenant for subordination, nondisturbance, and attornment. See Mortgage Deed of Trust Foreclosure §§6.90-6.98; Office Leasing: Drafting and Negotiating the Lease, chap 28 (Cal CEB 1996), referred to throughout this Action Guide as Office Leasing.

(3) Inquire whether any of the leases have been mortgaged and, if so, whether your client (or its predecessor) entered into an agreement giving the leasehold mortgagee rights to notice of default, cure, lease assumption, or related matters. See Office Leasing, chap 28.

b. If your client holds a leasehold mortgage:

(1) Conduct the inquiries described above, applied to any sublessees and fee mortgagees;

(2) Determine whether the fee holder has made his or her interest subject to your client's lien—giving, in effect, a third party mortgage that guarantees (on a nonrecourse basis) his lessee's obligations to your client; and

(3) Be aware that if your client forecloses, assuming lease obligations without a reservation of rights (even for a temporary period) may create contractual liability under the lease to the owner. See Vallely Invs. LP v BancAmerica Commercial Corp. (2001) 88 CA4th 816, 106 CR2d 689.

Reprioritization

A senior interest may lose priority to junior interests by:

a. Significantly modifying the senior position (*e.g.*, shortening the maturity date, increasing the interest rate or payments); or

b. Other conduct prejudicial to the junior (*e.g.*, allowing construction loan funds to be diverted for nonconstruction purposes).

Further Research: See Mortgage Deed of Trust Foreclosure §9.81; Gluskin v Atlantic Sav. c³ Loan Ass'n (1973) 32 CA3d 307, 108 CR 318; compare *Gluskin* with *Resolution Trust Corp. v BVS Dev., Inc.* (9th Cir 1994) 42 F3d 1206 (no loss of priority for 5-month extension without consent of subordinated seller). See also information on potential pitfalls, step 10, below.

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/When Selecting Appropriate Remedy/STEP 9. IDENTIFY LENDER'S OPTIONS

STEP 9. IDENTIFY LENDER'S OPTIONS

DETERMINE IF TRUSTEE'S SALE AVAILABLE

VERIFY POWER OF SALE

Review deed of trust for power-of-sale clause, essential to a trustee's sale (nonjudicial foreclosure). For power of sale, see [step 1](#), above.

DETERMINE IF DEBTOR IS IN ARMED SERVICES

Reason

Lender needs a court order to foreclose even nonjudicially:

- a. While borrower is in military service; or
- b. Within 3 months after borrower leaves the military. See Servicemembers Civil Relief Act (50 USC App §532(a)(1)).

NOTE

Act applies to all military servicemembers and their dependents, whether they entered military service before or after signing a loan or mortgage agreement.

What to Do

- a. If your client knows that borrower is not in military service, have client give trustee a written declaration to that effect.
- b. If client does not know borrower's military status, you may have to obtain certificate from each branch of the service verifying that borrower is not a member.

Further Research: On viability of trustee sale, see [Mortgage Deed of Trust Foreclosure, chap 2](#).

DETERMINE IF JUDICIAL FORECLOSURE AVAILABLE

CANNOT USE IF 4 YEARS PAST DUE DATE

Under [CCP §§337, 360](#), judicial foreclosure action must be filed within 4 years after maturity date of:

- a. The debt ([Flack v Boland \(1938\) 11 C2d 103, 106, 77 P2d 1090](#)); and
- b. Any installment payment to be enforced by the action ([Trigg v Arnott \(1937\) 22 CA2d 455, 457, 71 P2d 330](#)).

Further Research: See [Mortgage Deed of Trust Foreclosure, chap 3](#).

When Critical

Pay close attention to the 4-year limitation in those cases in which a trustee's sale is:

- a. Not feasible (*e.g.*, the obligation secured is an unliquidated contractual obligation); or
- b. Undesirable (*i.e.*, debt is undersecured, and a deficiency judgment is essential to make lender whole).

Look for Tolling Factors

If the 4-year statute of limitations may be an issue, consider tolling factors that would apply in any civil case (*e.g.*, borrower's absence from state). See CCP §351 and case authorities interpreting that statute.

DETERMINE IF DEFICIENCY JUDGMENT AVAILABLE

NOT AVAILABLE IF NOTE IS NONRECOURSE

Review the note for a provision (common in loans to developers) that borrower will have no personal liability for a deficiency (nonrecourse or limited recourse). See, *e.g.*, Real Estate Finance §3.97.

Significance

Eliminates the principal advantage of foreclosing judicially, *i.e.*, ability to obtain deficiency judgment on a nonpurchase money loan.

Exceptions

Most nonrecourse clauses are heavily negotiated and contain exceptions allowing lender to recover in limited circumstances, *e.g.*, fraud, rent-skimming, waste, toxic contamination.

NOT AVAILABLE IF LOAN IS PURCHASE MONEY

Determine if borrower is protected from deficiency judgment, regardless of the method of foreclosure, because the loan is a standard purchase money secured debt (for a definition of purchase money, see step 5, above).

HOW LENDER MIGHT AVOID RESTRICTION

Check for Holder-in-Due-Course Status

If purchase money character is not apparent on face of note, and client qualifies as holder in due course, lender *may not* be bound by purchase money restrictions (see Mortgage Deed of Trust Foreclosure §1.27).

Check for Waiver

See information on how borrowers can lose purchase money protections, step 5, above; Mortgage Deed of Trust Foreclosure §§4.64-4.66, 5.68-5.70.

Check for Choice-of-Law Clause

Even if the loan is purchase money in character, lender may be able to obtain deficiency judgment against borrower *if*:

- a. Loan documents provide that law of different state governs;
- b. There are enough contacts with the other jurisdiction; and
- c. Lender brings action to enforce the debt in the other state. See information on dealing with multijurisdictional real property collateral, below.

USE COORDINATED PLAN

Generally, review the obligations and all security and other sources of repayment (see steps 1-2, above, regarding structure of secured obligations and identification of security).

If Guaranty Involved

Review the effects of CCP §726 and antideficiency rules (see step 5, above) before determining:

- a. Potential enforceability of the guaranty;
- b. Whether to tender lender's position to the guarantor before a trustee's sale by way of a so-called "Mariners letter" (see Mariners Sav. & Loan Ass'n v Neil (1971) 22 CA3d 232, 99 CR 238; but see Krueger v Bank of America (1983) 145 CA3d 204, 193 CR 322);

- c. Likelihood of actually collecting any deficiency from guarantor after a trustee's sale, balanced against risk that guarantor may cross-complain for damages for lender liability (see Mortgage Deed of Trust Foreclosure, chap 12);
- d. Appropriate amount of credit bid (for information on planning lender's bid, see step 30, below); and
- e. Whether to pursue the prudent but time-consuming course of including an action on the guaranty with an action for judicial foreclosure (see step 12, below) and proceeding to judgment on both (see Mortgage Deed of Trust Foreclosure §§9.91, 9.95-9.99).

Further Research: On guarantor liability, see generally Real Estate Finance, chap 6; Mortgage Deed of Trust Foreclosure, chaps 4-5, 9-10, 12.

WHEN DEALING WITH CONTAMINATED PROPERTY

LENDER LIABILITY UNDER CERCLA

Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 USC §§9601-9675):

- a. Lenders face potential liability for environmental cleanup costs by reason of involvement with the property:
 - (1) Throughout the loan term;
 - (2) During the workout period; or
 - (3) As owners of property acquired through foreclosure or alternative arrangements; and
- b. Additionally, strict liability will attach to a lender or other party determined to be a prior or present owner or operator of a hazardous waste site; see CERCLA (42 USC §9607(a)(1)).

Security Interest Exception

Secured lender is *not* an owner liable for cleanup costs under CERCLA if lender qualifies as "person, who, without participating in the management ... holds indicia of ownership primarily to protect his security interest." 42 USC §9601(20)(A); compare CERCLA with Health & S C §25323.5.

Lender Participation in Management May Trigger Liability

Secured lender can have liability for cleanup costs, as an "owner" under CERCLA, if it participates in management of the property (42 USC §9601(20)(A)) (*Hill v East Asiatic Co. (In re Bergsøe Metal Corp.)* (9th Cir 1990) 910 F2d 668, 671), *but not merely by*:

- a. Encouraging the development of the contaminating project;
- b. Reserving the right to inspect the property and to take possession upon foreclosure; or
- c. Foregoing exercise of remedies under a workout.

Liability Requires Decision-Level Participation

- a. After significant legislative effort, the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (Pub L 104-208, 110 Stat 3009-462) was signed into law. Among other things, it states that a lender's participation in management (to the degree that causes lender to lose its liability exemption) requires lender's actual (not potential) participation in management through decision-making control over the handling or disposal of hazardous substances or through day-to-day decision-making with respect to environmental compliance. See 42 USC §9601(20)(F).
- b. The Act also adopted nearly all elements of the so-called security interest exception that had been previously defined by EPA regulation (see former 40 CFR §300.1100) adopted in 1992 but later withdrawn. As summarized below, the Act had the effect of defining CERCLA terminology, including "participation in management" and "indicia of ownership primarily to protect a security interest," in a manner more protective of the secured creditor than the interpretations previously given them by certain courts. In addition, CERCLA was concurrently revised to clarify and expand protections for fiduciaries. See 42 USC §9607(n).

Lender May Take Title Without Losing Security Interest Exception

With CERCLA's substantial incorporation of the former EPA regulation, a lender may do the following without incurring CERCLA liability (see 42 USC §9601(20)(E)-(G)):

- a. Undertake or require an environmental audit of the property before accepting it as security;
- b. Require and police environmental compliance by borrower without fear of incurring "operator" liability;
- c. Engage in workout negotiations so long as borrower remains the ultimate decision-maker for operation of the facility;
- d. Foreclose on or accept a deed in lieu of foreclosure to real property collateral; and
- e. Hold for disposition title to real property obtained through foreclosure or deed in lieu of foreclosure and continue to be within the exemption—provided that lender seeks to sell the property at the earliest practicable, commercially reasonable time, taking into account market conditions and legal and regulatory requirements.

Further Research: On lender liability for contamination under federal law, see Mortgage Deed of Trust Foreclosure §12.152. See also Dwyer, Note, *Relief from CERCLA's "Rock and a Hard Place": The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act*, 3 *Env'tl Law* 859 (1997); Holly, Comment, *Potential Responsibility Under CERCLA: Canadyne-Georgia Corp. v. Nationsbank, N.A. (South)—An Illustration of Why We Need a Common Federal Rule Defining "Owned" and "Operated,"* 12 *Vill Env'tl L J* 119 (2001).

COMMON LAW CLAIMS

- a. Lenders who take title to contaminated collateral may face private-party claims based on common law doctrines such as negligence, trespass, battery, assault, ultrahazardous activity, and nuisance. See, e.g., *KFC W. Inc. v Megbriq* (1994) 23 CA4th 1167, 28 CR2d 676 (suit against prior owner for continuing trespass); *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 23 CR2d 377 (suit against prior owner for negligence, continuing trespass, public nuisance); *Rosenblatt v Exxon Co. USA* (Md 1994) 642 A2d 180 (surveying common law claims).
- b. Absent outright operation of its borrower's business, a lender is unlikely to be named in such actions before taking title.

Use Extreme Caution in Workouts

- a. Consult environmental counsel before undertaking workout negotiations and at each step of a workout, to avoid structure that makes lender the ultimate decision-maker in management of the property.
- b. Borrowers' attempts to unilaterally deed *mortgaged property* (see Glossary) to lender have failed for lack of acceptance; however, title can be cleared by recordation of a notice of nonacceptance authorized by CC §1058.5(a).

Use Caution Even if Property Appears Clean

Lender should not consider taking title under a deed in lieu of foreclosure (see step 10, below) without trying to preserve an innocent-purchaser defense (see 42 USC §9607(b)(3)) by undertaking at least a Phase I environmental review of the property. See Mortgage Deed of Trust Foreclosure §§12.151-12.153.

Example: A bank stipulated to \$425,000 in civil penalties and made \$450,000 more available for cleanup of a California dry cleaning plant on which it held a mortgage, but did not foreclose. The bank stipulated that it would revise internal policies so that test results were delivered to its borrowers and, if no responsible person could be located, would inform state agencies. The bank settled district attorney's charges that it had violated Health & S C §25189 by failing to remove testing wastes it generated and delaying report of contamination to borrower and authorities. The first charge echoes facts recited by the trial court in *U.S. v Fleet Factors Corp.* (SD Ga 1993) 821 F Supp 707; however, the charge that the bank failed to disclose test results suggests a burdensome duty for lenders.

Use Receiver

Advise lender to seek appointment of a receiver if, for example, it desires to enforce assignment of rents or apply certain funds toward cleanup, since receiver is agent of the court, not lender.

Further Research: See Schmall & Tellier, *Hazardous Lending: Making Loans in the Post-Fleet Factors Era*, 8 *Cal Real Prop J* 1 (Summer 1990).

WHEN LENDER CAN WAIVE SECURITY

Under California law, lender may waive its enforcement rights against the real property security and sue on the debt (CCP §726.5(a)) *if*:

- a. The property is environmentally impaired as defined in CCP §726.5(e)(3), essentially requiring a separate judicial determination of impairment in excess of 25 percent of the value of all collateral; and
- b. Borrower had certain knowledge of or responsibility for the contamination (for information on requirements for borrower knowledge and responsibility negligence, see below).

Not Applicable to Most Residential Property

Inapplicable if the real property security contains 1-15 dwelling units used for residential purposes. CCP §726.5(e)(5).

Applies to Loans Made or Modified After January 1, 1992

Lender can elect to waive the contaminated security only if loan was made, renewed, or modified after January 1, 1992. CCP §726.5(g).

Must First Bring Action

Before lender may waive the contaminated security, it must give written notice of default to borrower and bring an action to have a court establish the property's value *and* confirm its environmentally impaired status. See CCP §726.5(b).

Borrower Knowledge or Negligence Required

Lender can waive its rights in the real property security only if borrower or a related party or agent (CCP §726.5(d)):

- a. Knowingly or negligently contributed to the contamination;
- b. Knowingly or willfully permitted it; or
- c. Knew of the contamination or its threat when the loan was made, renewed, or modified and failed to disclose this in writing to beneficiary (unless beneficiary had actual knowledge of the contamination).

NOTE

The burden may be on *borrower* to prove that CCP §726.5(a) does not apply, *i.e.*, that borrower neither caused nor had the requisite knowledge of the contamination. See CCP §726.5(d); Ferguson, Weir, Brody & Louie, *Assembly Bill 1735: New Rights for Lenders Holding Contaminated Real Property Security*, 15 CEB Real Prop L Rep 1, 9 (Jan. 1992).

Complications if Lender Has Multiple Security

If the loan is also secured by other real property, fixtures, or personal property, the foreclosure and fair value provisions of CCP §726.5(c) make it impractical for lender to waive the contaminated security. See Ferguson, Weir, Brody & Louie, *Assembly Bill 1735: New Rights for Lenders Holding Contaminated Real Property Security*, 15 CEB Real Prop L Rep 1, 8 (Jan. 1992).

LENDER CAN ENFORCE ENVIRONMENTAL INDEMNITIES

Before or after foreclosure, lender may, with limitations, bring an action for damages or specific performance for borrower's breach of any environmental covenant, indemnity, representation, or warranty. Whether in the deed of trust or in a separate document, this action under CCP §736, which is not a vehicle for recovery on the note, *will not*:

- a. Trigger the affirmative defense or sanction of CCP §726 (for more information on the CCP §726 rule, see step 5, above); or
- b. Constitute a deficiency judgment within the meaning of CCP §§580a-580b, 580d (for antideficiency protections for borrowers, see step 5, above).

Exceptions

Code of Civil Procedure §736 does not apply to:

- a. Certain loans of less than \$200,000 involving innocent borrowers (CCP §736(c)); or

b. Damages related to contamination the beneficiary knowingly permitted (CCP §736(b)(4)).

Loans Made or Modified After January 1, 1992

Lender's right to enforce environmental covenants under CCP §736(e) applies only to a loan made, renewed, or modified after January 1, 1992.

Residential Property

Inapplicable if the real property security contains 1-15 dwelling units used for residential purposes. CCP §736(f)(4).

Further Research: For analysis of these and other remedies available when real property security is contaminated, see Ferguson, Weir, Brody & Louie, *Assembly Bill 1755: New Rights for Lenders Holding Contaminated Real Property Security*, 15 CEB Real Prop L Rep 1 (Jan. 1992); Ross, *AB 1755: Environmental Remedies for Lenders*, 10 Cal Real Prop J 18 (Winter 1992). See also Mortgage Deed of Trust Foreclosure §§4.54-4.57, 5.60, 12.151-12.153.

WHEN DEALING WITH MIXED COLLATERAL

WHEN ARISES

Client's loan is secured by real *and* personal property, *e.g.*, a hotel, restaurant, or theater. See, *e.g.*, forms in Real Estate Finance, chap 7.

SELECT REMEDY CAREFULLY

Lender's right to recover a deficiency or resort to all its security will be affected by several laws:

Real Property Principles

One-action and antideficiency rules restrict lender's remedies, as described above; *and*

Commercial Law Principles

Lender's disposition of personal property collateral in a manner that is not commercially reasonable also might cause loss of lender's deficiency claim and its security interest in any other collateral, including perhaps the real property security. See Com C §§9603, 9615. See also *Alcock v Small Bus. Admin. (In re Alcock)* (9th Cir 1995) 50 F3d 1456 (mixed collateral; SBA subordinated first deed of trust securing primary obligation without guarantor's knowledge; guaranty waivers found inadequate under former Com C §3606 (now Com C §3605(e)) and guaranty exonerated).

Clash of Laws

Mixed collateral foreclosure that combines commercial law and real property remedies might lead to additional problems. For possible problems, see below.

HOW TO CHOOSE REMEDY

a. Review with client the advantages and disadvantages of each option.

b. Make sure that client's chosen remedy complies with commercial law requirements of:

(1) Good faith (Com C §§1304, 1309, 9610-9611, 9624); and

(2) Commercial reasonableness (Com C §§9607, 9610; *Massey-Ferguson Credit Corp. v Casaulong* (1976) 62 CA3d 1024, 1029, 133 CR 497).

Further Research: See Mortgage Deed of Trust Foreclosure §§4.21-4.22, 5.16, 9.12-9.23; Enforcing Security Interests in Personal Property, steps 5 and 21 (Cal CEB Action Guide June 2007), referred to throughout this Action Guide as Enforcing Security Interests; Secured Transactions, chap 5; Weise, *An Introduction to Revised UCC Article 9*, 22 CEB Cal Bus L Rep 4 (July 2000).

OPTION 1: SEPARATE NONJUDICIAL SALES OF REAL AND PERSONAL PROPERTY (COM C §9610)

What You Do

- a. First, foreclose nonjudicially on the real property (through a trustee's sale); and
- b. In a separate procedure, dispose of the personal property nonjudicially under the Commercial Code. See Enforcing Security Interests, steps 10-29.

Effect

Remember that:

- a. You cannot obtain a deficiency judgment following trustee's sale (CCP §580d); but
- b. If the collateral consists of multiple pieces of real and personal property, you can later foreclose nonjudicially on remaining real and personal property without running afoul of CCP §726.

When to Use

Use when:

- a. You have decided with lender that it will not benefit lender to pursue a deficiency;
- b. Lender desires an economical and quick remedy; and
- c. Due to nature of the collateral, lender anticipates that different buyers will be interested in the real and personal property.

Maintain Separate Procedures

Make sure that:

- a. Lender advertises real and personal properties separately;
- b. The separate notification and sale procedures are followed for real property (see below) and personal property (see Enforcing Security Interests); and
- c. Lender or lender's accountant calculates the credit bid for the real property by deducting:
 - (1) Estimated value of the personal property; and
 - (2) Estimated damage to realty from personal property removal.

NOTE

It usually is prudent to deduct an additional amount at least from the opening bid. See information on lender's maximum bid, step 30, below.

OPTION 2: JUDICIAL FORECLOSURE ON REAL PROPERTY AND NONJUDICIAL SALE OF PERSONAL PROPERTY (COM C §9604)

What You Do

- a. Judicially foreclose on the real property; and
- b. Dispose of the personal property under Commercial Code. See Enforcing Security Interests, steps 10-29.

Effect

Remember that:

- a. Lender can pursue a deficiency judgment following judicial foreclosure, unless barred by a nonrecourse clause or CCP §580b (for nonrecourse notes, see above); and
- b. Lender's lien on any excluded real property is extinguished by CCP §726 but continues on the personal property.

When to Consider

Consider judicial foreclosure when lender:

- a. Intends to pursue a deficiency judgment and the deed of trust is not a standard purchase money deed of trust (for information on how lender can avoid purchase money restrictions, see above).
- b. Needs a judicial determination of issues (for more information, see [step 15](#), below).
- c. Determines that a receiver should be appointed, *e.g.*, to collect rents and profits or to prevent waste pending foreclosure (see [step 15](#), below), although after the receiver is appointed, lender can switch to nonjudicial foreclosure (see [steps 36-37](#), below).

Review Possible Problems

Some authorities recommend against using this option on the grounds that there is an irreconcilable clash between:

- a. [Com C §9604](#), which assumes an allocation of the debt between the real and personal property collateral; and
- b. Real property laws that treat the secured obligation as an indivisible debt, *e.g.*:
 - (1) Borrower's right to halt foreclosure by reinstating the debt under [CC §2924c\(a\)\(1\)](#); and
 - (2) The sanction and affirmative defense effects of [CCP §726](#) (see [step 5](#), above).

Further Research: See Hetland & Hansen, *The "Mixed Collateral" Amendments to California's Commercial Code—Covert Repeal of California's Real Property Foreclosure and Antideficiency Provisions or Exercise in Futility?*, 75 Cal L Rev 185 (1987); and response in Hirsch, Arnold, Rabin, & Sigman, *The UCC Mixed Collateral Statute—Has Paradise Really Been Lost?*, 36 UCLA L Rev 1 (1988).

OPTION 3: FORECLOSE ONLY ON THE PERSONAL PROPERTY

What You Do

- a. Dispose of the personal property under Commercial Code (see Enforcing Security Interests, steps 10-29); and
- b. Obtain a deficiency judgment without including the real property security.

Effect

Client loses its lien on any real property security. [CCP §726](#); [Com C §9604](#). (For information on [CCP §726](#) rule, see [step 5](#), above.)

When to Use

Use when real property is valueless, because of, *e.g.*, toxic waste cleanup costs (but see alternatives in [step 5](#), above).

Anticipate Debtor's Response

Borrower may respond by asserting [CCP §726](#) as an affirmative defense, requiring creditor to foreclose on real property before obtaining deficiency judgment. (For information on [CCP §726](#) rule as an affirmative defense, see [step 5](#), above.)

OPTION 4: UNIFIED JUDICIAL FORECLOSURE

What You Do

Dispose of the personal property with the real property in a unified judicial foreclosure. [Com C §9604\(a\)\(2\)](#).

Effect

- a. Generally, when disposing of personal property in a unified judicial foreclosure, lender should assume it is subject to both:
 - (1) Real property law; and
 - (2) "Commercial reasonableness" requirements of Commercial Code regarding personal property.

NOTE

One court held that the unified sale option afforded secured creditors under former Com C §9501(4)(a)(ii) (now Com C §9604) may be exercised only when it is commercially reasonable to sell the real and personal property together, *e.g.*, when a business premises is sold together with fixtures and inventory located on it. *Aspen Enters., Inc. v Bodge* (1995) 37 CA4th 1811, 44 CR2d 763 (lender holding note secured by residential mortgage and new tire inventory could not elect unified sale; lender's repossession, commingling, retention, and credit to debtor on account of tires was not per se commercially unreasonable so as to bar action for judicial foreclosure and deficiency judgment). In addition, a court of appeal held that former Com C §9501 relieved a creditor foreclosing on mixed collateral *entirely* from the CCP §726(b) requirement that a motion to recover a deficiency judgment, including the accompanying fair-value hearing, be filed within 3 months after completion of the real property foreclosure sale. *Florio v Lau* (1998) 68 CA4th 637, 80 CR2d 409. (The same analysis arguably applies under the successor statute, Com C §9604.)

b. Any excluded personal property remains subject to lender's lien.

c. Lender can pursue a deficiency judgment unless *any* of the real property was encumbered by a standard purchase money mortgage or deed of trust. CCP §580b.

d. Lender loses its lien on excluded real property. CCP §726. (For more information on lender's losing its security, see step 5, above.)

When to Use

a. Use the unified judicial foreclosure process:

(1) When selling an ongoing business, *e.g.*, restaurant, manufacturing facility;

(2) When the whole is worth more than the separate pieces;

(3) For same reasons you would choose option 2, above.

b. Procedure should not be used when the real and personal property are not "closely related." *Aspen Enters., Inc. v Bodge* (1995) 37 CA4th 1811, 1819, 44 CR2d 763.

OPTION 5: UNIFIED NONJUDICIAL FORECLOSURE

What You Do

Dispose of the real and personal property in a unified nonjudicial foreclosure. Com C §9604(a)(2).

Effect

Be aware that:

a. When conducting a unified nonjudicial foreclosure, lender is subject to real property law and, with respect to the personal property, the "commercial reasonableness" requirements of Commercial Code. See *Aspen Enters., Inc. v Bodge* (1995) 37 CA4th 1811, 1819, 44 CR2d 763.

b. Any excluded personal property remains subject to lender's lien.

c. Lender cannot pursue a deficiency judgment (barred after nonjudicial foreclosure by CCP §580d).

d. Lender does not lose its lien on excluded real property (*Hatch v Security-First Nat'l Bank* (1942) 19 C2d 254, 260, 120 P2d 869).

When to Use

a. Use the unified nonjudicial foreclosure process:

(1) When selling an ongoing business, *e.g.*, restaurant, manufacturing facility;

(2) When the whole is worth more than the separate pieces, *e.g.*, the manufacturing plant, including machinery, is worth more than the land plus liquidation value of the machinery;

(3) For same reasons you would choose option 1, above.

b. Note that this procedure should not be used when the real and personal property are not "closely related." *Aspen Enters., Inc. v*

WHEN DEALING WITH MULTIPLE OR MULTIJURISDICTIONAL COLLATERAL

PROCEED WITH CAUTION

Multistate real property security presents serious problems relating to jurisdiction, choice of law, and the proper application of California procedures. These factors require counsel to thoroughly consider conflicting laws and to formulate a comprehensive enforcement plan before undertaking any remedy.

Further Research: See Guttenberg & Sherlin, *A Lender's Guide to California's Antideficiency Laws in Multistate Transactions, Part I*, 14 CEB Real Prop L Rep 1 (Jan. 1991); *Part II*, 14 CEB Real Prop L Rep 54 (Feb. 1991); Shaddock, *Safe Harbors for Foreclosing Creditors in Multiple-State Security Contexts: California's Antideficiency Statutes and Choice of Law Doctrine*, 10:5 Cal Real Prop J 1, 3 (Fall 1992) (referred to throughout this Action Guide as *Shaddock*).

IDENTIFY NATURE OF PROBLEM

Multiple Parcels Within a County or State

Statute permits foreclosure of multiple parcels of real property at a single sale in a county where one of the parcels is situated. See CC §2924g(b) (nonjudicial foreclosure); CCP §726(d) (judicial foreclosure). This situation does not present conflict-of-law issues.

Multiple Laws Applicable to One or More Parcels

Documents containing choice-of-law clauses may specify that state law other than California law governs foreclosure on real property located in California, or may require that California law be applied despite the fact that some or all of the parcels of real property are located outside of California.

Multiple Parcels Located in Different Jurisdictions

Parcels located in states outside California present difficult jurisdictional issues and test the limits of the Constitution's full faith and credit clause. See US Const art IV, §1.

CONSIDER CONFLICT-OF-LAW PRINCIPLES

Where Valid Choice-of-Law Clause Exists

Choice-of-law provisions are presumptively valid. There are, however, instances in which the parties' choice of law will not be honored. See generally *Nedlloyd Lines B.V. v Superior Court* (1992) 3 C4th 459, 465, 11 CR2d 330 (requiring "substantial relationship" between selected state's law and transaction); *Smith, Valentino & Smith v Superior Court* (1976) 17 C3d 491, 495, 131 CR 374; Restatement (Second) of Conflict of Laws §187(2) (1971).

In the Absence of a Valid Choice of Law

Courts make a three-factor inquiry into the law applicable to cases subject to the law of two or more jurisdictions:

- a. Consider the policies reflected in the laws of the competing states;
- b. Evaluate the governmental interest of each state to apply its law in light of its respective policies; and
- c. Apply the law of the state that has the comparatively stronger governmental interest in the issue in question.

Further Research: *Kearney v Solomon Smith Barney, Inc.* (2006) 39 C4th 95, 45 CR3d 730.

REVIEW LOAN DOCUMENTS

Determine whether the loan documents require an action to be handled under the laws of a particular jurisdiction.

Choice-of-Law Provision

Loan documents frequently contain a choice-of-law provision that provides that the documents will be interpreted under the laws

of a particular state. Check to see that the choice-of-law provisions in the note, deed of trust, and other documents agree. See Kerivan v Title Ins. & Trust Co. (1983) 147 CA3d 225, 195 CR 53 (deed of trust and note with different choice-of-law provisions lead to "patent ambiguity"). See also Mortgage Deed of Trust Foreclosure §§5.61-5.63.

Location of Parties and Collateral

In the absence of a valid choice of law, courts considering which jurisdiction's substantive law to apply will consider the domicile and principal business offices of the parties to the loan documents as well as the physical location of collateral.

Other Provisions That "Ground" the Transaction

Other factors that provide a jurisdictional nexus may be found in the loan documents, *i.e.*, loan documents may provide for conduct of a relationship, or:

- a. Funding through a branch office;
- b. Call for payment at a lockbox address;
- c. Require notice in care of local agents; or
- d. Establish the execution of documents in a particular location.

"Fractionalization" of Debt

If debt was broken into pieces to correspond with the location and value of the collateral (*e.g.*, one note governed by California law and secured by California real property; another note governed by a foreign state and secured by property located in that state), each "piece" of the transaction may be treated as an independent loan subject to the laws of the jurisdiction chosen by the parties. See Shadduck, p 3 (suggesting that fractionalization is valid but questioning the effect of cross-default clauses between separate notes).

CONSIDER IMPACT OF APPLICABLE LAWS IN LIGHT OF JURISDICTIONAL ISSUES

CCP §580d

- a. Nonjudicial foreclosure on real property located in California bars the lender from subsequently obtaining a deficiency judgment against borrower. For trustee's sale deficiency bar, see step 5, above.
- b. Nonjudicial foreclosure of real property located in California may *not* bar entry of a deficiency judgment in and under the laws of a foreign state (thereafter enforceable in California). See, *e.g.*, United Bank of Denver v K & W Trucking Co. (1983) 147 CA3d 217, 195 CR 49; compare United Bank of Denver with Martin v Midgett (Ariz 1966) 413 P2d 754 (CCP §580b held not to bar Arizona action on note; security and original loan parties were in California).

CCP §726(a)

Code of Civil Procedure §726(a) codifies the one-action, one-form-of-action, and security-first principles that a debtor may assert either as a defense in a judicial action or as a sanction barring foreclosure of additional security. See Mortgage Deed of Trust Foreclosure, chap 4.

- a. In cases where California law applies, a foreign proceeding to exercise in rem (but not in personam) jurisdiction over real property collateral does not implicate CCP §726. Felton v West (1894) 102 C 266; see also Maryland Cas. Co. v Nottingham (1936) 18 CA2d 135, 63 P2d 864.
- b. However, the debtor may still argue that the creditor has elected its remedies against the debtor in a foreign proceeding, particularly if the creditor has waived its security to obtain a money judgment in the foreign jurisdiction. See Ould v Stoddard (1880) 54 C 613.

CCP §§580a, 726(b)

- a. Debtor (and possibly a guarantor) is entitled to a hearing on the fair value of the property on which a lender has judicially foreclosed before a deficiency is assessed against that party. CCP §726(b).
- b. Code of Civil Procedure §580a provides similar protections to debtors facing actions by "sold-out" juniors who bought at the senior's foreclosure, and *may* offer protection to guarantors. See Mortgage Deed of Trust Foreclosure §§3.87, 5.23.

c. It is unclear under present law if these rights may be exercised when lender has foreclosed under the laws of another jurisdiction or when a California foreclosure is subject to the substantive law of another jurisdiction.

CCP §580b

a. Under CCP §580b, no deficiency is available on a purchase money obligation *if*:

(1) The note represents seller financing secured by the property being purchased; or

(2) The note represents a third party loan secured by the property being purchased and the property is residential, owner-occupied in whole or in part, and no more than four units.

b. Code of Civil Procedure §580b may be applied to protect a California buyer in a purchase of out-of-state property if the loan documents specify that California law applies or if the transaction has enough California contacts. See *Kish v Bay Counties Title Guar. Co.* (1967) 254 CA2d 725, 62 CR 494; *Hersch & Co. v C & W Manhattan Assocs.* (9th Cir 1982) 700 F2d 476. See also Mortgage Deed of Trust Foreclosure §5.61.

Laws of Other Jurisdictions

It is beyond the scope of this Action Guide to discuss the foreclosure laws of foreign states. Note that provisions for nonjudicial foreclosure and the assessment of deficiencies vary substantially among states. Where a conflict-of-law issue arises in the context of real property foreclosure, it is essential that counsel understand:

a. Whether the foreign jurisdiction's substantive laws may or will apply; and

b. How those laws will affect lender's interests in its collateral and its ability to assert a deficiency against its borrower or guarantor, or both.

NOTE

Counsel should retain local counsel when it appears that the foreign jurisdiction's laws control the foreclosure process.

Create Comprehensive Enforcement Plan

After a lender has thoroughly considered the issues discussed above, counsel should create a comprehensive enforcement plan tailored to the particular circumstances presented. Counsel should consider the following in creating the plan, *e.g.*, if obtaining a *deficiency judgment*, a lender may wish to concurrently bring:

a. Primary action on the debt and to prove up the deficiency (and, if applicable, to foreclose on property located in the forum state); and

b. Ancillary proceedings in foreign states for the limited purpose of selling the real property located there.

NOTE

Judgment rendered in the primary action should be *res judicata* regarding the issues presented in the foreign proceeding, where final judgment could thereafter be entered and enforced against property located in the foreign state.

Consider Benefits and Risks of Judicial and Nonjudicial Remedies

a. Nonjudicial foreclosure is generally a faster, more efficient means of realizing lender's collateral.

b. When California law is applied, nonjudicial foreclosure of real property in a *foreign jurisdiction* may constitute a waiver of lender's deficiency under CCP §580d. *Consolidated Capital Income Trust v Kbaloghli* (1986) 183 CA3d 107, 227 CR 879 (where California law applies, nonjudicial foreclosure in Texas estops lender from asserting claim against guarantor).

c. When the laws of a foreign jurisdiction apply, California antideficiency statutes are inapplicable to a nonjudicial foreclosure. *First-Trust Joint Stock Land Bank v Meredith* (1936) 5 C2d 214, 53 P2d 958 (nonjudicial foreclosure in foreign state); *United Bank of Denver v C & W Trucking Co.* (1983) 147 CA3d 217, 195 CR 49 (enforcing Colorado deficiency judgment notwithstanding earlier nonjudicial foreclosure on property in California).

Timing Events to Protect Lender

a. The stringent antideficiency and related protections afforded under California law may be significantly more restrictive than

analogous provisions in the foreign state.

b. It may be best for lender to wait to seek remedy in the foreign jurisdiction until lender seeks or receives a judgment in California.

c. When the foreign jurisdiction's laws apply, counsel may desire the assistance of local counsel.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/When Selecting Appropriate Remedy/STEP 10. CONSIDER AN EXTENSION OR WORKOUT

STEP 10. CONSIDER AN EXTENSION OR WORKOUT

WHEN TO CONSIDER

Lender should consider a consensual resolution (*i.e.*, workout; see [Mortgage Deed of Trust Foreclosure, chap 10](#)):

- a. If the troubled loan involves a construction project or commercial project managed by trustor;
- b. If there is a potentially meritorious claim for lender liability; or
- c. When foreclosure will result in a large nonrecoverable deficiency.

NOTE

The Mortgage Forgiveness Debt Relief Act of 2007 (Pub L 110-142, 121 Stat 1803) (see Tax Issues, below) provides borrowers with more favorable tax treatment for debt forgiveness, and those savings may motivate the borrower to be more cooperative in certain workouts.

WHEN TO USE

When Borrower Not Culpable

Consider a workout if borrower's default was caused by factors beyond his or her reasonable control, *e.g.* ([Mortgage Deed of Trust Foreclosure §10.9](#)):

- a. General economic or local market conditions causing slow rentals or sales;
- b. Unforeseen problems with contractor's performance;
- c. Unavailability of materials causing delays in construction; or
- d. Unavoidable cost overruns leading to cash-flow problems.

To Avoid Foreclosure on Construction Loans

Successful workout avoids the problems that can result from foreclosure on a construction project ([Mortgage Deed of Trust Foreclosure §10.9](#)), *e.g.*:

- a. Cessation of work, deterioration of improvements, expiration of permits and entitlements;
- b. Removal of building materials from the site by borrower, contractor, or others; or
- c. Removal of security personnel or devices that protect the partially constructed improvements. See [step 15](#), below, on obtaining appointment of a receiver to protect the security.

To Avert Borrower Bankruptcy

Lender is usually better off with a workout that enables borrower to complete the construction project or repay the loan, or both, than with a project in bankruptcy. On bankruptcies, see [step 14](#).

To Fix Loan Problems

A reasonable workout involves concessions by both sides; lender can use the opportunity to solve problems with the loan by, *e.g.*, requiring additional collateral or addressing perfection or other documentation problems.

To Reduce Lender Liability Exposure

Lender can condition financial concessions on the satisfactory resolution of all prior borrower claims against lender. See [Mortgage](#)

Deed of Trust Foreclosure §12.136.

WHEN NOT TO USE

Do not use a workout when:

- a. Borrower's financial condition has seriously worsened;
- b. Borrower's management or construction of the project was incompetent;
- c. Borrower diverted funds earmarked for the project to other projects; or
- d. Borrower has become openly uncooperative.

Restricted by Third-Party Agreement

Lender may be required by terms of agreement with third party (*e.g.*, take-out lender or fee owner (where the security is a leasehold)) to diligently pursue foreclosure.

Further Research: See Mortgage Deed of Trust Foreclosure §§10.7-10.8.

HELP CLIENT EVALUATE INVESTMENT

Lender must decide:

- a. If loan will remain a viable investment if restructured; and
- b. Whether a proposed workout merits spending more time and resources in light of:
 - (1) Prospects for future profitable operations; and
 - (2) Potential liabilities from abandoning the property and the project.

Collect Resources and Information

Work closely with lender to obtain the data, analyses, and expert opinions necessary to enable client to make these evaluations.

Further Research: See Mortgage Deed of Trust Foreclosure §§10.2-10.6.

TYPES OF WORKOUTS

Workouts can take many forms, *e.g.*:

Forbearance Agreement

Lender postpones foreclosure remedies for consideration from borrower (see Mortgage Deed of Trust Foreclosure §§10.20-10.22.

Loan Modification Agreement

Lender agrees to modify terms of loan in exchange for consideration from borrower (see Mortgage Deed of Trust Foreclosure §§10.23-10.27.

Deed in Lieu of Foreclosure

Lender accepts a deed of the property from borrower (see Mortgage Deed of Trust Foreclosure §§10.29-10.32.) Note that borrowers' attempts to unilaterally deed mortgaged property to lenders have failed for lack of acceptance; however, title can be cleared by recordation of a notice of nonacceptance under CC §1058.5(a).

REVIEW POTENTIAL PITFALLS

Before engaging in workout negotiations, carefully review the potential pitfalls and the need for a prenegotiation agreement followed by thorough documentation (including guarantors and junior lienholders) in the event a workout is agreed to, *e.g.*:

Binding Oral Promise

Lender's oral promise to postpone foreclosure is enforceable if supported by consideration (*e.g.*, borrower's promise to pay or do something). *Raedeke v Gibraltar Sav. c³ Loan Ass'n* (1974) 10 C3d 665, 672, 111 CR 693; Mortgage Deed of Trust Foreclosure §§2.88, 10.21. But see *Nguyen v Calhoun* (2003) 105 CA4th 428, 129 CR2d 436 (borrower failed to tender timely performance; thus, putative buyer could not quiet title against foreclosure sale purchaser).

Waiver Issues

If the workout will involve borrower's waiver of CCP §726 and antideficiency protections, review *DeBerard Props., Ltd. v Lim* (1999) 20 C4th 659, 85 CR2d 292; Mortgage Deed of Trust Foreclosure §§4.65, 5.68-5.70.

Tax Issues

Some workout agreements effectively forgive part of the debt. Both lenders and borrowers should get advice from qualified tax experts on the impact of any workout on tax benefits or liabilities. See Mortgage Deed of Trust Foreclosure §§10.24, 10.30. Under the Mortgage Forgiveness Debt Relief Act of 2007 (Pub L 110-142, 121 Stat 1803) and extending amendments, a borrower may exclude from gross income the discharge of "qualified principal residence indebtedness" (subject to special rules in IRC §108(h), in an amount up to \$2 million for married taxpayers filing jointly and \$1 million for those filing separately) if the discharge occurs between January 1, 2007, and January 1, 2013. IRC §108(a)(1)(E). See Stanley, *Reflections on the Mortgage Forgiveness Debt Act of 2007*, 31 CEB Real Prop L Rep 45 (March 2008). A similar bill containing exceptions was passed in California. See SB 1055 (2008), which added Rev & T C §17144.5. See also pending California SB 401 (2010).

Loss of Lender's Priority

Lender could lose priority on all or a portion of its debt, through optional advances or modification of the loan. See Mortgage Deed of Trust Foreclosure §9.83; *Gluskin v Atlantic Sav. c³ Loan Ass'n* (1973) 32 CA3d 307, 108 CR 318; *Lennar Northeast Partners v Buice* (1996) 49 CA4th 1576, 57 CR2d 435 (senior loan modified without consent of junior hard money lender loses priority on modification). But see *Friery v Sutter Buttes Sav. Bank* (1998) 61 CA4th 869, 72 CR2d 32 (refusing to extend *Gluskin* to benefit nonsubordinating junior after senior advanced note's maturity date; junior lien had attached after senior and violated "due on" clause).

Exoneration of Guarantor

Lender's modification of the loan could exonerate a guarantor, although most well-drafted guaranties waive this protection. See CC §2819; Real Estate Finance, chap 6; Mortgage Deed of Trust Foreclosure, chaps 9-10.

Further Research: On workouts, see generally Mortgage Deed of Trust Foreclosure, chap 10; Murray, *Defensive Real Estate*, 14 CEB Real Prop L Rep 101 (Spring 1991).

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/When Selecting Appropriate Remedy/STEP 11. EVALUATE NONJUDICIAL FORECLOSURE (TRUSTEE'S SALE)

STEP 11. EVALUATE NONJUDICIAL FORECLOSURE (TRUSTEE'S SALE)

WHAT IT IS

Trustee conducts an auction sale of the real property under the procedures in [CC §§2924-2924I](#), under the power-of-sale clause of the deed of trust. For information on power of sale, see [step 1](#), above. For comprehensive discussion of trustee's sale, see [Mortgage Deed of Trust Foreclosure, chap 2](#).

Other Terms Used

Trustee's sale is also called:

- a. Private sale; or
- b. Extrajudicial or nonjudicial foreclosure.

WEIGH ADVANTAGES

Does Not Involve Courts

May lessen chance that borrower will retain counsel who will identify and marshal defenses and lender liability claims.

Faster

Faster than judicial foreclosure (completed within roughly 4 months if aggressively pursued and trustor does not delay it).

Less Costly

Less costly than judicial foreclosure, except perhaps in case of very large debt where trustee fees may exceed cost of judicial foreclosure. See [CC §2924d\(b\)](#).

Not Subject to Postsale Redemption Rights

- a. May attract higher bids from third parties, giving lender a better chance of being paid in full out of the proceeds; or
- b. If lender is the successful bidder, he or she acquires the property free of borrower's redemption rights (but see [step 33](#), below, on IRS redemption rights). For redemption rights following judicial foreclosure, see [step 44](#), below.

No Statute of Limitations

Deed of trust not subject to statute of limitations (*Flack v Boland* (1938) 11 C2d 103, 106, 77 P2d 1090; *Nicolopoulos v Superior Court* (2003) 106 CA4th 304, 130 CR2d 626), although the power to conduct a trustee's sale will eventually expire through operation of the Marketable Record Title Act ([CC §§880.020-887.090](#)), 10 to 60 years after deed of trust is recorded (see [CC §882.020](#); *Nicolopoulos v Superior Court, supra*).

IF COLLATERAL IS MULTIPLE REAL PROPERTIES

a. If the collateral comprises multiple real properties, the trustees' sales may be conducted one at a time in the order selected by lender (if terms of deed(s) of trust allow), *although*:

- (1) Amount of lender's successful credit bid at a sale is "spent" and no longer available to bid at later sales (for steps in planning lender's maximum bid, see [step 30](#), below).
- (2) Junior lienholders and transferees can sometimes require that the foreclosures be conducted in the order provided in [CC §§2899, 3433](#) (called "marshaling" of assets). See [Mortgage Deed of Trust Foreclosure §§2.75, 3.7Z, 6.89, 9.8Z](#); [Real Estate Finance §4.46](#) (on effect of borrower's waiver).
- (3) Foreclosure trustee (particularly if a title company) may take the position that a single deed of trust recorded against

multiple parcels has only one "power of sale" and thus requires all parcels to be sold together. This is not an uncommon belief, but one for which there appears to be no case authority. See Mortgage Deed of Trust Foreclosure §9.13.

b. Compare nonjudicial foreclosure with judicial foreclosure, which requires consolidation of all security into a single action.

Further Research: CCP §726; Walker v Community Bank (1974) 10 C3d 729, 734, 111 CR 897. See Mortgage Deed of Trust Foreclosure §9.2.

WEIGH DISADVANTAGES

a. Cannot obtain deficiency judgment after sale (significant primarily on nonpurchase money debts, because deficiency is barred on most purchase money debts regardless of type of foreclosure. For information on antideficiency protections for borrowers and protections for third parties, see step 5, above).

b. Does not enable creditor to obtain interim relief, such as appointment of a receiver to collect rents, without initiating a concurrent judicial foreclosure. For initiating both judicial and nonjudicial foreclosure, see step 13, below.

NOTE

If lender does "double-track" judicial and nonjudicial foreclosures, borrower may attempt to challenge lender's claimed attorney and foreclosure fees as excessive.

WHEN TO USE

Always Consider

Always consider trustee's sale because:

a. It is fast, flexible, cost-effective, and not subject to postsale redemption rights (see above).

b. Client is not bound by initiation of trustee's sale process (can switch to judicial foreclosure any time before trustee's sale is conducted) (see Carpenter v Title Ins. & Trust Co. (1945) 71 CA2d 593, 596, 163 P2d 73; Mortgage Deed of Trust Foreclosure §§2.13, 3.11).

c. Client can pursue judicial and nonjudicial foreclosure in tandem and obtain benefits of provisional remedies (see below).

d. Even if client is willing to invest the time and money in judicial foreclosure to obtain deficiency judgment on a nonpurchase money obligation, debtor can discharge the judgment in bankruptcy. See California Real Estate Bankruptcies: Law and Litigation, chap 5 (Cal CEB 2010), referred to throughout this Action Guide as RP Bankruptcy. For information on reevaluating judicial foreclosure, see step 14, below.

When Proceeding Against Multiple Security

If client holds more than one deed of trust securing a single note and does not wish to foreclose on all at once, trustee's sale is the only option. For information on piecemeal foreclosures, if multiple deeds of trust secure notes, see above.

When 4-Year Limitations Period Has Expired

Trustee's sale is client's only option if 4 years have elapsed since maturity of the debt, with no partial payment by debtor or tolling of statute of limitations. See CCP §§337, 360; Flack v Boland (1938) 11 C2d 103, 106, 77 P2d 1090; Mortgage Deed of Trust Foreclosure §§3.16-3.20.

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/When Selecting Appropriate Remedy/STEP 12. EVALUATE JUDICIAL FORECLOSURE

STEP 12. EVALUATE JUDICIAL FORECLOSURE

WHAT IT IS

Judicial foreclosure is an alternative process (to trustee's sale) for enforcing security interest in real property (see [steps 34-48](#), below):

- a. Lender obtains judgment ordering sale of the property;
- b. Levying officer conducts sale and distributes proceeds as required by [CCP §701.810](#); and
- c. If proceeds do not cover the debt, lender may seek deficiency judgment, unless barred by [CCP §580b](#) purchase money restriction or terms of the loan documents and subject to fair-value defense (for purchase money deficiency bar and fair-value limitation, see [step 5](#), above).

Further Research: For comprehensive discussion of judicial foreclosure, see [Mortgage Deed of Trust Foreclosure, chap 3](#).

WEIGH ADVANTAGES

Deficiency Judgment

Client can obtain deficiency judgment *if*:

- a. Not barred by terms of the loan documents (for nonrecourse notes, see [step 9](#), above);
- b. Debt is not a standard purchase money debt (see [CCP §580b](#); for purchase money deficiency bar, see [step 5](#), above); and
- c. Court subsequently determines that fair value of property on the date of foreclosure sale is less than the debt (see [step 5](#), above).

Provisional Remedies

Client can apply to the court for provisional remedies (not available in extrajudicial proceedings like trustee's sales), *e.g.*:

- a. Appointment of receiver to collect rents pending the foreclosure sale (see [step 15](#), below); or
- b. Injunctive relief (see [step 16](#), below).

Lis Pendens

Lender can record lis pendens (see [step 35](#), below).

Can Cause Prompt Cure

In cases involving a substantially undersecured debt and a solvent borrower, the mere filing of a judicial foreclosure (with its potential for deficiency judgment) can result in borrower's prompt cure of the default.

WEIGH DISADVANTAGES

Cost

Usually more expensive than trustee's sale.

Time

Usually takes much longer than trustee's sale, particularly if borrower cross-complains, causing loss of priority on court's calendar (although priority *may* be retained if an injunction is in place or if lender brings a motion to advance trial).

Redemption Rights

Property is subject to postsale redemption rights unless deficiency claim is waived (see [step 44](#), below); depresses property's value at the foreclosure sale.

Statute of Limitations

Subject to 4-year statute of limitations ([CCP §337](#)) applicable to actions on written contracts.

Must Consolidate Security

If more than one deed of trust secures the note, all real property security and all obligors must be consolidated into single judicial foreclosure action. [CCP §726](#); *Walker v Community Bank* (1974) 10 C3d 729, 734, 111 CR 897.

Limits on Deficiency

Deficiency judgment will be limited by fair-value rule requiring that borrower be credited with the higher of:

- a. The successful bid at auction; or
- b. Intrinsic (*i.e.*, nondistress) fair value. For fair-value limitation, see [step 5](#), above.

Allows Borrower to Speculate

In cases of curable defaults, reinstatement is available to borrower during the entire course of the action, giving borrower a prolonged de facto option to reinstate if the market improves.

WHEN TO USE

Use judicial foreclosure when it is appropriate to pursue a deficiency judgment, when the security instrument lacks a power-of-sale clause, or when conflicts among the parties require judicial resolution.

Pursuing Deficiency Judgment

Judicial foreclosure is a prerequisite to obtaining a deficiency judgment that is warranted under the circumstances, taking into consideration:

- a. Nature of the debt, *i.e.*, must be:
 - (1) Recourse note (for nonrecourse note, see [step 9](#), above); and
 - (2) Free of purchase money protections (for purchase money deficiency bar, see [step 5](#), above);
- b. Size of probable deficiency (for fair-value limitation, see [step 5](#), above);
- c. Financial position of borrower and ability to collect judgment;
- d. Greater investment of time and money required for judicial foreclosure;
- e. Risk that debtor will discharge the deficiency judgment in bankruptcy (see [step 14](#), below); and
- f. Risk that starting judicial foreclosure will cause borrower to retain counsel and assert claims that might otherwise be ignored.

When No Power of Sale

When deed of trust lacks a power-of-sale clause (rare) or security instrument is not conventionally structured (*e.g.*, collateral assignment of leasehold with no power of sale or UCC recorded instead of leasehold mortgage (*Lovelady v Bryson Escrow, Inc.* (1994) 27 CA4th 25, 32 CR2d 371)), judicial foreclosure is the only available remedy. For power of sale, see [step 1](#), above.

For Judicial Determination of Issues

- a. There are conflicts and issues that may best be resolved in a foreclosure action, rather than in a lawsuit following a trustee's sale, *e.g.*:

(1) Conflicts between lender and borrower over amount of debt or right to foreclose; or

(2) Conflicts among encumbrancers over priority.

b. Some or all of the obligation requires judicial determination to liquidate (*e.g.*, agreement to provide permits and off-site improvements).

Further Research: On considerations in choosing judicial foreclosure over trustee's sale, see Mortgage Deed of Trust Foreclosure §§3.1-3.11.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/When Selecting Appropriate Remedy/STEP 13. CONSIDER INITIATING BOTH JUDICIAL AND NONJUDICIAL FORECLOSURE

STEP 13. CONSIDER INITIATING BOTH JUDICIAL AND NONJUDICIAL FORECLOSURE

WHEN TO CONSIDER

Consider initiating both types of foreclosure simultaneously to:

- a. Obtain appointment of a receiver and injunctive relief immediately in the judicial foreclosure (see [steps 15-16](#), below); and then
- b. Obtain the benefit of a nonredeemable sale through a trustee's sale (for postsale redemptive rights, see [step 11](#), above).

Point of No Return

Be sure not to allow entry of judgment in the judicial foreclosure or receivership action before the trustee's sale date, because lender will be deemed to have made an irrevocable choice between the two methods on the earlier of:

- a. Completion of the trustee's sale (*Carpenter v Title Ins. & Trust Co.* (1945) 71 CA2d 593, 597, 163 P2d 73); or
- b. Entry of judgment in the judicial foreclosure (*Vlahovich v Cruz* (1989) 213 CA3d 317, 323, 261 CR 565).

Further Research: See [Mortgage Deed of Trust Foreclosure §§2.13, 3.11](#).

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/When Selecting Appropriate Remedy/STEP 14. UNDERSTAND EFFECT OF BORROWER'S BANKRUPTCY FILING

STEP 14. UNDERSTAND EFFECT OF BORROWER'S BANKRUPTCY FILING

REVIEW TYPES OF BANKRUPTCY

The most common forms of bankruptcy are the following (see [California Real Estate Bankruptcies: Law and Litigation, chap 5 \(Cal CEB 2010\)](#), referred to throughout this Action Guide as RP Bankruptcy):

Chapter 7 Liquidation

A court-appointed trustee collects and liquidates the assets (except exempt assets) of an individual or business debtor. See 11 USC §§109(b), 701-766.

Chapter 11 Reorganization

Debtor-in-possession attempts to work out a court-approved plan with creditors (involving partial payment, delayed payment, or both) to enable debtor to continue operating or liquidate over time in an orderly manner; available to individuals, but more frequently used by businesses. A trustee may be appointed in cases of debtor misconduct. See 11 USC §§109(b), (d), 1101-1146.

Chapter 13 Debt Consolidation

Consolidates debts and allows payment through court-approved plan; available to individuals who have regular source of income and debts not exceeding certain limits. See 11 USC §§109(e), 1301-1330.

Further Research: For specific law on enforcing secured loans against borrowers in bankruptcy, see [Mortgage Deed of Trust Foreclosure, chap 11](#). For an overview of bankruptcy law, see [RP Bankruptcy, chaps 1-5](#).

REVIEW BAPCPA

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub L 109-8, 119 Stat 23) made sweeping changes to the Bankruptcy Code. Key changes are discussed generally, and as they affect real property assets, in [Mortgage Deed of Trust Foreclosure, chaps 7, 11](#).

BE AWARE OF AUTOMATIC STAY

a. When borrower files a bankruptcy petition, an automatic stay bars lender from taking action against borrower or the collateral. See 11 USC §362. But see *Citizens Bank v Strumpf* (1995) 516 US 16, 133 L Ed 2d 258, 116 S Ct 286 (bank's freeze of debtor's deposit account pending stay relief hearing not stay violation). See also *Burkart v Coleman (In re Tippett)* (9th Cir 2008) 542 F3d 684 (postpetition transfers by debtor without court approval not void ab initio; however, trustee can seek avoidance subject to defenses by bona fide purchasers and encumbrancers). On effect of automatic stay, see [RP Bankruptcy, chap 4](#).

NOTE

A bank freeze on a deposit may nonetheless be subject to attack as a violation of [CCP §726](#). See [step 5](#), above.

b. Under BAPCPA, the filing of a petition does not automatically stay the enforcement of a lien against real property (1) following entry of a stay relief order in a prior bankruptcy action for a period of up to 2 years after entry of the order or (2) if the filing violates a prior bankruptcy court order prohibiting the debtor from filing again. 11 USC §362(b)(20)-(21). See [Mortgage Deed of Trust Foreclosure §§11.6, 11.11, 11.25-11.26](#).

c. Bankruptcy of the property's equitable owner, a co-obligor, or a junior lienor or tenant must be carefully evaluated before proceeding without judicial relief.

IMPACT OF STAY

Cannot Foreclose

Lender cannot foreclose unless it obtains relief from stay (on procedures, see [RP Bankruptcy, chap 4](#); [Mortgage Deed of Trust Foreclosure §§11.20-11.55](#)).

Payment Interruption

Debt service payments may be delayed during the bankruptcy case, especially if lender is oversecured, because the court can be persuaded that the equity cushion provided by property value affords "adequate protection" without periodic payments to lender. See Mortgage Deed of Trust Foreclosure §11.22. But see 11 USC §362(d)(3) (compelling debt service on a fast track under BAPCPA in "single-asset real estate" bankruptcies).

Interest Stops Accruing

If lender is undersecured, debt will not accrue interest during bankruptcy case. See *United Sav. Ass'n v Inwood Forest Assocs., Ltd* (1988) 484 US 365, 371, 98 L Ed 2d 740, 748, 108 S Ct 626; Mortgage Deed of Trust Foreclosure §§11.23, 11.134.

Probable Shortfall

Debt probably will not be paid in full, unless lender is fully secured, because bankruptcy administrative costs are paid before unsecured claims. See 11 USC §§503(b)(1), 507(a)(1); Mortgage Deed of Trust Foreclosure §11.61.

Effect on Foreclosure

- a. Bankruptcy petition filed after judicial foreclosure decree, but before sale, held to stay sale. See *In re Coleman* (Bankr D NJ 1988) 82 BR 15. See also 11 USC §1322(c) (allows debtor to cure secured claim after foreclosure judgment, provided debtor files petition before sale).
- b. Stay protects debtor's preforeclosure equity of redemption; if sale is stayed, equity of redemption is tolled along with sale. See *In re Capital Mortgage & Loan, Inc.* (Bankr ED Cal 1983) 35 BR 967, 971.
- c. If petition filed before notice of sale is given, stay will toll reinstatement period by prohibiting publication of notice. If sale was noticed at time petition is filed, stay will prevent sale from occurring as scheduled and will toll reinstatement period if sale is continued for more than 5 business days. See Mortgage Deed of Trust Foreclosure §§2.88-2.96, 11.7, 11.13.
- d. Petition filed after sale, but before docketing of sheriff's certificate or timely recordation of trustee's deed upon sale, does not include foreclosed property in bankruptcy estate. See *Bebensee-Wong v FNMA (In re Bebensee-Wong)* (BAP 9th Cir 2000) 248 BR 820. But see *Little v Duncombe (In re Duncombe)* (Bankr CD Cal 1992) 143 BR 243 (decided before amendment to CC §2924h(c)), which established relation back for trustee's deed recorded within 15 days of sale).
- e. Petition filed during postsale statutory redemption period may not toll running of redemption period, but may extend period up to 60 days under 11 USC §108(b). Compare *Hamblen v Federal Sav. & Loan Ins. Corp. (In re Thomas J. Grosso Inv.)* (9th Cir 1972) 457 F2d 168, with *Johnson v First Nat'l Bank* (8th Cir 1983) 719 F2d 270. See Mortgage Deed of Trust Foreclosure §11.12.

Forced Choice in Chapter 11

If undersecured in a Chapter 11 case, lender must choose between having full debt balance remain a lien on the security or having the debt bifurcated, with the undersecured portion of the debt treated with other unsecured claims under Chapter 11 plan. Lender rarely elects to allocate claim solely to property, preferring to also have unsecured claim to be voted to block acceptance of debtor's plan by class of unsecured creditors. See 11 USC §1111(b)(2); *Montclair Retail Ctr. v Bank of the West (In re Montclair Retail Ctr.)* (BAP 9th Cir 1995) 177 BR 663; Mortgage Deed of Trust Foreclosure §§11.93, 11.99, 11.110.

WHEN BANKRUPTCY IS NOT A THREAT

Lender may prefer that borrower file bankruptcy, *e.g.*:

- a. When lender is undersecured, reorganization is unlikely; consequently, lender believes it will be relatively easy to obtain relief from stay (see, *e.g.*, 11 USC §362(d); Mortgage Deed of Trust Foreclosure §§11.20-11.32);
- b. When borrower is wasting the property or diverting funds (lender may prefer bankruptcy court supervision or appointment of a trustee instead of continuing borrower's control of the property; see RP Bankruptcy, chaps I, 4); or
- c. When borrower asserts lender liability claims (see RP Bankruptcy §§4.38-4.71) and trustee (if appointed) would be a more rational party with whom to resolve these claims.

IF BANKRUPTCY IS IMMINENT

Advise Lender to Make Independent Evaluation

- a. Advise lender to seek bankruptcy advice and make its own strategic evaluation rather than rely solely on borrower's threats of bankruptcy (see Mortgage Deed of Trust Foreclosure §§10.9-10.19, 11.1-11.19);
- b. Proceed efficiently with chosen remedies (bankruptcy may not materialize); and
- c. If borrower claims to have filed bankruptcy, obtain case number and confirm it.

Protect Interest in Rents

These steps establish the lender's interest in rents and right to the "cash collateral" protections of 11 USC §363:

- a. Verify that assignment of rents (in deed of trust or separate document) is recorded;
- b. Make written demand on defaulting borrower for the rents; and
- c. Although not required to actualize an "absolute" assignment of rents, consider seeking appointment of a rents receiver.

Further Research: See 11 USC §552(b); CC §2938, summarized under *Assignment-of-Rents-and-Profits Clause* in Glossary; *In re GOCO Realty Fund I* (Bankr ND Cal 1993) 151 BR 241; Mortgage Deed of Trust Foreclosure, chaps 6, 11.

Record Deed of Trust

If lender's deed of trust was never recorded, consider doing so before the bankruptcy petition is filed (bankruptcy trustee has status of bona fide purchaser on date of filing, under 11 USC §544); but:

- a. Be aware that recordation of the deed of trust within 90 days before borrower's bankruptcy can be attacked as a preference; however, this is not a reason to forgo late recordation (see 11 USC §547(e)(2)(C); Mortgage Deed of Trust Foreclosure §§11.81-11.85); and
- b. Review factors discussed in step 2, above.

Postpone Reinstatement of Senior Loan

If client, such as junior lienholder, was planning to advance funds to cure defaults on a senior encumbrance, advise client to wait until toward the end of the reinstatement period; if borrower files bankruptcy before reinstatement period expires, senior lender will be stayed from foreclosing and your client can use the money to obtain stay relief. On rights of junior lienholder as debtor or creditor in bankruptcy, see Mortgage Deed of Trust Foreclosure §§11.14, 11.45, 11.62, 11.126. On sold-out junior rights generally, see Mortgage Deed of Trust Foreclosure §§4.42-4.46, 5.10-5.12, 5.39-5.44.

Reevaluate Judicial Foreclosure

Deficiency judgment can be discharged in bankruptcy, so an initial decision by lender to foreclose judicially should be reconsidered if borrower's bankruptcy is probable. See 11 USC §§101(5), 101(12), 524(a), 727, 1141(d), 1328(a).

IF TRUSTOR HAS ALREADY FILED BANKRUPTCY

- a. Evaluate whether automatic stay applies and whether to move for stay relief. See 11 USC §§362(b)(20)-(21), 362(d); RP Bankruptcy, chap 4; Mortgage Deed of Trust Foreclosure §§11.20-11.55.
- b. Monitor the bankruptcy court file, even if lender decides not to seek relief from the automatic stay; if the bankruptcy case is dismissed, lender can proceed with foreclosure.
- c. Assist lender in filing proof of claim with loan documents attached. See 11 USC §§502(a), 1111(a); Fed R Bankr P 3001, 3003; RP Bankruptcy, chap 3; Mortgage Deed of Trust Foreclosure §§11.89-11.93.
- d. Review potential for recovery of attorney fees incurred in bankruptcy case, including whether lender's claim will be fully secured or undersecured. Compare *Travelers Cas. & Surety Co. v PGE³E* (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199 (unsecured creditor not barred from recovery of contract-based attorney fees merely because dispute turned on federal bankruptcy issues), with *SNTL Corp. v Centre Ins. Co. (In re SNTL Corp.)* (9th Cir 2009) 571 F3d 826 (unsecured creditor may recover attorney fees incurred postpetition if supported by prepetition contract and applicable law). See also *Qmect, Inc. v Burlingame Capital Partners II, LP (In re Qmect, Inc.)* (Bankr ND Cal 2007) 368 BR 882; Mortgage Deed of Trust Foreclosure §§11.94-11.95.

IF BENEFICIARY VIOLATES THE STAY

Actions in violation of the automatic stay, including foreclosure, are void ab initio. 11 USC §362(b)(20)-(21). See *40255 Washington St. Corp. v Luardi (In re 40255 Washington St.)* (9th Cir 2003) 329 F3d 1076 (11 USC §549(c) does not create exception for good-faith purchasers who buy at foreclosure sale conducted in violation of automatic stay). See RP Bankruptcy, chap 4.

Exceptions

- a. A bankruptcy petition filed in violation of a court order will not stay a postpetition foreclosure. 11 USC §362(b)(21)(B). See additional exceptions in 11 USC §362(b).
- b. When a foreclosure sale is held before the bankruptcy filing, recordation of the trustee's deed after the bankruptcy filing, but within 15 days of the sale under CC §2924h(c), will not violate the automatic stay or constitute a transfer avoidable under 11 USC §549. *Bebensee-Wong v FNMA (In re Bebensee-Wong)* (BAP 9th Cir 2000) 248 BR 820. See Mortgage Deed of Trust Foreclosure §§7.93, 11.9.

NOTE

Tardy recordation of the trustee's deed risks avoidance under 11 USC §549; however, if debtor delays recordation of the bankruptcy petition in the county of sale until after the trustee's deed is recorded, the deed should be protected under 11 USC §549(c). *In re Stork* (Bankr ND Cal 1997) 212 BR 970.

Invalid Deed Must Be Rescinded

When a trustee's deed is invalidated by reason of bankruptcy (or otherwise), a notice of rescission of deed that properly identifies the invalid deed, all liens of record purportedly affected by the sale, and the reason for rescission will restore record title to the status quo before the sale. See CC §1058.5(b).

Penalty for Stay Violation

If the lender knew of the stay and intentionally performed the violative act, it will be liable for actual damages and attorney fees and may be liable for punitive damages as follows if borrower is an individual:

- a. Sanctions may be recovered for willful stay violation (see 11 USC §362(h); *Eskanos e³ Adler v Leetien* (9th Cir 2002) 309 F3d 1210;
- b. Debtor may be entitled to emotional distress damages (*Sternberg v Johnston* (9th Cir 2009) 582 F3d 1114) even if debtor has not suffered financial damage (*Dawson v Washington Mut. Bank, F.A. (In re Dawson)* (9th Cir 2004) 390 F3d 1139);
- c. Trustee cannot obtain stay violation damages as "individual" under §362(h), but can seek sanctions under 11 USC §105 (*Knupfer v Lindblade (In re Dyer)* (9th Cir 2003) 322 F3d 1178).

Further Research: For an overview of bankruptcy considerations, see RP Bankruptcy, chaps 1-5; Secured Transactions, chap 6. For specific law on enforcing real property secured loans against borrowers in bankruptcy, see Mortgage Deed of Trust Foreclosure, chap 11.

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/Consider Use of Provisional Remedies/STEP 15. CONSIDER SEEKING APPOINTMENT OF A RECEIVER

Consider Use of Provisional Remedies

STEP 15. CONSIDER SEEKING APPOINTMENT OF A RECEIVER

WHAT IT IS

The court appoints a person to perform specific duties of management and control over the mortgaged property. See CCP §564. See also steps 36-37, below; Mortgage Deed of Trust Foreclosure, chap 6; California Civil Procedure Before Trial, chap 33 (4th ed Cal CEB 2004), referred to throughout this Action Guide as Civ Proc Before Trial. On lenders' considerations in receivership actions, see Mortgage Deed of Trust Foreclosure, chap 10.

COURT DIRECTED

The receiver is *not* directed by lender, but is directed by and answerable to the court. See Cal Rules of Ct 3.1179; Turner v Superior Court (1977) 72 CA3d 804, 813, 140 CR 475; Mortgage Deed of Trust Foreclosure §6.44.

WHEN TO USE

Advise the client to seek a receiver when someone needs to manage or control the property pending final disposition (by judicial foreclosure or trustee's sale), *e.g.*:

Receive Rents

To receive rents and profits under an assignment-of-rents-and-profits clause while the nonjudicial or judicial foreclosure proceeds (see Mortgage Deed of Trust Foreclosure §§2.12, 3.5, 3.55, 6.34-6.46; see Glossary for summary of *Assignment-of-Rents-and-Profits Clause*).

Repair and Maintain Property

To conduct repairs and other upkeep necessary to maintain the value of the property (see Mortgage Deed of Trust Foreclosure §6.35).

NOTE

If no repairs are necessary to maintain the value of the property and deed of trust does *not* include an assignment-of-rents clause, a foreclosure receiver may be appointed under CCP §564(b)(2) with a showing of insufficient security; however, the receivership will be limited to maintaining the value of the property. See Mortgage Deed of Trust Foreclosure §§6.15-6.16.

Further Research: See 6 Witkin, California Procedure, *Provisional Remedies* §§419-460 (5th ed 2008), referred to throughout this Action Guide as 6 Witkin, Procedure, *Prov Rem*; Civ Proc Before Trial, chap 33.

WHEN NOT TO USE

Do not use if the costs and risks of obtaining and maintaining the receivership outweigh the benefits of rent received (see Mortgage Deed of Trust Foreclosure §6.36).

EFFECT OF RECEIVER

The appointment of a receiver is not an "action" for purposes of the one-action rule (see CCP §726(a); step 5, above, for rule) (CCP §564(d)), *but*:

a. The safest way to proceed during the foreclosure is for the receiver *not* to disburse to lender the rents or proceeds collected, because some lingering doubts remain that such disbursement might trigger CCP §726 sanctions or reinstate the debt. See Mortgage Deed of Trust Foreclosure §§6.40-6.41, 6.45-6.46 (note that sample orders in Mortgage Deed of Trust Foreclosure §§6.102-6.103, 6.106 do not provide for periodic disbursement of rent receipts to lender).

b. In contrast, certain authorities advise that the receiver make periodic disbursements of rents and profits to the lender on the basis of the language in the last paragraph of CC §2938(c). See Real Estate Finance §§5.5-5.7.

c. In any case, to avoid violating the one-action rule, do not proceed to a judgment or interlocutory decree in the judicial action. See Mortgage Deed of Trust Foreclosure §§6.41, 6.46.

CONSIDER GROUNDS

Court may appoint a receiver when:

No Rents-and-Profits Clause

You can show that (CCP §564(b)(2)):

a. Property is in danger of being lost, removed, or materially injured; or

b. Both:

(1) A condition of the deed of trust or mortgage has not been performed (*i.e.*, borrower failed to make payments when due); and

(2) The property is probably insufficient to satisfy the debt (*i.e.*, appraised value of the property is less than the outstanding balance of the loan).

Further Research: See *Bank of Woodland v Stephens* (1904) 144 C 659, 660, 79 P 379; Mortgage Deed of Trust Foreclosure §6.15.

NOTE

If there is no rents-and-profits clause, the receiver cannot collect the rents and profits. See *Locke v Klunker* (1898) 123 C 231, 55 P 993; Mortgage Deed of Trust Foreclosure §6.16.

Rents-and-Profits Clause

Both CCP §564(b)(11) and (b)(12) provide for a receiver in enforcing an assignment of rents in the deed of trust. Traditionally, lenders have shown that receivers have been appointed to enforce assignments of rents by the courts of equity (under former CCP §564(b)(8)), *i.e.*, deed of trust included language authorizing appointment of a receiver without regard to the adequacy of security (*Barclay's Bank v Superior Court* (1977) 69 CA3d 593, 602, 137 CR 743).

If Hazardous Substance

Lender is entitled to enter property after reasonable notice to inspect for any hazardous substance. CC §2929.5; CCP §564(c).

NOTE

If you obtain a receiver to inspect for hazardous substance, make sure the receiver gives reasonable notice, usually at least 24 hours' notice. See CC §2929.5.

HOW OBTAINED

File Action

You must file a court action, *e.g.*, for:

a. Judicial foreclosure (see CCP §564(b)(2)); or

b. Specific performance of the rents-and-profits clause or other equitable relief (see CCP §564(b)(9), (b)(11), (b)(12)); or

c. Both (see step 34, below).

NOTE

Because of the one-action rule, it is best to file an action for both specific performance and judicial foreclosure to make sure that a final judgment on the specific performance action is not entered before the foreclosure is complete. See Mortgage Deed of Trust Foreclosure §§3.5, 4.8-4.11, 6.37, 6.41, 6.46. Although CCP §564(b)(11) could be read to permit a preforeclosure final judgment, it is not sufficiently clear on this point.

Request Receiver

Apply to the court to appoint a receiver (see [steps 36-37](#), below).

Further Research: On grounds for appointment of receiver, see [Mortgage Deed of Trust Foreclosure §§6.15-6.18, 6.32-6.38, 10.43; Civ Proc Before Trial, chap 33](#). For Judicial Council forms on receiverships and injunctions, see [Mortgage Deed of Trust Foreclosure §§6.102-6.106](#).

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/Consider Use of Provisional Remedies/STEP 16. CONSIDER REQUESTING AN INJUNCTION

STEP 16. CONSIDER REQUESTING AN INJUNCTION

WHAT IT IS

The court issues an order restraining or directing defendant to take or refrain from taking action regarding the property, most commonly in connection with the appointment of a receiver. See CCP §§525-526, 745; step 38, below; Civ Proc Before Trial, chaps 32-33; Mortgage Deed of Trust Foreclosure §6.14.

WHEN TO USE

Advise lender to seek an injunction when you want to restrain borrower from taking action with regard to the property, *e.g.*, when borrower is:

- a. Contacting tenants and telling them to pay rents or profits to borrower, instead of trustee or receiver; or
- b. Dismantling improvements on the property.

Further Research: See 6 Witkin, Procedure, *Prov Rem* §§274-460.

CONSIDER GROUNDS

Court may issue an injunction when:

Complaint for Specific Performance

Lender has requested specific performance in the complaint and part of that performance is to restrain borrower from an action, *e.g.*, lender is entitled to rents and requests court to restrain borrower, who has defaulted under the terms of the loan instruments, from continuing to collect rents. CCP §526(a)(1).

Complaint for Injunctive Relief

Some act by borrower during litigation would produce waste or irreparable injury, *e.g.*, the property is in disrepair and borrower's collection of rents and failure to make necessary repairs would indicate that during the pendency of the litigation these acts were producing waste or great or irreparable injury to lender. CCP §526(a)(2).

Complaint for Judicial Foreclosure

a. Some act by borrower during litigation would render the requested judgment ineffectual, *e.g.*, lender may show that, unless borrower is immediately restrained from spending or otherwise disbursing rental funds, borrower will be unable to satisfy any potential judgment. CCP §526(a)(3).

NOTE

The court may consider the potential insolvency of borrower in evaluating whether an injury can be adequately compensated in damages. See West Coast Constr. Co. v Oceano Sanitary Dist. (1971) 17 CA3d 693, 700, 95 CR 169 (preliminary injunction restraining water district from expending money on sewer construction fund upheld on uncontroverted showing of defendant's potential inability to pay plaintiff).

b. Some act by borrower during litigation would injure the real property, *e.g.*, borrower's dismantling the improvements on the property. CCP §745.

HOW OBTAINED

File Action

You must file a court action, *e.g.*, for:

- a. Injunctive relief alone (CCP §527); or

b. Injunctive relief together with judicial foreclosure and specific performance (see [step 34](#), below).

NOTE

Because of the one-action rule, as with the appointment of a receiver, it is best to file one action for all judicial relief to make sure that you do not obtain a final judgment for one remedy before the foreclosure is complete. For effect of the receiver, see [step 15](#), above.

Request TRO or Preliminary Injunction

Ask the court to issue order restraining borrower (see [step 38](#), below).

Further Research: See Judicial Council forms on receiverships and injunctions in [Mortgage Deed of Trust Foreclosure §§6.103-6.106](#).

© The Regents of the University of California

STEP 17. CONSIDER CLAIM AND DELIVERY

AVAILABILITY OF CLAIM AND DELIVERY IN REAL PROPERTY FORECLOSURE CONTEXT

NATURE OF REMEDY

Claim and delivery is a provisional remedy that enables the plaintiff in an action for recovery of *specific, tangible personal* property to obtain possession of the property before judgment.

WHEN TO USE

Claim-and-delivery procedure is most often used when *personal* property sought is security for repayment of a debt now in default.

REAL PROPERTY DISTINGUISHED

Claim and delivery is used only for personal property. To obtain possession of real property, use remedy of unlawful detainer. See Handling Unlawful Detainers (Cal CEB Action Guide May 2009); California Landlord-Tenant Practice, chaps 8-13 (2d ed Cal CEB 1997), referred to throughout this Action Guide as Unlawful Detainers and Landlord-Tenant, respectively.

NOTE

Claim and delivery, a provisional remedy for personal property, potentially presents unique problems in the "mixed collateral" setting when lender has security interests in both real and personal property. For discussion of lender's options when dealing with mixed collateral, see step 9, above.

CONSIDER ADVANTAGES AND DISADVANTAGES

Advantages

- a. Ensures collectability of final judgment;
- b. Facilitates settlement;
- c. Promotes informal discovery; and
- d. Permits liquidation.

Disadvantages

- a. Risk to lender arising from interplay with antideficiency laws for real property security (see step 39, below);
- b. Remedy is only provisional (*i.e.*, remedy only grants temporary possession, does not decide ownership issues);
- c. Possible damage exposure if client loses underlying suit;
- d. Possibility of bankruptcy filing "staying" enforcement;
- e. Costs/Practicality: Depending on value of collateral and client's ultimate goals, other provisional remedies may be more practical; and
- f. Personal property limitation.

Procedures for Obtaining Claim and Delivery or Writ of Possession

An overview of procedures is given in step 39, below. See generally Debt Collection Practice in California §§6.111-6.166 (2d ed

Cal CEB 1999), referred to throughout this Action Guide as Debt Collection; Obtaining a Writ of Possession (Cal CEB Action Guide August 2004).

© The Regents of the University of California

STEP 18. CONSIDER PREJUDGMENT ATTACHMENT

AVAILABILITY OF ATTACHMENT IN REAL PROPERTY
FORECLOSURE CONTEXT

GENERAL LIMITATIONS

- a. Contract-based claim.
- b. Claim must exceed \$500.

LIMITATIONS IN FORECLOSURE CONTEXT

General prohibition against attachment for claims secured by real property. CCP §483.010(b).

Exceptions

- a. "Worthless" or "declining" collateral exception (CCP §483.010(b)), narrowly tailored;
- b. Decline or destruction must not be attributable to petitioner's actions;
- c. Only available where collateral declined or became worthless after security interest granted;
- d. Attachment limited in amount to lesser of amount of decline or difference between value of collateral and claim; and
- e. Mixed obligations: Petitioner can seek attachment based on nonsecured obligation concurrently with pursuing foreclosure of secured obligation.

Limitations on Attachment Against Natural Person Defendants (CCP §483.010)

- a. Claim must be based on obligation arising from defendant's conduct of trade, business, or profession;
- b. Not available when claim based on sale or lease of real property;
- c. Not available when claim based on money loaned by defendant for personal, family, or household purposes; but
 - (1) Loan used to purchase real property secured by real property—attachment unavailable; and
 - (2) Loan to defendant's business secured by defendant's other real property—attachment available.

DETERMINE TYPE AND VALUE OF DEFENDANT'S PROPERTY SUBJECT TO
ATTACHMENT

CAN ONLY ATTACH PROPERTY LOCATED IN CALIFORNIA

Dependent on Defendant's Legal Status

- a. *Individual defendants:* Petitioner can only attach certain statutorily enumerated and otherwise nonexempt assets that must be described with particularity in application. CCP §487.010.
- b. *Corporations/Partnerships/Association Defendants:* Petitioner can attach any California property for which method of levy is provided under CCP §§488.300-488.485. CCP §487.010(a)-(b).

CONSIDER ADVANTAGES AND DISADVANTAGES OF ATTACHMENT

ADVANTAGES

- a. Grants secured position:
 - (1) Against other unsecured creditors; and
 - (2) In bankruptcy proceedings begun more than 90 days after lien attaches;
- b. Ensures that final judgment can be collected;
- c. Settlement motivation: Obtaining writ demonstrates "probable validity" of claims;
- d. Basis for obtaining jurisdiction over nonresident defendants;
- e. Basis for informal discovery of defendant's defenses and counterclaims; and
- f. Res judicata effect of findings at attachment hearing.

DISADVANTAGES

- a. Limitations in real property foreclosure context:
 - (1) Limited availability (CCP §483.010(b)), *and may trigger CCP §726 rule sanctions if statutory procedures not scrupulously followed* (see *Shin v Superior Court* (1994) 26 CA4th 542, 31 CR2d 587);
 - (2) Limited in amount (CCP §483.010(b)); and
 - (3) Limitations for attachment against individual defendants. CCP §483.010(b).
- b. Time and cost considerations:
 - (1) Very technical and time-consuming procedure;
 - (2) Additional professional costs, *e.g.*:
 - (a) Attorney time drafting motion papers and attending hearings;
 - (b) Expert testimony to demonstrate decline in value; and
 - (3) Locating assets subject to attachment;
- c. Liability for claim of wrongful attachment;
- d. Attachment lien terminates on bankruptcy filing or general assignment occurring within 90 days; and
- e. Election-of-remedies issue: Existing case law suggests obtaining attachment lien for contract-based claim may preclude tort claims.

Further Research: See also Obtaining a Writ of Attachment (Cal CEB Action Guide August 2009).

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 19. SEND REQUIRED PRELIMINARY NOTICES

If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)

STEP 19. SEND REQUIRED PRELIMINARY NOTICES

SEND PRELIMINARY NOTICES TO BORROWER

a. If required by the note or deed of trust, send borrower:

- (1) Declaration of default; and/or
- (2) Notice of acceleration of loan.

Example: See notice required by the FNMA/FHLMC Uniform Instrument Deed of Trust for use in California as first deed of trust on 1- to 4-unit family residences.

NOTE

Consider giving preliminary notice and opportunity to cure even if not required by loan documents, to avoid claims of lender liability based on, *e.g.*, bad faith, precipitous action. See *K.M.C. Co. v Irving Trust Co.* (6th Cir 1985) 757 F2d 752, 760; Mortgage Deed of Trust Foreclosure §12.135; but such action carries risk of raising standards of notice and conduct by lender. *Lupertino v Carbabal* (1973) 35 CA3d 742, 111 CR 112; *Lopez v Bell* (1962) 207 CA2d 394, 24 CR 626. For information on borrower defenses, see step 4, above.

b. If construction loan, comply with any requirements of notice to borrower of certain breaches, *e.g.*, failure to correct defective work.

c. Lender may be required to notify borrower of availability of home-ownership counseling, within 45 days after default, if the default:

- (1) Is on a loan on borrower's principal residence; and
- (2) Results from involuntary loss of income.

Further Research: See 12 USC §1701x(c)(4)-(6); *Tully v World Sav. c³ Loan Ass'n* (1997) 56 CA4th 654, 661 n3, 65 CR2d 545.

NOTIFY FHA OR VA

If the loan is insured by the Federal Housing Administration (FHA) or Department of Veterans Affairs (VA), then:

- a. Help lender provide required notice to appropriate agency; and
- b. Contact the agency to determine what sale procedures must be followed to enable lender to recover from the agency on the insured loan or guaranty if the foreclosure proceeds do not satisfy the debt.

Further Research: See 12 USC §§1707-1715z-20 (FHA); 38 USC §§3701-3736 (VA); Mortgage Deed of Trust Foreclosure §§2.27-2.28.

NOTIFY JUNIOR ENCUMBRANCERS

Provide the notice required by CC §2924e(b) to certain junior encumbrancers who within past 5 years provided lender or lender's predecessor-in-interest with (CC §2924e(b)):

- a. A written request for such notice, together with \$40 fee; or
- b. A renewal of the request, with the \$15 renewal fee.

Who Can Request Notice

Holders of *junior encumbrances* (see Glossary) on residential property or holders of junior encumbrances that on any property did not originally exceed \$300,000 can request that they be given notice.

What Notice Should Contain

Notice should:

- a. Advise that borrower is delinquent by 4 months or more in paying the obligation secured by your client's deed of trust; and
- b. State the amount of the delinquency.

When to Send

Send:

- a. Within 15 days after borrower has remained delinquent for 4 months (CC §2924e(c)); or
- b. As soon as possible thereafter.

Consequences if Notice Not Sent

If lender fails to give the notice and a foreclosure sale occurs, lender may be liable to the junior encumbrancer for (CC §2924e(d)):

- a. Any actual damages due to failure to provide timely notice; and
- b. \$300.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 20. ANTICIPATE ATTEMPTS TO SET ASIDE TRUSTEE'S SALE AND ACTIONS FOR WRONGFUL FORECLOSURE

STEP 20. ANTICIPATE ATTEMPTS TO SET ASIDE TRUSTEE'S SALE AND ACTIONS FOR WRONGFUL FORECLOSURE

CONSIDER POSTSALE LAWSUITS

Be aware of the potential for a lawsuit after the trustee's sale, either:

- a. To set the sale aside; or
- b. For damages for wrongful foreclosure.

Effort to Enjoin Sale Not Required

Although a litigious borrower will typically try to enjoin the sale, this effort is not a prerequisite to a later action to set aside the sale. On the bases and procedures for enjoining or setting aside a trustee's sale, see Mortgage Deed of Trust Foreclosure, chaps 7, 10.

UNDERSTAND LENIENT STANDARDS

Because trustee's sales often work large forfeitures, the standards in case law for setting aside the sale are lenient, *e.g.*:

Gross Price Disparity

A trustee's sale may be set aside if there is:

- a. A gross disparity in price (between the successful bid or credit bid and the fair value of the property); and
- b. Even a slight irregularity or unfairness in the sale or the procedures leading up to the sale.

Further Research: See Whitman v Transtate Title Co. (1985) 165 CA3d 312, 323, 211 CR 582; Lopez v Bell (1962) 207 CA2d 394, 398, 24 CR 626. See also Mortgage Deed of Trust Foreclosure §§2.64, 2.69-2.71, 2.79, 7.56-7.71. But see Knapp v Doherty (2004) 123 CA4th 76, 20 CR3d 1.

Lender Misconduct

Lender misconduct may be sufficient basis for setting aside trustee's sale, *e.g.*:

- a. Misconduct in original loan transaction (see Mortgage Deed of Trust Foreclosure §§12.27-12.127);
- b. Holding a trustee's sale on the basis of a cured default, *e.g.*, when loan is reinstated or paid off but trustee does not get word in time (see Bank of America v La Jolla Group (2005) 129 CA4th 706, 28 CR3d 825; System Inv. Corp. v Union Bank (1971) 21 CA3d 137, 98 CR 735);
- c. Misconduct during presale foreclosure process (see Strutt v Ontario Sav. & Loan Ass'n (1972) 28 CA3d 866, 105 CR 395); or
- d. Misconduct at the sale itself (see Pierson v Fischer (1955) 131 CA2d 208, 280 P2d 491).

HOW TO MINIMIZE RISK OF SUCCESSFUL LAWSUIT

There is a great deal you can do, working with lender and trustee, to minimize chances of a successful attack on the trustee's sale:

Use Experienced Trustee

- a. Because trustee's sale procedures are detailed and highly technical, it is not advisable or cost-effective for you to act as trustee; however, you will want to monitor the process and consult closely in instances of large or exotic secured obligations.
- b. Best to use an institutional trustee (or trustee's agent) such as a title company or a foreclosure company that does trustee's sales in volume, confers regularly with title counsel, and is familiar with the procedures.

Monitor Trustee's Activities

Closely monitor activities of the foreclosing trustee to assure full compliance with the procedures of CC §§2924-2924f. See steps 25-32, below. See also Mortgage Deed of Trust Foreclosure, chap 2.

Discourage Inconsistent Conduct

Inconsistent conduct by trustee can create estoppel problems. See *Lupertino v Carbabal* (1973) 35 CA3d 742, 111 CR 112.

Example: If trustee follows procedures for mailing and posting notices that exceed the statutory minimum, make sure it follows those procedures at each step in the foreclosure and in successive foreclosure proceedings on the same deed of trust.

Obtain TSG

If you do serve as the foreclosing trustee, be sure to order a trustee's sale guaranty (TSG, see Glossary) from a title company. See step 23, below.

Encourage Vigorous Bidding

a. Make genuine efforts to encourage vigorous cash bidding at the trustee's sale:

- (1) Multiple bidding increases chances that foreclosing lender will be paid in full; and
- (2) Sale to cash bidder is much harder to set aside because the presumptions of procedural compliance created by trustee's deed recitals and CC §2924 are deemed conclusive regarding sale to a bona fide purchaser (see, e.g., *Melendrez v D e³ Inv., Inc.* (2005) 127 CA4th 1238, 26 CR3d 413), but merely prima facie regarding a purchasing beneficiary (therefore, a cash sale discourages postsale attacks).

b. Avoid improper bid-chilling behavior, such as:

- (1) Paying prospective bidders not to bid or entering into preforeclosure agreements for resale by lender (see CC §2924h(g));
- (2) Scheduling the sale at an inaccessible location; or
- (3) Repeatedly postponing the sale when cash bidders attend.

Document Borrower Misconduct

Make a record concerning any inequitable presale conduct by borrower to support an "unclean hands" defense in a later action to set aside the trustee's sale.

Example: If borrower abuses the bankruptcy laws with a bad-faith bankruptcy, seek appropriate findings of bad faith from the bankruptcy court. See Mortgage Deed of Trust Foreclosure §§11.24-11.27. See also step 14, above.

Ascertain Borrower's Financial Condition

a. Pay careful attention to borrower's financial condition.

b. Use any presale proceedings (e.g., a bankruptcy filing or state court action to enjoin) to gather financial information. This information can be used to develop lender's argument, when borrower challenges the trustee's sale, that borrower must "do equity" by tendering the amount of the debt concededly due. See *Karlson v American Sav. e³ Loan Ass'n* (1971) 15 CA3d 112, 117, 92 CR 851; *Crummer v Whitehead* (1964) 230 CA2d 264, 268, 40 CR 826.

Further Research: For further strategies to reduce lender's liability arising out of the trustee's sale, see Mortgage Deed of Trust Foreclosure §12.154.

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 21. DECIDE WHETHER TO SUBSTITUTE A NEW TRUSTEE

STEP 21. DECIDE WHETHER TO SUBSTITUTE A NEW TRUSTEE

LENDER'S POWER TO APPOINT NEW TRUSTEE

Beneficiary can designate a replacement trustee under:

- a. Terms of most deeds of trust; or
- b. Civil Code §2934a.

REASONS FOR REPLACEMENT

- a. Original trustee may be unwilling to handle the nonjudicial foreclosure, *e.g.*, if the default is nonmonetary in nature.
- b. Beneficiary may not want to pay the fees demanded by title company trustee.
- c. Beneficiary may feel more comfortable having an attorney or other individual serve as trustee.

WHY LENDERS USE PROFESSIONAL TRUSTEES

Usually, lenders use title companies or foreclosure specialists to handle nonjudicial foreclosure because:

- a. Professional trustee is more efficient and cost-effective than an attorney who is not familiar with the mechanics of trustee's sales;
- b. If foreclosing lender is the successful bidder at the trustee's sale, it is easier to obtain title insurance when the title company served as trustee; and
- c. Attorneys who are not familiar with the detailed notice and sale procedures prefer not to serve as trustees because of potential liability for errors.

Your Role

If client uses a nonattorney trustee, you should:

- a. Be familiar with all steps in trustee's sale process;
- b. Explain the process to client;
- c. Provide advice in making strategic decisions;
- d. Help client furnish necessary information and documents to trustee;
- e. Suggest that client engage an experienced foreclosure or title company to act as trustee for the entire process (*i.e.*, from sending notice of default to conducting sale and delivering deed); and
- f. Advise client to carefully document any substitution of trustee (see Note, below).

Further Research: See Mortgage Deed of Trust Foreclosure §§2.4-2.26.

WHEN TO SUBSTITUTE

Substituting trustee is best done before trustee records notice of default; additional notices must be given thereafter (see below).

HOW TO SUBSTITUTE

Choice of Procedures

- a. If deed of trust limits trustee's duties to those incidental to power of sale, you may effect substitution under *either*:
 - (1) Civil Code §2934a; or
 - (2) Terms of the deed of trust.
- b. If deed of trust imposes greater duties on trustee, substitution procedure in deed of trust may control.

Further Research: See CC §2934a; U.S. Hertz, Inc. v Niobrara Farms (1974) 41 CA3d 68, 83, 116 CR 44; Mortgage Deed of Trust Foreclosure §§2.21-2.23.

Statutory Procedure

Substitution of trustee is effected by recordation in the county recorder's office of a substitution document that:

- a. Is executed and acknowledged by all beneficiaries or their successors-in-interest (CC §2934a(a)(1)); and
- b. Contains (CC §2934a(a)(2)):
 - (1) Date the deed of trust was recorded;
 - (2) Name of trustor;
 - (3) Book and page where deed of trust is recorded (you will have to use the recorder's document number if the county no longer uses books and page numbers); and
 - (4) Name of new trustee.

If Substitution Made Before Notice of Default But Not Recorded

If the substitution of a new trustee is executed, but not recorded, before or concurrently with recordation of the notice of default (see step 25, below), help lender do the following (CC §2934a(b)):

- a. First, mail a copy of the substitution (before or concurrently with its recordation) to all persons entitled to receive a copy of the notice of default under CC §2924b (for more information, see step 25, below);
- b. Second, mail a copy of the substitution to the current trustee of record;
- c. Third, attach to the substitution an affidavit that notice has been given to all such persons, including the former trustee, in the manner required by statute; and
- d. Fourth, record the substitution.

If Substitution Made After Notice of Default

If lender wants to substitute a new trustee after the notice of default is recorded (see step 25, below), but before the notice of sale is recorded (see steps 22 and 26, below), help lender do the following (CC §2934a(c)):

- a. First, mail a copy of the substitution (before or concurrently with its recordation) to all persons entitled to receive a copy of the notice of default under CC §2924b (for more information, see step 25, below);
- b. Second, mail a copy of the substitution to the current trustee of record;
- c. Third, attach to the substitution an affidavit that notice has been given to all such persons, including the former trustee, in the manner required by statute; and
- d. Fourth, record the substitution.

When Substitution Is Effective

The trustee is deemed authorized to act on the date of execution of the substitution document, not the date of its recordation. CC §2934a(d).

After Notice of Sale

If lender needs to replace trustee after the notice of sale has been given, advise lender that:

- a. A new notice of sale (giving name, address, and phone number of new trustee) must be given in accordance with CC §2924f after execution of the substitution (CC §2934a(e));
- b. This probably will significantly delay the sale (see timing requirements in CC §2924f(b)(1)); but
- c. If new notice is not given, any sale conducted by substitute trustee is void (CC §2934a(e)).

NOTE

Lender should ascertain who is actual trustee of record before commencing foreclosure. No one other than trustee of record has authority to conduct the sale or deliver a valid trustee's deed. See Pro Value Props., Inc. v Quality Loan Serv. Corp. (2009) 170 CA4th

579, 88 CR3d 381; *Heritage Oaks Partners v First Am. Title Ins. Co.* (2007) 155 CA4th 339, 66 CR3d 510; *Mortgage Deed of Trust Foreclosure* §§2.21-2.26, 2.74, 2.98. But see *Jones v First Am. Title Ins. Co.* (2003) 107 CA4th 381, 131 CR2d 859 (trustee's sale mistakenly conducted by former trustee could be validated over trustor's objection through reformation, supportable in light of documented forbearance and consensual foreclosure).

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 22. PREPARE FORMAL DEMAND THAT TRUSTEE BEGIN FORECLOSURE

STEP 22. PREPARE FORMAL DEMAND THAT TRUSTEE BEGIN FORECLOSURE

CONTACT TRUSTEE

If client is using a title company or other corporate trustee, contact the company to determine what is needed to initiate the foreclosure process.

MAKE DEMAND

Prepare formal demand that trustee begin foreclosure in accordance with the deed of trust and the law:

- a. Some title company trustees provide a form to be completed by lender for this purpose;
- b. Otherwise, you can prepare a letter for your client's signature, requesting in accordance with terms of deed of trust that trustee begin the foreclosure process under the power of sale.

Furnish Documents

Forward to trustee the originals of note, any assignment of note, and deed of trust. For information on copies of note, see [step 2](#), above.

Effect of Not Furnishing Documents

Failure to forward original note and deed of trust to trustee does not render trustee's sale invalid. See [step 2](#), above; [Mortgage Deed of Trust Foreclosure §2.34](#).

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 23. UNDERSTAND TRUSTEE'S SALE GUARANTY (TSG)

STEP 23. UNDERSTAND TRUSTEE'S SALE GUARANTY (TSG)

WHEN OBTAINED

Trustee obtains a trustee's sale guaranty (TSG) from a title company before recordation of the notice of default; if trustee is a title company, it orders the policy from its own title department.

WHAT IT IS

TSG is an insurance policy for all persons designated as the "Assured" (typically, the beneficiary and the trustee).

Indemnifies Trustee and Beneficiary

Title company indemnifies assured parties against certain losses resulting from errors in assurances made in the policy.

Assurances

The assurances are made as of the date notice of default is recorded for certain matters reported in the public records, *e.g.*:

- a. How title to the real property is vested;
- b. Names and addresses of persons who have recorded requests for special notice;
- c. Names and addresses of persons entitled to receive copies of the notices of default and sale under CC §2924b(c);
- d. Names and addresses of any federal or state taxing agencies entitled to receive copies of the notice of sale;
- e. That the property is located in the city or judicial district stated in the TSG; and
- f. That the newspapers listed in the TSG qualify for publication of notice under CC §2924f.

Effect on Lender

If a problem arises, lender's recourse depends on its designation as an assured party under the TSG. If it is so designated, lender may tender directly. If not, lender's recourse is against the *trustee*, not the title company issuing the TSG; the trustee as the assured party under the TSG then looks to the title company.

DATE-DOWNS DEFINED

Title company provides trustee with supplements ("date-downs") that notify trustee of changes occurring after the date of the original TSG.

When Issued

Date-downs are generally issued immediately:

- a. Before recordation of notice of sale;
- b. After borrower files bankruptcy;
- c. After borrower's bankruptcy case is dismissed; and
- d. Before the trustee's sale.

NOTE

Some authorities recommend that trustee also obtain a date-down 31 days before the trustee's sale to search for IRS and state tax liens. See Mortgage Deed of Trust Foreclosure §2.31.

REVIEW TSG

Review the TSG and all date-downs to, among other things:

Notice to All Parties

Make sure that all persons and tax agencies entitled to receive notices of default and sale have been notified.

Bankruptcy

Ascertain whether any bankruptcies have been filed to prevent foreclosure. See 11 USC §362(a); *Kertesz v Ostrowsky* (2004) 115 CA4th 369, 8 CR3d 907 (discussing effects of automatic stay including tolling of statute of limitations for creditor actions); Mortgage Deed of Trust Foreclosure, chaps 7, 11.

Timing to Extinguish Junior Tax Liens

Determine if notice of sale must be given to tax authorities (see step 26, below) as result of the filing, more than 30 days before trustee's sale date, of a tax lien by:

- a. IRS (see IRC §7425); or
- b. State of California, for postponed property taxes under Senior Citizens and Disabled Citizens Property Tax Postponement Law (Rev & T C §§20581-20586).

NOTE

When you obtain your copy of the TSG, be sure it includes copies of the recorded documents reflected in the TSG.

Further Research: For a discussion of the TSG, see Title Ins, chap 9; Mortgage Deed of Trust Foreclosure §2.34.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 24. RESPOND TO REQUESTS FOR STATEMENT OF UNPAID BALANCE (CC §2943)

STEP 24. RESPOND TO REQUESTS FOR STATEMENT OF UNPAID BALANCE (CC §2943)

WHAT IT IS

Lender must provide certain persons (see below) with a "beneficiary statement" (see [Glossary](#)) showing (CC §2943(a)(2)):

- a. Unpaid balance of the loan;
- b. Interest rate;
- c. Total amounts of all overdue installments of principal and interest;
- d. Amount of the periodic payments;
- e. Date on which obligation is due, in whole or in part;
- f. Date to which real estate taxes and assessments have been paid, if known;
- g. Amount of hazard insurance and the premium, if known;
- h. Balance of any impound account for taxes and insurance;
- i. Nature and, if known, amount of any additional costs or expenses paid or incurred by the beneficiary that are secured by the lien; and
- j. Whether debtor can transfer the debt to a new borrower (*e.g.*, if a buyer of the property wants to assume the obligations of the loan rather than obtain new financing).

WHO IS ENTITLED TO RECEIVE IT

These parties are entitled to receive statement:

- a. Trustor;
- b. Trustor's successor in interest (*e.g.*, a buyer of the real property that is encumbered by the deed of trust);
- c. Junior encumbrancers, *i.e.*, anyone holding an *encumbrance* (*e.g.*, tax lien; see [Glossary](#)) of lower priority than your client's deed of trust;
- d. Beneficiary of any deed of trust encumbering the property; and
- e. Escrow agent in a transaction involving the property. [CC §2943\(a\)\(4\)](#).

WHEN TO REQUEST AND RESPOND

Request for Statement

Entitled persons may request the statement ([CC §2943\(b\)\(2\)](#)):

- a. Any time before notice of default is recorded;
- b. Within 2 months after notice of default is recorded; or
- c. No later than 31 days before entry of the foreclosure decree in judicial proceedings.

Lender's Response

Lender must mail or transmit a facsimile of the statement to the entitled person:

- a. Within 21 days after receipt of the written request ([CC §2943\(b\)\(1\)](#)); or
- b. If lender requests reasonable proof that requester is an entitled person, within 21 days after receipt of that proof ([CC §2943\(e\)\(3\)](#)).

HELP BENEFICIARY RESPOND

Request Fee

Require that requester pay the fee, if any, provided in your client's deed of trust, up to \$60. See [CC §2943\(e\)\(6\)](#).

Statement of Condition

- a. If entitled person specifically requests statement of condition, prepare it using payment information supplied by client or client's accountant;
- b. Send with the statement of condition:
 - (1) A copy of the note and any modifications of the note ([CC §2943\(b\)\(1\)](#)); and
 - (2) If specifically requested, a copy of the deed of trust ([CC §2943\(e\)\(2\)](#)).

Payoff Demand

- a. If the request does not specify type of statement desired, treat it as request for payoff demand. [CC §2943\(e\)\(1\)](#).
- b. Prepare payoff demand, setting forth ([CC §2943\(a\)\(5\)](#)):
 - (1) Amounts required to satisfy entire secured obligation (as of date of preparation of payoff; and
 - (2) Information reasonably necessary to calculate payoff amount on per diem basis for a period not to exceed 30 days.

NOTE

Lender is not required to furnish payoff demand if request is received after publication of notice of sale. [CC §2943\(c\)\(1\)](#).

- c. If requested by entitled person, send a copy of the deed of trust with the payoff demand. [CC §2943\(e\)\(2\)](#).

Amendments

Advise lender of importance of amending statement if circumstances change (for effect, see below).

Short-Pay Demand

Additional procedures exist for requesting and preparing a short-pay demand statement if lender has previously agreed in writing to accept a discounted payoff. [CC §2943\(c\)\(2\)](#). See [CC §2943\(a\)\(6\)-\(8\)](#). On short sales, see [Mortgage Deed of Trust Foreclosure §7.21A](#).

EXPLAIN EFFECT

Recipient's Reliance

- a. Recipient is entitled to rely on the statement of condition, payoff demand, or any amendment of either, in accordance with their terms ([CC §2943\(d\)\(1\)](#)); but
- b. Amounts omitted from such statements can be recovered from borrower as an unsecured obligation following the judicial or nonjudicial foreclosure sale ([CC §2943\(d\)\(3\)](#)); however, the recovery of such omitted amounts plus the escrow payoff may not exceed in the aggregate the value of the collateral at the time of the payoff. See [Ghirardo v Antonioli \(1996\) 14 C4th 39, 57 CR2d 687](#) (applying both [CCP §§726](#) and [580b](#)).

Penalties

Lender is liable to entitled person for actual damages and a penalty of \$300 for willful failure to provide a requested statement or payoff demand. [CC §2943\(e\)\(4\)](#).

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 25. MONITOR NOTICE OF DEFAULT

STEP 25. MONITOR NOTICE OF DEFAULT

CONTENTS OF NOTICE

WHEN REQUIRED

Before trustee can schedule a sale of the property, trustee, substituted trustee, or agent of beneficiary or trustee must record and distribute a notice of default. CC §§2924, 2924b.

Form

The notice must:

- a. Identify the deed of trust (CC §2924(a)(1)(A)):
 - (1) Name of original trustor; and
 - (2) Book and page, or instrument number, if applicable, of recordation or a description of the property;
- b. State that a breach of the secured obligation has occurred (CC §2924(a)(1)(B));
- c. Describe the nature of each breach actually known to beneficiary (see below) (CC §2924(a)(1)(C));
- d. State beneficiary's election to sell the property (CC §2924(a)(1)(C)); and
- e. If the default is curable (CC §§2924(a)(1)(D), 2924c(b)(1)):
 - (1) Include headings and warning language that property may be sold without court action;
 - (2) State amount due and reinstatement period;
 - (3) Name current beneficiary to enable trustor to ascertain amount owing or to arrange payment to stop foreclosure;
 - (4) Meet certain typeface requirements if printed (*i.e.*, type size and boldface type), *and* capitalization requirements if typed; and
 - (5) Be written in specified foreign language if the loan was subject to CC §1632 (*e.g.*, if the loan was primarily for personal, family, or household purposes as defined in CC §1632(b)(4) and lender and borrower negotiated the transaction primarily in that language).

Further Research: See form in Mortgage Deed of Trust Foreclosure §2.130.

NOTE

The notice of default is a strictly regulated document, and extreme care must be used in preparing your own version. See Miller v Cote (1982) 127 CA3d 888, 179 CR 753 (foreclosure sale enjoined for defective notice; under loan documents, breach of negative covenant was not by itself default but merely triggered lender's right to accelerate, and notice did not refer to failure to pay accelerated debt). Note that giving the notice of default and similar performance of statutory nonjudicial foreclosure procedures are privileged communications under CC §47(c)(1). Kachlon v Markowitz (2008) 168 CA4th 316, 85 CR3d 532 (substituted trustee not liable for performance of foreclosure procedures undertaken upon credible evidence and without malice). See Anolik v EMC Mortgage Corp. (ordered not published August 10, 2005; former opinion at 128 CA4th 1581, 28 CR3d 759 (illustrating how foreclosure based on erroneous notice of default may be attacked).

REVIEW DESCRIPTION OF BREACH

Be Complete

- a. Notice of default must describe nature of each breach actually known to beneficiary; but:
- b. Failure to include an actually known default does not:
 - (1) Invalidate a trustee's sale; or
 - (2) Preclude lender from claiming the omitted default in a separate notice of default (but this starts a separate notice and cure

period).

Further Research: CC §2924. See Mortgage Deed of Trust Foreclosure §§2.37-2.50.

NOTE

Before instructing trustee to prepare a subsequent notice of default to include omitted defaults, review CC §§2924 and 2924c and recent amendments to them. See Mortgage Deed of Trust Foreclosure, chap 2.

Be Inclusive

Make sure the notice states lender's election to sell the property to satisfy (CC §2924(a)):

- a. The specific defaults described in the notice; and
- b. "[A]ny other obligation; including taxes, insurance payments, and any payments due senior liens or leaseholds," which obligations are secured by the deed of trust that is in default.

Further Research: For the effect of the "any other obligation" language in the notice on (1) borrower's equity of redemption, see step 28, below; Mortgage Deed of Trust Foreclosure §2.73; and (2) borrower's reinstatement rights, see step 27, below; Mortgage Deed of Trust Foreclosure §2.58.

NOTE

With respect to defaults by reason of recurring obligations that fall due after recordation of the default notice, CC §2924c(a)(1) defines such obligations and, as a condition to reinstatement, permits lender to require reimbursement for such advances or proof of payment by borrower.

Be Accurate and Certain

Description should be broad but certain:

- a. General description (*e.g.*, "Failure to pay January installment") can be adequate (see Engelbertson v Loan c³ Bldg. Ass'n (1936) 6 C2d 477, 478, 58 P2d 647);
- b. Too much detail is risky because lender cannot reject borrower's tender of a cure that complies with precise description, even if inaccurate (see Tomczak v Ortega (1966) 240 CA2d 902, 903, 50 CR 20); but
- c. If notice *inadequately* describes the default, lender cannot:
 - (1) Require that the default be cured as a condition to reinstating the loan; or
 - (2) Rely on it as basis for trustee's sale. See System Inv. Corp. v Union Bank (1971) 21 CA3d 137, 152, 98 CR 735.

Further Research: See Mortgage Deed of Trust Foreclosure §§2.38, 10.11.

CONSIDER NATURE OF BREACH

Failure to Pay Installments When Due

Borrower's failure to pay installment of principal and interest on time is generally a material breach, *but*:

- a. Don't record notice of default on basis of minor delay (for monetary default, see step 3, above); and
- b. Make sure lender has not waived strict performance by course of conduct (see step 4, above).

Failure to Pay Third Parties

a. Deed of trust generally requires borrower to:

- (1) Maintain hazard insurance;
- (2) Keep real property taxes current; and
- (3) Remain current on any senior encumbrances.

b. These covenants are part of the secured obligation.

c. If borrower fails to perform the covenants, the typical deed of trust and CC §§2876, 2924c, and 2924.7 allow lender to:

- (1) Make the payments to protect the security; and

- (2) Add these sums to the debt owed by borrower; and/or
- (3) Declare a default, accelerate all payments, and foreclose.

NOTE

Remember, however, that judges are often hostile to lenders' use of extraordinary remedies when their security is not materially impaired or at risk. See, *e.g.*, *Schoolcraft v Ross* (1978) 81 CA3d 75, 146 CR 57; Mortgage Deed of Trust Foreclosure §§10.76, 12.18, 12.142.

Advise Lender to Weigh Advancing Funds

a. If, after the notice of default is recorded, borrower defaults on:

- (1) Loan payments on a senior mortgage; or
- (2) Any other recurring obligation to a third party;

b. Your lender-client may:

- (1) Advance funds necessary to cure such default; or
- (2) Require instead that borrower provide reliable written evidence that such recurring obligations have been paid before reinstatement. See CC §2924c(a)(1).

Unauthorized Transfer of Property

a. Under a "due-on" clause, lender has the right to accelerate the obligation if borrower transfers title or other interest in the property to a third party without lender's consent.

b. If lender wishes to foreclose for a violation of a due-on-sale or due-on-transfer clause, make sure that:

- (1) The clause is enforceable (see below);
- (2) Lender first accelerates the debt in accordance with the terms of the note and deed of trust; and
- (3) The notice of default describes the breach as:
 - (a) Nonpayment of the loan balance after demand.
 - (b) *Not* the transfer itself.

Further Research: See *Miller v Cote* (1982) 127 CA3d 888, 179 CR 753; Mortgage Deed of Trust Foreclosure, chap 8.

REVIEW ENFORCEABILITY OF "DUE-ON" CLAUSES

Federal Preemption

Federal law preempts state-law enforcement of due-on-sale clauses. See Garn-St. Germain Depository Institutions Act of 1982 (12 USC §1701j-3); 12 CFR pts 556, 590-591; *Fidelity Fed. Sav. & Loan Ass'n v de la Cuesta* (1982) 458 US 141, 73 L Ed 2d 664, 102 S Ct 3014.

Due-on-Sale Generally Enforceable

Lender may enforce a due-on-sale clause according to its terms, *except* in specific situations on residential loans (for home mortgage exceptions, see below). See 12 CFR §591.5(b).

Due-on-Encumbrance Clause

On the effect of federal preemption on nonfederally insured lenders and *due-on-encumbrance clauses* (see Glossary), see Mortgage Deed of Trust Foreclosure §§8.11, 8.15.

Home Mortgage Exceptions

Lender may *not* enforce due-on-transfer clause in loan secured by owner-occupied home in the following situations (12 CFR §591.5(b)(1)):

- a. Borrower allows subordinate lien to encumber title (*e.g.*, borrower takes out another mortgage or incurs a tax lien);
- b. Transfer on death of a joint tenant;

- c. Borrower leases out all or part of the property for term of 3 years or less, without giving the lessee an option to purchase;
- d. Certain intrafamily transfers where transferee is or will be occupying the property; or
- e. Transfer into a living trust in which borrower remains the occupant of the property.

California Restrictions

The restrictions in CC §2924.6 (similar to those listed above) are enforceable to the extent that they are not inconsistent with federal law. See Mortgage Deed of Trust Foreclosure §8.18.

RECORDATION AND MAILING

REVIEW RECORDING REQUIREMENTS

When

Record notice of default after reviewing all contractual provisions in loan documents, especially notice and cure provisions, and any other evidence in the loan file that lender has extended the time for performance (see step 4, above). For planning purposes, calendar dates such that the notice of default will precede the notice of sale by no less than 3 months (see step 26, below).

NOTE

For specified "window period" loans on owner-occupied residential property with no more than four dwelling units, CC §2923.5, effective September 6, 2008, and sunseting on January 1, 2013, prohibits a foreclosing party from recording a notice of default until 30 days after contacting the borrower in order to "assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." The statute sets forth specific methods of contact, information to be delivered, and alternatives to satisfy lender's diligence requirements in the event the borrower cannot be contacted. See Mortgage Deed of Trust Foreclosure §§2.37, 2.49.

Where

Trustee must record the notice of default in the county recorder's office of the county where the property is located. CC §2924.

Who

Trustee, substituted trustee, or agent for beneficiary or trustee. CC §2924b(b)(4).

REVIEW MAILING REQUIREMENTS

Method

- a. Mailings must be done by registered or certified mail, postage prepaid (CC §§2924b(b)(1), (c)(1)); and
- b. An extra copy of the notice must be mailed to trustor by simple, first-class mail, postage prepaid (CC §2924b(e)).

Within 10 Days After Recordation

Trustee or beneficiary must mail copy of the notice of default (showing date of recordation) to:

- a. Each person specified in a recorded request for notice (CC §2924b(b)(1)) (see request procedure in CC §2924b(a)); and
- b. Each trustor specified in your client's deed of trust (CC §2924b(b)(1)), addressed to:

- (1) The address specified in the deed of trust; or
- (2) The trustor's "last known address," if different; and

c. Any person specified in a request for notice set forth in your client's deed of trust (CC §2924b(d)) (see publication or post-and-mail procedure if mailing address is not specified).

NOTE

Under CC §2924b(b)(3), the trustor's "last known address" is the "last business or residence physical address actually known" by the mortgagee, beneficiary, trustee, or other person authorized to record the notice of default. The beneficiary must inform the trustee if it actually knows the trustor's last address. An address is "actually known" if it is in the original deed of trust or in any subsequent *written* notification of a change of *physical* address. E-mail addresses are insufficient forms of giving notice of default.

Actual Knowledge Exception

When trustee had actual knowledge that trustor had died and public administrator was appointed, notice was held defective when mailed to property address and trustor's business address, but not office of public administrator. Estate of Yates v West End Fin. Corp. (1994) 25 CA4th 511, 32 CR2d 53 (\$100,000 equity in property sold for \$5000; professional foreclosure bidder and subsequent purchaser not BFPs).

Consider Extra Steps

- a. Prudent lenders go beyond the requirements of CC §2924b, *e.g.*, sending the notice to all possible addresses of trustor and notifying guarantors and others possibly affected, even if they haven't recorded requests for notice.
- b. However, be aware that one case decided before 2005 revision of CC §2924b held that a lender who does that is estopped to fall back on the lower statutory standards in later proceedings on the same deed of trust. See Lupertino v Carbabal (1973) 35 CA3d 742, 748, 111 CR 112.

Within 1 Month After Recordation

Trustee or beneficiary must mail copy of the notice (showing date of recordation) to following persons (if ascertainable from recorded instruments as of date notice of default recorded) (CC §2924b(c)(2)(A)-(F)):

- a. Successor-in-interest to the trustor;
- b. Beneficiary of any deed of trust recorded after or subordinated to your client's deed of trust (see definition of *subordination* in the Glossary);
- c. Assignee of any beneficial interest in such junior deeds of trust;
- d. Vendee of any installment land sale contract recorded after or subordinated to your client's deed of trust;
- e. Lessee of any lease recorded after or subordinated to your client's deed of trust;
- f. Successor-in-interest to such vendee or lessee; and
- g. State Controller, if lien has been filed for postponed property taxes (see step 26, below).

Identify Trustor's Last Known Address

Advise lender to check its records and notify trustee of last known address of trustor because:

- a. Notice must be sent to trustor at "last business or residence physical address actually known" by the beneficiary or trustee. An address is "actually known" if it is in the original deed of trust or mortgage or in any subsequent written notification of a change of address. Physical address does not include the trustor's e-mail or other electronic address (CC §2924b(b)(3)), but:
 - b. Trustee:
 - (1) Generally mails copies of the notice to the addresses of record shown in TSG (see step 23, above);
 - (2) Is not liable for failing to send notice to a physical address of which he or she has no actual knowledge (see CC §2924b(b)(3)); and
 - (3) Has no common law duty to take reasonable steps to provide *actual* notice of foreclosure to trustor. See I.E. Assocs. v Safeco Title Ins. Co. (1985) 39 C3d 281, 287, 216 CR 438.

Further Research: See Mortgage Deed of Trust Foreclosure §§2.42-2.50.

UNRUH ACT NOTICE FOR CONSUMER DEBTOR

WHEN REQUIRED

Notice is required 30 days after recordation of notice of default under a deed of trust that (CC §2924f(c)):

- a. Encumbers real property containing a single-family, owner-occupied residence; and
- b. Secures an obligation in a contract for goods or services under the Unruh Act (CC §§1801-1812.20).

WHAT TO DO

If borrower has not corrected the default within 30 days after notice of default was recorded, make sure trustee sends borrower the additional short notice required by CC §2924f(c)(3).

Further Research: See Mortgage Deed of Trust Foreclosure §§2.48, 2.97, 2.132.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 26. MONITOR THE NOTICE OF SALE

STEP 26. MONITOR THE NOTICE OF SALE

WHEN TO SET DATE FOR SALE

The trustee's sale must be set for a date no earlier than:

- a. 3 months (CC §2924(a)(2)) *after* recordation of notice of default (see step 25, above); *plus*
- b. 20 days (CC §2924f(b)(1)) *after* recordation of notice of sale.

Allow 31 Days

Make sure the sale is scheduled at least 31 days after recordation of the notice of sale, not just the 20 days required by CC §2924f.

Why You Allow 31 Days

Unless written notice of sale is given to the taxing authority at least 25 days before the trustee's sale, the following tax liens will *not* be extinguished by the sale:

- a. Federal tax liens filed more than 30 days before the sale date (IRC §7425); and
- b. A lien by State of California for postponed property taxes under the Senior Citizens and Disabled Citizens Property Tax Postponement Law (Rev & T C §§20581-20586) that is recorded (Govt C §16187):

- (1) After the notice of default; but
- (2) At least 30 days before the sale.

NOTE

Under amended CC §2924b(c)(4), failure to provide the IRS with a copy of the sale notice (which failure results in the tax lien surviving foreclosure) is grounds for rescinding the sale and invalidating the deed at the election of the trustee or the successful bidder, in either case with the consent of the beneficiary. Rescission must be exercised before the successful bidder transfers title to a bona fide purchaser (BFP) for value. Even if timely notice is given to the IRS, the property will still be subject to redemption by the IRS for 120 days following the sale. See step 33, below.

CALENDAR STEPS ON TAX LIENS

Timing is tight if the tax liens were filed after the last TSG date-down (usually the date notice of default recorded):

Date-Down of TSG

Make sure trustee obtains another date-down of the TSG (see steps 20 and 23, above) to identify any tax liens filed as of 31 days before the sale date.

Send Notice

If new tax liens *were* filed more than 30 days before the sale date, make sure trustee sends notice of sale to appropriate authority (IRS or State Controller) not less than 25 days before the sale.

NOTE

Title company must act quickly to get the information to trustee in time for trustee to send out the notices; calendar the dates so you can monitor the process.

Further Research: See generally Mortgage Deed of Trust Foreclosure §§2.31, 2.62.

TEMPORARY MORATORIUM ON RESIDENTIAL SALES

For specified "window period" first-priority loans on owner-occupied residential property, CC §2923.52, effective June 15, 2009, adds 90 days to the 3-month minimum period between the notice of default and the notice of trustee sale; however, this additional 90-day waiting period will not apply under circumstances described in CC §2923.55. Under CC §2923.53, lenders may obtain exemptions from this 90-day waiting period by registering compliant loan modification programs under California Corporations Commissioner guidelines that do not specifically require modifications to be granted. Pursuant to CC §2923.54, notices of trustee

sale covered by these statutes must contain additional declarations regarding compliance or exemption. The moratorium expires on January 1, 2011. See Mortgage Deed of Trust Foreclosure §§2.62A-2.62C, discussing details of California Foreclosure Prevention Act (CFPA) (CC §§2923.52-2923.55, 2924).

CONTENTS OF NOTICE

WHAT TO INCLUDE

Trustee must advertise the trustee's sale by a prescribed notice of sale (CC §§2924, 2924f(b), 2924h) that includes (CC §2924f(b)(1)):

Time

Date and time of sale (for time of sale, see step 30, below).

Place

Street address and specific location of sale (for place of sale, see step 30, below).

Trustee

Name, street address, and telephone number of trustee.

Trustor

Name of original trustor.

Warning

Specific warning (in CC §2924f(c)(3)) that debtor's property will be sold at auction if debtor does not take action, but this applies only to specified consumer loans on residential property.

Property

a. Description of the property that will be sold, by (CC §2924f(b)(1)):

- (1) Street address or other common designation; and
- (2) County Assessor's parcel number.

b. If the property lacks street address or other common designation, the notice must contain (CC §2924f(b)(1)):

- (1) Legal description of property;
- (2) Current beneficiary's name and address; and
- (3) Statement that directions may be obtained by written request to beneficiary within 10 days after first publication of the notice.

c. If a unified sale of real and personal property will be held, a description of the personal property to be foreclosed, copied from the security agreement or financing statement. CC §2924f(b)(2).

NOTE

Always include the County Assessor's parcel number, because an accurate parcel number will cure defects in the property's street address or common description or beneficiary's address or directions.

Unpaid Balance

Notice of sale should also include (CC §2924f(b)(1)):

- a. Total unpaid balance of the secured obligation; and
- b. Reasonable estimate of costs, expenses, and advances, as of date of initial publication of the notice of sale.

NOTE

Trustee is not liable for good-faith errors in stating the amount, and such errors do not affect validity of a sale to a bona fide purchaser (BFP) for value. See CC §2924f(b)(1).

Republication

If new notice is being given because winning bidder at original sale canceled his or her payment check, that fact must be included in the notice. CC §2924h(d).

Payment Form

If beneficiary will accept payment by cash equivalent other than cashier's check, that should be specified. See CC §2924h(b).

Further Research: See Mortgage Deed of Trust Foreclosure §2.63.

CONSIDER INCLUDING NOTICE OF MATERIAL FACTS

If lender has knowledge of facts materially affecting the property's value (*e.g.*, unstable soil conditions), consider attaching to the notice of sale a statement:

- a. Briefly describing the matters that might be material; and
- b. Inviting prospective bidders to inspect the pertinent reports or other materials at lender's or trustee's office (involve trustor; weigh disclosures and their timing carefully).

Further Research: On lender's duty of disclosure to prospective bidders, see step 30, below; Mortgage Deed of Trust Foreclosure §§2.77, 12.81-12.107.

RECORDATION, MAILING, PUBLISHING, AND POSTING THE NOTICE OF SALE

WHEN TO RECORD NOTICE OF SALE

No later than 20 days before the sale, trustee must record the notice in the recorder's office of the county in which the property (or a portion of it) is located. The notice must be set in a typeface no smaller than that specified in Govt C §6043. CC §2924f(b)(1).

HOW TO MAIL

No later than 20 days before the sale, trustee must send a copy of the notice of sale by registered or certified mail to:

- a. Trustor (CC §2924b(b)(2)) at trustor's last known address (for how to identify last known address, see step 25, above);
- b. Each person who has recorded a request for such notice (CC §2924b(b)(2));
- c. Persons and entities described in CC §2924b(c)(1)-(4) (see CC §2924b(c)(3); see also step 25, above); and
- d. Sacramento office of any state taxing agency that recorded a notice of tax lien before the notice of default was recorded (CC §2924b(c)(3)).

NOTE

Civil Code §2924f prescribes the minimum number of days before the sale for serving the notice of sale; however, earlier notice to the borrower has been held not to violate strict-compliance requirements. See, *e.g.*, Knapp v Doherty (2004) 123 CA4th 76, 20 CR3d 1 (finding notice was served 9 days prematurely, but declining to set aside sale in absence of prejudice to trustor).

HOW TO PUBLISH

A copy of the notice of sale must be published (CC §2924f(b)(1)):

When

Once a week for 3 consecutive calendar weeks, the first publication to be at least 20 days before the date of sale.

Where

In a newspaper of general circulation published in the city (or if the property is not located in a city, in the judicial district or county) in which the property or some part of it is located.

HOW TO POST

Trustee must post a copy of the notice (CC §2924f(b)(1)):

When

At least 20 days before the sale.

Public Place

In a "public place" (*e.g.*, a courthouse notice board) in the city or, if property is not located in a city, then in the judicial district where the property will be sold.

On the Property

a. If property to be sold is a single-family residence, then:

- (1) On its front door; or
- (2) If access to front door is impeded, then on the common entrance or guard gate to the development; or
- (3) If access to entrance is impeded, then in a conspicuous place on the property; or

b. If property to be sold is not a single-family residence, then in a conspicuous place on the property.

ADDITIONAL NOTICE TO RESIDENTIAL TENANTS

Civil Code §2924.8, effective September 8, 2008, requires posting and mailing of an additional notice to tenants of residential real property, including notice that the tenants cannot be evicted in less than 60 days. See step 49, below. See also Mortgage Deed of Trust Foreclosure §2.68.

HOW TO DOCUMENT THE POSTING

Declaration

Instruct trustee to have the person posting the notice of sale execute a declaration under penalty of perjury to establish compliance with statutory requirements.

Photograph

Also recommend that trustee photograph the posted notice to defeat any later claim that the notice was not posted or that the posting did not comply with statutory requirements.

NOTE

Failure to post the notice will not affect the validity of a sale to a bona fide purchaser (BFP) for value. CC §2924f(b)(1).

Further Research: On recordation, publication, and service of the notice of sale, see Mortgage Deed of Trust Foreclosure §§2.64-2.71.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 27. PREPARE TO RESPOND TO OFFERS TO REINSTATE THE OBLIGATION

STEP 27. PREPARE TO RESPOND TO OFFERS TO REINSTATE THE OBLIGATION

WHAT IT IS

During a limited time after lender begins either a nonjudicial or judicial foreclosure, a monetary default can be cured, regardless of whether lender has declared an acceleration of the obligation, and (CC §2924c(a)(1)):

- a. The obligation then remains in full force and effect as if the default had not occurred; and
- b. Lender must dismiss or discontinue all proceedings to foreclose the obligation.

WHEN IT MAY BE REINSTATED

Obligation may be reinstated:

- a. At any time before the trustee sale by agreement of lender and borrower (Bank of America v La Jolla Group (2005) 129 CA4th 706, 28 CR3d 825); or
- b. Under CC §2924c(e), after notice of default is recorded and until *5 business* days before:
 - (1) Trustee sale; or
 - (2) Judgment of foreclosure if a judicial foreclosure (see steps 34-44, below).

NOTE

Be careful when calculating the *5 business* days to include Saturdays, and exclude Sundays and holidays. CC §9. Holidays will include optional bank holidays under CC §7.1 if reinstatement must be accomplished by, at, or through a bank. CC §9.

If Sale Postponed

If a trustee's sale is postponed for more than *5 business* days, the reinstatement period is automatically revived and borrower may reinstate up to *5 business* days before the new sale date. CC §2924c(e).

WHO MAY REINSTATE

Under CC §2924c(a)(1), these parties may reinstate:

- a. Trustor;
- b. Successor-in-interest to the trustor; or
- c. Beneficiary of any junior deed of trust or encumbrance.

HOW REINSTATED

Amount to Reinstale

Party pays or offers to pay to the beneficiary (CC §2924c(a)(1)):

- a. Defaults described in the notice of default (CC §2924c(a)(1)(A));
- b. Defaults on recurring obligations that were not included in the notice of default (CC §2924c(a)(1)(B));
- c. Reasonable costs and expenses actually incurred by lender in the foreclosure proceeding as provided by statute (CC §2924c(a)(1)(C), (c));
- d. Trustee or attorney fees provided by statute, if authorized in the loan documents (CC §2924c(d)); see Bruntz v Alfaro (1989) 212 CA3d 411, 422, 260 CR 488 (statutory limit applies to judicial foreclosure also)); and
- e. If provided in the security instrument, other costs and expenses, in addition to those provided in the statute, such as amount expended on attorney fees to protect the security in a bankruptcy action but not in the foreclosure action (see Pasani v Merit-McBride Realtors, Inc. (1987) 190 CA3d 1496, 1512, 236 CR 59; 4 Miller & Starr §10:191).

NOTE

Be aware of CC §§1501, 2076, the purpose of which is to allow a borrower who is willing and able to pay the debt to know the demands of the lender so that the borrower makes a conforming tender. McElroy v Chase Manhattan Mortgage Corp. (2005) 134 CA4th 388, 394, 36 CR3d 176.

Method of Payment

Reinstatement amount must be paid with legal tender or negotiable instrument. Lender's failure to object will not rehabilitate borrower's tender of a worthless instrument. McElroy v Chase Manhattan Mortgage Corp., supra.

NOTE

The loan may also be reinstated through lender's receipt of proceeds from another portion of the collateral (*e.g.*, personal property foreclosure or draw under letter of credit) or through a receiver's collection of enough net rents. See, *e.g.*, Maggiore v Palo Alto Inn, Inc. (1967) 249 CA2d 706, 57 CR 787; Mortgage Deed of Trust Foreclosure §6.45.

Partial Payment

Advise lender clients not to accept partial payments unless the borrower has been clearly advised in writing that partial payments will not waive the default. Compare Tully v World Sav. & Loan Ass'n (1997) 56 CA4th 654, 65 CR2d 545, with Melendrez v D & I Inv., Inc. (2005) 127 CA4th 1238, 26 CR3d 413.

IF REQUESTED, EXECUTE AND RECORD NOTICE OF RESCISSION

If the person reinstating the obligation requests it, execute and record a notice that the declaration of default has been rescinded. CC §2924c(a)(2).

Further Research: On reinstatement, see Mortgage Deed of Trust Foreclosure §§2.51-2.61, 2.72, 8.84.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 28. ANTICIPATE THAT BORROWER OR OTHERS MAY EXERCISE THEIR EQUITY OF REDEMPTION RIGHTS

STEP 28. ANTICIPATE THAT BORROWER OR OTHERS MAY EXERCISE THEIR EQUITY OF REDEMPTION RIGHTS

WHAT IT IS

Before the foreclosure sale, a party (*e.g.*, borrower or other interested parties) may pay all of the obligation and extinguish the lien. [CC §§2903-2906](#).

NOTE

This right is often called the "equity of redemption" to distinguish it from the statutory right of redemption *after a judicial* foreclosure sale. See [step 44](#), below.

WHEN TO REDEEM

Party may redeem ([CC §2903](#)):

- a. After the obligation becomes due; and
- b. Before the foreclosure sale.

WHO MAY REDEEM

These parties may redeem:

- a. Trustor;
- b. Successor-in-interest to the trustor;
- c. Any other person with an interest in the property, including junior lienholders, *and* judgment lien creditors ([CC §§2903-2904](#)).

HOW REDEEMED

Party pays or offers to pay to lender (see [CC §2905](#)), *e.g.*:

- a. Principal balance due;
- b. Accrued interest to the date of redemption;
- c. Foreclosure costs;
- d. Late charges;
- e. Prepayment penalties; and
- f. Trustee's and attorney fees incurred.

Further Research: On borrower's and junior lienholders' equity of redemption, see [Mortgage Deed of Trust Foreclosure §§2.73, 8.85](#).

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 29. EXPECT POSTPONEMENTS OF TRUSTEE'S SALE

STEP 29. EXPECT POSTPONEMENTS OF TRUSTEE'S SALE

WHO MAY POSTPONE SALE

Trustee or Lender

The sale may be postponed any time before the sale is completed:

- a. At trustee's discretion; or
- b. On lender's instructions.

Further Research: See CC §2924g(c)(1); on exercise of trustee's discretion, see Mortgage Deed of Trust Foreclosure §2.88.

NOTE

The former right of trustor to a 1-day postponement was repealed (1992 amendment to CC §2924g(c)(1)).

Other Postponements

Trustee must postpone the sale (CC §2924g(c)(1)):

- a. On mutual agreement, whether oral or written, between lender and borrower;
- b. When stayed by operation of law; or
- c. On order by a court having jurisdiction.

HOW TO POSTPONE SALE

Trustee may either give a new notice of sale in writing (CC §2924c(e)) or, at the time and location last announced for the sale, trustee may publicly announce (CC §2924g(d)):

- a. The postponement;
- b. The reason; and
- c. New time, date, and place of sale.

EFFECT ON REINSTATEMENT

If New Notice of Sale

Borrower's reinstatement right (see step 27, above) is automatically revived when new notice of sale is given, and borrower may reinstate until 5 *business* days before new sale date. CC §2924c(e).

If Notice of Postponement

Borrower's reinstatement right is not revived if notice of postponement (see CC §2924g(d)) is announced at time and place of scheduled sale and postponement period is not greater than 5 *business* days. CC §2924c(e).

WAITING PERIOD

Unless a court orders otherwise, trustee must wait 7 calendar days after dismissal of action, or expiration or termination of injunction, order, or stay that triggered postponement (see CC §2924g(d)), except in bankruptcy actions, which usually have 10-day waiting period (see Note, below).

WHEN NEW NOTICE IS NOT REQUIRED

If Court Dismisses Bankruptcy Before Sale Postponed

Renotice is clearly not necessary when, after receiving initial foreclosure sale notice, borrower files bankruptcy action that is dismissed before originally scheduled sale date (see *Carl I. Brown e3 Co. v Anderson (In re Anderson)* (BAP 9th Cir 1996) 195 BR 87).

If Trustee Follows California Notice Statutes

Under California law, trustee may orally postpone a sale for successive periods of 5 *business* days or less (adding up to many months) while the stay is in effect without having to give new notice. See CC §2924g(d); Hicks v E.T. Legg & Assoc. (2001) 89 CA4th 496, 108 CR2d 10.

WHEN NEW NOTICE MAY BE REQUIRED

After Court Grants Relief From Stay or Dismisses Bankruptcy

- a. Two bankruptcy trial courts held that federal law requires a lender to renotify a postponed trustee's sale after obtaining relief from the automatic bankruptcy stay (see *Tome v Baer (In re Tome)* (CD Cal 1990) 113 BR 626) or after dismissal of the bankruptcy case (see *In re Acosta* (D Ariz 1995) 181 BR 477).
- b. Most other published opinions, however, have ruled that no federal authority mandates renoticing the sale following stay relief or case dismissal. See authorities cited in *Nghiem v Ghazvini (In re Nghiem)* (BAP 9th Cir 2001) 264 BR 557, aff'd (9th Cir 2002) 53 Fed Appx 489 (unpublished opinion; see 9th Cir R 36-3; opinion may not be cited as precedent) (held neither federal nor California law requires additional notice beyond oral postponements given at time of prior noticed or postponed sale).
- c. Until the Ninth Circuit settles this issue, counsel should advise lender of the possibility that a bankruptcy court might set aside a foreclosure sale if a new notice of sale is not given after lender obtains relief from stay to conduct a sale that was postponed during the bankruptcy. For further discussion, see Mortgage Deed of Trust Foreclosure §§2.94, 7.108.

NOTE

Unless bankruptcy court orders otherwise, an order granting stay relief does not become effective until 14 days after its entry, under Fed R Bankr P 4001(a)(3). If a case is dismissed, the automatic stay expires immediately. A judgment on dismissal is effective when entered. See Fed R Bankr P 9021. In bankruptcy cases, the 7-day waiting period under CC §2924g(d) does not apply. See CC §2924g(e).

WHEN NEW NOTICE IS REQUIRED

New notice of sale must be given if the sale is postponed for a period or periods totaling more than 365 days. CC §2924g(c)(2).

NOTICE REQUIRED FOR TAXING AUTHORITIES

- a. Oral announcement in accordance with CC §2924g(d) (see above) is sufficient to notify IRS and State Controller of the postponement; but
- b. A *written* notice of the new sale date must be given, at least 25 days before the sale *if* trustee originally did not provide notice of sale because the tax lien was filed 30 days or less before original sale date (for when to set date for sale, see step 26, above).

Effect of Failure to Notify

If the taxing authority (IRS or State Controller) is not given timely written notice, the tax lien will not be extinguished by the sale. See Mortgage Deed of Trust Foreclosure §§2.13, 2.40. See also step 26, above.

Further Research: On postponements and rescheduling trustee sale, see Mortgage Deed of Trust Foreclosure §§2.88-2.96, 7.108; Bernhardt, *The Editor's Take*, 24 CEB Real Prop L Rep 195 (July 2001). See also Residential Capital, LLC v Cal-Western Reconveyance Corp. (2003) 108 CA4th 807, 134 CR2d 162 (trustee properly refused to deliver deed to prevailing bidder when trustee learned that beneficiary and trustor had previously agreed to postpone sale; bidder had no cause of action other than for refund of bid amount with interest).

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 30. PREPARE FOR THE TRUSTEE'S SALE

STEP 30. PREPARE FOR THE TRUSTEE'S SALE

CHECK SALE ARRANGEMENTS

Check the trustee's sale arrangements for statutory compliance:

Place of Sale

Trustee may conduct the sale only at the place specified in the notice of sale, which must be in the county where the property or some part of it is located. CC §2924g(a).

NOTE

If the property straddles counties, but secures an obligation subject to the Unruh Act (see step 25, above), the sale must be held in the county in which the residence is located. CC §2924f(c)(4).

Time of Sale

Sale may occur only at the time and location specified in the notice of sale (or in an announcement of postponement (see step 29, above)), which must be:

- a. Between 9 a.m. and 5 p.m. on any business day, Monday through Friday (CC §2924g(a)); and
- b. No sooner than:
 - (1) 20 days after mailing the notice of sale (for how to mail, see step 26, above); and
 - (2) 20 days after recordation of the notice (for when to record notice of sale, see step 26, above).

NOTE

Review CC §§2924, 2924b(b), 2924f(b)(1). For when to set date for sale, see step 26, above.

EXPLAIN SALE PROCEDURES TO CLIENT

Explain to your client that the trustee conducts the sale as a public auction with the property going to highest bidder. See CC §2924g(a). Stress that lender's attendance and presale preparation is crucial.

Bidding Rules

See CC §2924h; for payment requirements, see below.

If Multiple Parcels

Deed of trust usually authorizes trustee to determine the order of sale. See CC §2924g(b).

If Security Is Single-Family Home

Extra requirements apply if the property is a single-family, owner-occupied home securing a consumer debt subject to Unruh Act (CC §§1801-1812.20). See CC §2924f(c).

Further Research: On trustee's sale procedures, see Mortgage Deed of Trust Foreclosure §§2.74-2.99.

COMPLY WITH DISCLOSURE DUTIES

IF LENDER KNOWS OF DEFECTS IN THE PROPERTY

What to Disclose

Lender must disclose to prospective bidders at the trustee's sale all facts that:

- a. Are known to lender and not known or reasonably discoverable by a buyer; and

b. Have a significant and measurable effect on the value of the property. *Karoutas v HomeFed Bank* (1991) 232 CA3d 767, 771, 775, 283 CR 809 (discussed below); compare *Karoutas* with *Somerset S. Props., Inc. v American Title Ins. Co.* (SD Cal 1994) 873 F Supp 355 (foreclosure sale purchaser sued beneficiary and captive trustee over employee's misrepresentation that deed of trust was second rather than fourth; title insurer denied coverage).

Further Research: On disclosing material property defects, see *Mortgage Deed of Trust Foreclosure §§2.77, 12.132-12.151; Handling Real Property Sales Transactions, steps 5-6* (Cal CEB Action Guide March 2009).

When Disclosure Duty Applies

The *Karoutas* case involved nonjudicial foreclosure sale of a single-family residence with serious soil subsidence at which lender actively bid to drive up the price; however, the court's rationale could apply to commercial property and to judicial foreclosure.

Inspection Probably Not Required

Whether lender has a duty to *inspect* the property for defects was not decided in *Karoutas*, but seems unlikely. See 232 CA3d at 771.

HELP CLIENT MAKE REQUIRED DISCLOSURES

Help client comply with disclosure duty (*Karoutas* opinion did not address how to make the disclosures), *e.g.*, see Brody, *Drafting in Response to Recent Developments, (E) Karoutas and Lender's Disclosures*, Emerging Issues in Foreclosures, Guaranties, and Other Remedies 235, 252 (Cal CEB Program Handbook Jan. 1996).

Make Materials Available

Weigh making written disclosure materials and consultant reports available for inspection at client's or trustee's offices and attaching notice of that fact to the notice of sale (see [step 26](#), above).

Have Bidders Sign Acknowledgment

Attempt to collect bidders' signatures to statement acknowledging their opportunity to review the materials and the adequacy of the disclosures.

Have Trustee Announce at Sale

Instruct trustee to announce the nature and availability of the materials at the sale.

NOTE

Keep in mind that an inaccurate or heavy-handed disclosure of "defects" might be characterized as an effort to discourage cash bidding in a later action to set aside the trustee's sale. For information on bidding, see [step 20](#), above. Some protection against an allegation of bid-chilling is afforded by [CC §2924h\(g\)](#), stating that it is not unlawful to announce that foreclosure property is being sold "as is," but [§2924h\(g\)](#) is a narrow harbor and cannot be relied on as an alternative to proper disclosure.

Postpone Sale

If all bidders have not had ample opportunity to review the materials, postpone the sale for a reasonable time, *e.g.*, 10 days. For information on postponements, see [step 29](#), above.

HELP CLIENT PLAN BIDDING STRATEGY

EXPLAIN PAYMENT REQUIREMENTS

Before starting the bidding, trustee may require all bidders (except the foreclosing lender to the extent of lender's debt) to show evidence of their ability to deliver to trustee their full bid amount in ([CC §2924h\(b\)](#)):

- a. Cash;
- b. Cashier's check; or
- c. Other cash equivalent specified in the notice of sale.

Lender May Credit Bid

The foreclosing lender may credit bid, which means it need not pay cash or cash equivalent to acquire title by the trustee's deed, and may offset its bid to the extent of total amount due, including trustee's fees and expenses. [CC §2924h\(b\)](#).

No Credit Bids by Others

Other bidders (*e.g.*, junior lienholders) are *not* allowed to "credit bid" amounts owed them by borrower. See *Nomellini Constr. Co. v Modesto Sav. & Loan Ass'n* (1969) 275 CA2d 114, 115, 79 CR 717.

Borrower and Affiliates May Bid

Any person may bid at the foreclosure sale. Partners of the defaulting borrower may bid. *Jones v Wagner* (2001) 90 CA4th 466, 108 CR2d 669 (partner's bid paid mortgage in full; bid not violation of fiduciary duties to other partners).

Exception

However, the borrower itself will not be permitted to repurchase the property at foreclosure to wipe out *junior liens* (see Glossary) or to redeem the property at a discount. *Webber v Inland Empire Invs., Inc.* (1999) 74 CA4th 884, 88 CR2d 594 (upholding jury verdict against corporate borrower for intentional interference with contract; borrower used its affiliate to wipe out junior mortgage by bidding at senior foreclosure sale); *DMC, Inc. v Downey Sav. & Loan Ass'n* (2002) 99 CA4th 190, 120 CR2d 761 (junior mortgage will reattach as equitable lien when borrower repurchases mortgaged property). See also CC §2930 (after-acquired title inures to mortgagee as security); consider also doctrine of estoppel by deed.

Further Research: On trustee's sale bidding strategies, see Mortgage Deed of Trust Foreclosure §§2.76-2.87; Hansen, *Wielding the Two-Edged Sword: What Every Attorney Needs To Know About Real Property Secured Transactions*, 22 CEB Real Prop L Rep 159 (Aug. 1999); Crocker, *Beneficiary's Underbid—A Neglected Tool*, 44 LA B Bull 295 (1969); 4 Witkin, Summary, *Sec Trans Real Prop* §160.

Agreements Between Bidders Are Impermissible

Bidders or potential bidders cannot coordinate to hold down bidding for their mutual benefit. CC §2924h(g); *Lo v Jensen* (2001) 88 CA4th 1093, 106 CR2d 443 (otherwise lawful partnership formed between professional bidders on day before sale found to constitute "bid chilling" even though no other bidders were present; sale at 3 percent of value vacated).

NOTE

Foreclosing lenders should be cautious in presale discussions with potential bidders; negotiating for a subsequent sale of the property could expose lender to charges of bid-chilling.

PLAN LENDER'S MAXIMUM BID

Amount of lender's bid is crucial in preserving lender's right to recover additional sums after the trustee's sale (for information on money that is recoverable if debt not extinguished, see below). Determine in advance precise opening bid, step increases lender will make, and maximum bid lender is willing to enter before it lets property be sold to a bidder for a cash price.

Full Credit Bid

Full credit bid equals the outstanding debt to lender, including trustee's fees and costs. CC §2924h(b).

Effect of Full Credit Bid

a. Lender's acquisition of the property by full credit bid (CC §2910):

(1) Establishes the property's value as equal to the outstanding debt (*Sumitomo Bank v Taurus Developers, Inc.* (1986) 185 CA3d 211, 219, 229 CR 719); and

(2) Satisfies the debt and extinguishes the lien (*Cornelison v Kornbluth* (1975) 15 C3d 590, 606, 125 CR 557).

b. Consequently, such a lender will not be able to recover on additional security for the debt (*e.g.*, insurance proceeds) and may have difficulty establishing damages in an action for fraud or bad-faith waste (see below).

Reasons for Considering High or Full Credit Bid

a. If lender expects IRS to redeem the property after sale, he or she should consider a full credit bid, because IRS will pay only the amount of bid plus interest and other sums. For information on how IRS redeems, see step 33, below. See also *Fidelity Fed. Sav. & Loan Ass'n v U.S.* (MD Tenn 1978) 445 F Supp 683, 686.

b. In the past, a high credit bid was used to insulate sale from a challenge for fraudulent conveyance if borrower later files bankruptcy; however, the U.S. Supreme Court ruled that a *regularly conducted* foreclosure sale may not be attacked on the grounds of price. See 11 USC §548; *BFP v Revolution Trust Corp.* (1994) 511 US 531, 128 L Ed 2d 556, 114 S Ct 1757.

c. High credit bid may deny a party seeking to attack the sale one of the elements for such attack, *i.e.*, a gross disparity between price and value. See step 20, above.

Reasons for Making Less Than Full Credit Bid

- a. Preserve lender's strongest claim to collect damages for fraud or bad-faith waste (see below);
- b. Avoid extinguishing the debt, so that lender may pursue:
 - (1) A guarantor (see Mortgage Deed of Trust Foreclosure §9.91; but see Mortgage Deed of Trust Foreclosure §9.103);
 - (2) Additional security under the deed of trust, *e.g.*, rents held in receivership, insurance, or condemnation proceeds;
 - (3) Other security for the debt, *e.g.*, personal property collateral or a deed of trust on other real property; or
- c. Reduce amount realized by lender for income tax purposes.

NOTE

If lender does not want the property (*e.g.*, if it needs repairs), underbidding may encourage third party bidder to acquire it.

Further Research: On disadvantages of making full credit bid, see Mortgage Deed of Trust Foreclosure §§2.84-2.87, 2.107, 2.116, 2.120-2.129, 5.11, 6.11, 6.42, 6.46, 9.24, 9.30, 9.41.

IF LENDER PLANS LESS THAN FULL CREDIT BID

Bidding Fair Market Value Is Difficult

Some cases have suggested that lender should bid the property's fair market value (see, *e.g.*, *Sumitomo Bank v Taurus Developers, Inc.* (1986) 185 CA3d 211, 220, 229 CR 719), *but*:

- a. That seems unrealistic, given beneficiary's lack of access to the property; and
- b. A drive-by appraisal would not take into consideration interior damage or property defects not readily apparent.

Work Backward From Amount Owed

Many foreclosing lenders determine their bid by reducing the total amount owed by borrower (including trustee's fees and costs, but excluding controversial penalties and charges) by the amounts lender anticipates recovering:

- a. As "additional" security (*e.g.*, rents held in receivership, see below);
- b. By foreclosing on other real or personal property securing the debt (for dealing with mixed collateral, see step 9, above; Mortgage Deed of Trust Foreclosure §§9.12-9.17); or
- c. By an action against trustor for fraud or bad-faith waste (see below).

Give Trustee Bidding Instructions

- a. If lender authorizes trustee to bid on lender's behalf (the authors cannot recommend this), be certain that trustee has clear, explicit, written bidding instructions.
- b. Be aware that many institutional trustees are in the habit of entering full credit bids on behalf of the foreclosing lender, so emphasize the amount of your client's opening bid. After the opening bid, bids can advance in any amount, large or small. If your client wishes to bid competitively, it is advisable for a client representative or counsel to attend the sale.

PLAN FOR POSTSALE RECOVERY

WHEN LENDER CAN SEEK POSTSALE RECOVERY

- a. Despite antideficiency rules (see step 5, above), beneficiary may recover certain sums after the trustee's sale by means other than a deficiency judgment (*i.e.*, a money judgment against borrower based on the secured obligation); but
- b. In most cases, additional sums are recoverable only to the extent that the debt was not extinguished by the trustee's sale, *i.e.*, only if:
 - (1) Lender acquired the property by less than full credit bid; or
 - (2) Someone else acquired the property by a bid that was insufficient to satisfy borrower's debt to lender (including trustee's fees and costs).

Further Research: See, *e.g.*, *Universal Mortgage Co. v Prudential Ins. Co.* (9th Cir 1986) 799 F2d 458, 461 (insurance proceeds); *Eastland Sav. & Loan Ass'n v Thornhill & Bruce, Inc.* (1968) 260 CA2d 259, 262, 66 CR 901 (rents); Mortgage Deed of Trust

Foreclosure §§2.107, 2.116, 2.120-2.129, 5.11, 6.11, 6.42, 6.46, 9.24, 9.41, 9.91, 9.103, 10.51-10.70, 12.155-12.160.

SUMS RECOVERABLE ONLY IF DEBT NOT EXTINGUISHED

Lender should not enter a full credit bid at the trustee's sale if lender intends to pursue additional security for the debt, or ancillary tort actions, *e.g.*:

Fraud Recovery by Lending Institution

If beneficiary is a bank, savings and loan association, or credit union, after the trustee's sale it may recover damages from the former borrower for fraudulently inducing beneficiary to make the real estate loan, except for certain residential loans.

Further Research: See Fin C §§779, 7459-7460, 15102; *Sumitomo Bank v Taurus Developers, Inc.* (1986) 185 CA3d 211, 220 n4, 229 CR 719; *Mortgage Deed of Trust Foreclosure §§4.48, 5.55.*

Common Law Fraud Recoveries

Independent case law also allows a lender to recover damages from former borrower for fraud, but there is some conflict in the cases:

a. Earlier cases recognize a general exception from antideficiency rules for lenders' actions to recover damages based on borrower's fraud, *e.g.*:

(1) Debtor's fraudulent conduct that caused lender's deed of trust to become worthless (*Bell v Roy* (1986) 187 CA3d 694, 700, 232 CR 83);

(2) Borrower's misrepresentations (*e.g.*, about financial qualifications and intended use of the property) that induced lender to make the loan (see *Guild Mortgage Co. v Heller* (1987) 193 CA3d 1505, 1512, 239 CR 59).

b. One court of appeal (see *First Fed. Sav. & Loan Ass'n v Lehman* (1984) 159 CA3d 537, 542, 205 CR 600) held that a fraud action is permitted only if the fraud related to the value of the real property security, on the theory that:

(1) Otherwise the fraud would not be the cause of lender's damages; and

(2) The action would merely be an attempt by an *undersecured creditor* (see *Glossary*) to circumvent the antideficiency laws to obtain a deficiency judgment.

c. The supreme court endorsed fraud actions against third parties other than the borrower in narrow circumstances. See *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 44 CR2d 352 (despite full credit bid, lender may bring fraud action against third parties if bid entered in reliance on fraud). See also *Kolodge v Boyd* (2001) 88 CA4th 349, 105 CR2d 749 (lender's negligence action against appraiser not barred by lender's full credit bid if it reasonably relied on appraisal in making bid).

Further Research: See review of numerous cases disapproving *Lehman*, collected in *Franklin v Commonwealth Fin. Corp. (In re Franklin)* (9th Cir 1991) 922 F2d 536. See also *Mortgage Deed of Trust Foreclosure §§5.55, 10.55*. See discussion of *Alliance* and its progeny and their potential effect on claims against the borrower in *Mortgage Deed of Trust Foreclosure §§2.121-2.127*.

Bad-Faith Waste by Trustor

After the trustee's sale, lender may recover damages from trustor for impairing the security (*e.g.*, failing to pay property taxes despite enough property income or demolishing buildings or failing to maintain them in good condition), *if* he or she can show bad faith was involved.

Further Research: See CC §2929; *Cornelison v Kornbluth* (1975) 15 C3d 590, 604, 125 CR 557; *Nippon Credit Bank, Ltd v 1333 N. Cal. Blvd.* (2001) 86 CA4th 486, 103 CR2d 421 (sustaining actual and punitive damages in postforeclosure action against mortgagor for distributing property income to partners and affiliates instead of paying property taxes; action held not to violate antideficiency law); *Mortgage Deed of Trust Foreclosure §§2.119-2.120, 5.57-5.58*.

Rent-Skimming

If the property is residential, lender may recover damages from trustor or trustor's successor-in-interest for rent-skimming, as defined in CC §§890(a), 891(c), 891(g).

Hazard Insurance Proceeds

Lender may recover fire insurance proceeds recoverable for an earlier loss if the proceeds are security for the debt (*i.e.*, the insurance was required by the deed of trust). See *Redingler v Imperial Sav. & Loan Ass'n* (1975) 47 CA3d 48, 50, 120 CR 575.

Rents Held in Receivership

Lender may recover rents that have become additional security (*i.e.*, rents collected by a receiver appointed under the rents-and-

profits assignment clause of the deed of trust). See step 15, above.

Awards for Damage to the Property

Lender may recover an award obtained from third party for prior damage to the property if the award was additional security for the debt (*i.e.*, deed of trust assigned such awards to beneficiary). See Duarte v Lake Gregory Land & Water Co. (1974) 39 CA3d 101, 104, 113 CR 893.

WHEN ADDITIONAL SUMS CAN BE RECOVERED AFTER DEBT IS EXTINGUISHED

Beneficiary can pursue certain sums even after acquiring the property by full credit bid, because the actions are for damages that do not relate to the payment or nonpayment of the obligation.

Waste by Third Party

Lender may recover damages from a third party for committing waste on the property to extent recovery is available under general tort principles. See U.S. Fin. v Sullivan (1974) 37 CA3d 5, 12, 112 CR 18. But see Duarte v Lake Gregory Land & Water Co. (1974) 39 CA3d 101, 105, 113 CR 893.

Negligent Housing Construction by Trustor

- a. After acquiring residential property at trustee's sale, lender may recover damages from a developer/trustor for negligently constructing the improvements.
- b. Recovery is not limited by foreclosure laws because it rests on public policies to protect home buyers from negligent construction.

Further Research: Sumitomo Bank v Taurus Developers, Inc. (1986) 185 CA3d 211, 225, 229 CR 719.

NOTE

Beneficiary may not recover on a theory of strict liability, however, because strict liability is not based on a foreseeable duty of care but on implied warranties by those who place the product in the stream of commerce. Sumitomo Bank v Taurus Developers, Inc. (1986) 185 CA3d 211, 226, 229 CR 719.

UNDERSTAND TITLE ACQUIRED AT TRUSTEE'S SALE

RELATES BACK

Title conveyed by trustee's deed (after trustee's sale) is the title that was held by trustor on the date he or she executed the deed of trust. Dover Mobile Estates v Fiber Form Prods., Inc. (1990) 220 CA3d 1494, 1498, 270 CR 183.

Effect on Intervening Interests

Purchaser at the trustee's sale acquires the property free and clear of (*i.e.*, "wipes out" or "sells out"):

- a. Interests of trustor's successors-in-interest (*e.g.*, someone who bought the property following creation of the deed of trust); and
- b. Encumbrances junior to lender's deed of trust (*e.g.*, judgment liens and deeds of trust created with knowledge of lender's deed of trust or after it was recorded). See Carpenter v Smallpage (1934) 220 C 129, 132, 29 P2d 841.

Exceptions

- a. IRS has the right to redeem the property even if its lien was junior to lender's deed of trust. See step 33, below.
- b. Mechanics' liens are eliminated only if the *work* began after lender's deed of trust was recorded. See CC §3134.

Effect on Senior Encumbrances

Purchaser acquires title subject to all senior encumbrances. Streiff v Darlington (1937) 9 C2d 42, 45, 68 P2d 728.

EFFECT ON LENDER'S DEED OF TRUST

Trustee conveys title free and clear of foreclosing lender's deed of trust, even if the sale price does not cover the debt. CC §2910; CCP §726(b). See, *e.g.*, Ralph C. Sutro Co. v Paramount Plastering, Inc. (1963) 216 CA2d 433, 438, 31 CR 174.

EFFECT OF RECITALS IN TRUSTEE'S DEED

If, as is typical, trustee's deed states that trustee has complied with all legal requirements (*e.g.*, in recordation of mailing, posting, and publishing notices of default and sale), such statements are conclusive in favor of bona fide purchasers (BFPs) and encumbrancers (BFEs) for value and without notice. CC §2924.

Further Research: See generally Mortgage Deed of Trust Foreclosure §§2.18-2.20, 2.50, 2.99, 2.134.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 31. CONDUCT TRUSTEE'S SALE

STEP 31. CONDUCT TRUSTEE'S SALE

PLAN FOR THE SALE PROCEDURES

Customary Trustee's Sale Procedures

Assuming that your client is using the services of a professional trustee, the customary conduct of the sale will be as described below.

At Foreclosure Sale

At the noticed time and place, the trustee or a professional auctioneer hired by trustee will read a brief script including the following:

- a. Announces that sale is conducted under power of sale in that certain deed of trust [identifies instrument];
- b. States that full legal description of the property will not be read unless someone present objects;
- c. Recites the purported street address or common description of the property;
- d. Mentions that the sale is being held to satisfy a total indebtedness of [states amount in notice of sale];
- e. States that trustee offers for sale all of its right, title, and interest to the property previously described;
- f. Asks, "How much am I bid and by whom?";
- g. Announces the opening bid per your client's prior instructions: "On behalf of the Beneficiary, we bid the sum of \$___";
- h. Asks for other bids and, if any are received, asks for further bids; and
- i. Announces the final bid: "\$___ going once, \$___ going twice. Before a sale is called for the third and last time, are there further bids? \$___ for the third and last time—sold to [prevailing bidder]."

After Foreclosure Sale

- a. Foreclosure auctioneer delivers a report to trustee:
 - (1) Identifying the purchaser and sale price; and
 - (2) Turning over the cashier's checks if there was a third party purchaser.
- b. Trustee will prepare a Trustee's Deed Upon Sale, stating the total indebtedness on account of which the sale was held and the final sale price, and will record this, typically, a day or two after the sale.
- c. Trustee will mail a photocopy of the executed deed (without recorder's information) to your client several days after the sale.
- d. Some weeks later, depending on the mailing instructions typed on the face of the deed, you, your client, or the trustee will receive the original recorded deed via mail from the Office of the County Recorder.
- e. Trustee *must* distribute excess sales proceeds in the order of priority required by [CC §2924k](#); trustee *may* provide notice of availability of proceeds, but this is not mandatory; and, under [CC §2924j\(h\)](#), trustee will not be liable for giving such notice.

Disbursing Sale Proceeds

Under [CC §2924k\(a\)](#), trustee must disburse sale proceeds in this order:

- a. Reimburse its own costs and expenses of sale and handling proceeds (see [CC §§2924c\(c\)-\(d\)](#), [2924d\(b\)](#), [2924k\(b\)](#));
- b. Satisfy the debt owed to the beneficiary;
- c. Pay junior lienholders in their order of priority (see [Cal-Western Reconveyance Corp. v Reed](#) (2007) 152 CA4th 1308, 62 CR3d 244; [Dockrey v Gray](#) (1959) 172 CA2d 388, 341 P2d 746; and
- d. Pay any surplus to borrower ([Atkinson v Foote](#) (1919) 44 CA 149, 186 P 831) or its successor (but see [CTC Real Estate Servs. v Lepe](#) (2006) 140 CA4th 856, 44 CR3d 823 (victim of identity theft, not actual borrower, awarded surplus as equitable remedy)).

Resolving Disputes Over Proceeds

If parties dispute the priority of secured debts, the amount to be paid, or to whom, trustee has two alternative courses of action:

- a. Interplead the proceeds into court for a judicial determination under traditional rules of interpleader (see [CC §2924j\(e\)](#)); or
- b. Use the court deposit and summary procedure in [CC §2924j\(c\)-\(d\)](#) (see *Cal-Western Reconveyance Corp. v Reed*, *supra*).

Further Research: On legal aspects of trustee's sale procedures and postsale distribution of proceeds, see [Mortgage Deed of Trust Foreclosure §§2.74-2.109](#).

SUPPLEMENTING TRUSTEE'S SALE AND POSTSALE PROCEDURES

Consider the following additional or alternate procedures:

- a. Work with trustee to review and modify the auctioneer's script before the sale.
- b. Determine whether the real and (in instances of unified sales) personal property descriptions should be read in full.
- c. Identify any collateral *not* being offered for sale (*e.g.*, collateral being sold separately or to be realized through court procedures, such as funds held by a receiver).
- d. Include any disclosures being made by beneficiary regarding property defects.
- e. Request that before beginning the auction, the trustee representative prequalify interested bidders by verifying their ability to tender payment at or above the opening bid price.
- f. Make plans to record the sale on video or, at least, audiotape.
- g. Review in advance the form of Trustee's Deed Upon Sale and be certain that trustee is prepared to record it on the day of sale, preferably immediately after the sale. For effect of borrower's bankruptcy filing, see [step 14](#), above.
- h. If your client is the prevailing bidder, obtain a conformed copy of the recorded Trustee's Deed Upon Sale for use with tenants, insurers, brokers, governmental authorities, and other persons who may need to be dealt with immediately.

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 32. DISMISS JUDICIAL FORECLOSURE CAUSE OF ACTION

STEP 32. DISMISS JUDICIAL FORECLOSURE CAUSE OF ACTION

WHY DISMISS

- a. If lender is proceeding to foreclose both judicially and nonjudicially, the nonjudicial trustee's sale constitutes an election of remedies and lender must immediately cease prosecuting the cause of action or complaint for judicial foreclosure. *Flack v Boland* (1938) 11 C2d 103, 77 P2d 1090; *Vlahovich v Cruz* (1989) 213 CA3d 317, 261 CR 565.
- b. To be sure borrower cannot assert that judicial foreclosure was being wrongfully advanced after the trustee's sale, the cause of action (or complaint) for judicial foreclosure should be dismissed promptly. If possible, the dismissal should be without prejudice.

NOTE

Be careful not to dismiss the other causes of action that may be needed or have to be prosecuted after the dismissal of the judicial foreclosure cause of action.

Further Research: See Mortgage Deed of Trust Foreclosure §§2.13, 3.11.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Proceeding by Trustee's Sale (Nonjudicial Foreclosure)/STEP 33. PREPARE TO DEAL WITH IRS'S POSTSALE RIGHT OF REDEMPTION

STEP 33. PREPARE TO DEAL WITH IRS'S POSTSALE RIGHT OF REDEMPTION

WHAT IT IS

If the IRS has recorded a lien on the property before the foreclosure sale (IRC (26 USC) §7425):

- a. It has the right to pay other lienholders (for information on how IRS redeems, see below); and
- b. Take title to the property (see IRC §7425(d)(3)).

SEND NOTICE OF SALE TO IRS

WHEN REQUIRED

If the IRS recorded a lien on the property at least 30 days before the sale, send notice of sale to the IRS official, office, and address listed in the IRS publication specified in 26 CFR §301.7425-3(a)(1). See IRC §7425(b)(1).

DEADLINE TO GIVE NOTICE

Deadline to give notice is 25 days before the sale. IRC §7425(c)(1).

HOW TO GIVE NOTICE

Send notice of sale via registered or certified mail or by personal service in accordance with the procedures prescribed by the IRS. IRC §7425(c)(1); 26 CFR §301.7425-3(a)(1).

EFFECT OF GIVING NOTICE

IRS lien is extinguished, subject to the IRS's right to redeem within 120 days. IRC §7425(c)(2). See *Ellis v U.S.* (MD NC 2005) 2005-2 USTC ¶50,518, 96 AFTR2d 5535 (120-day period runs from date sale completed, not date trustee's deed recorded).

EFFECT OF FAILING TO GIVE NOTICE

If you fail to give notice, IRS lien is *not* extinguished and the purchaser at the property takes subject to the IRS lien. IRC §7425(b)(1).

HOW IRS REDEEMS PROPERTY

WHEN IRS CAN REDEEM

- a. Within 120 days after the sale (IRC §7425(d)(1)), the purchaser's title is subject to the IRS right of redemption.
- b. Usually, the purchaser will have to wait until the expiration of the 120 days to resell the property, or to obtain a title policy clear of the IRS lien (see below).

HOW IRS REDEEMS

The IRS contacts the purchaser and pays (28 USC 2410(d)):

- a. Amount paid or credit bid, including payments made to senior lienholders, to purchase the property;
- b. Interest on the amount of the secured obligation at 6 percent per annum for the period from the date of sale to the date of redemption; and
- c. The excess, if any, of purchaser's expenses in maintaining the property over either:
 - (1) Income derived from the property by the purchaser, *e.g.*, rents received; or
 - (2) Reasonable rental value of the property if property is:

- (a) Used by the purchaser, *e.g.*, the purchaser lives in the property and does not receive rent; or
- (b) Used with the purchaser's consent; or
- (c) Rented by the purchaser at less than its reasonable rental value.

EFFECT OF REDEMPTION

IRS may execute a certificate of redemption that vests title to the property in the name of the United States. IRC §7425(d).

ASK IRS TO RELEASE RIGHT OF REDEMPTION

WHEN TO ASK

If you represent the purchaser at the foreclosure sale and purchaser wants to clear the property of the IRS right of redemption during the 120-day period, *e.g.*, purchaser wants to resell or lease the property despite the IRS right of redemption, you have two choices:

- a. Contact the IRS and try to get the lien released; or
- b. Wait until the 120-day period expires, *e.g.*, if you do not want to alert the IRS to a property that it may want to purchase.

DETERMINE IF IRS INTENDS TO EXERCISE RIGHT

You may contact the IRS to:

- a. Ask if they intend to exercise the right of redemption.
- b. Determine if the lien is correct; for example, liens often show up incorrectly when two taxpayers with the same name own property in the same county, or the tax obligation may have been paid and the lien not removed.

DETERMINE IRS VALUATION OF RIGHT OF REDEMPTION

If the IRS indicates it might exercise right of redemption, ask it to determine the value of the right of redemption.

REQUEST RELEASE

On the basis of information provided by the IRS, request that it release the right of redemption if:

Value Set

You pay the amount requested by the IRS; or

No Value

IRS determines that the right of redemption is without value (IRS may release its right to redemption without any payment, *e.g.*, if the value of the property is much less than the total of purchase price and liens); or

Lien Incorrect

Lien was incorrectly recorded against this property.

NOTE

In considering whether to satisfy the IRS lien, understand that you do not acquire equitable subrogation rights against the debtor by paying the IRS. See *Bevan v Socal Communications Sites (In re Bevan)* (9th Cir 2003) 327 F3d 994.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Using Judicial Foreclosure and Other Judicial Remedies/STEP 34. PREPARE THE COMPLAINT

If Using Judicial Foreclosure and Other Judicial Remedies

STEP 34. PREPARE THE COMPLAINT

OBTAIN A TITLE REPORT/GUARANTY

To properly identify all necessary parties to the litigation, obtain from a title company a litigation or foreclosure guaranty showing the present condition of the record, *e.g.*, ownership, liens, taxes. See Mortgage Deed of Trust Foreclosure §3.21; Title Ins. chap 9. See step 23, above, concerning a trustee's sale guaranty (TSG).

IDENTIFY PROPER PLAINTIFF

Include an allegation explaining plaintiff's status, *e.g.*:

- a. Mortgagee named in a mortgage (CCP §725a);
- b. *Beneficiary* (CCP §725a; see Glossary for definition) named in a deed of trust, and if more than one beneficiary:
 - (1) Any one beneficiary can initiate the action;
 - (2) All beneficiaries should be joined as plaintiffs (or if necessary as defendants—see Civ Proc Before Trial, chap 14);
- c. Trustee named in a deed of trust (CCP §725a); or
- d. Successors-in-interest of a-c, above (CCP §725a); *e.g.*, if the benefits under the note and deed of trust were assigned to the plaintiff, include the facts of the assignment, *e.g.*, who assigned, date of assignment, copy of assignment document.

IDENTIFY DEFENDANTS NECESSARY TO FORECLOSE

Include allegations of the status of defendants you need to name to sell the property at a foreclosure sale, *e.g.*:

Present Owner

Present record owners of the mortgaged property, even if the present owner was not the original mortgagor, trustor, or borrower.

NOTE

You are not required to name anyone holding an interest in the property that is *unrecorded* when you file the complaint (CCP §726(c)), *but* if you are aware of the interest, name that person to be sure you extinguish their interest.

All Fractional-Share Owners

All present record owners of any fractional share of the property, because if you do not name a fractional-share owner, the sale is not valid regarding that fraction.

All Junior Lienholders

Anyone having an interest in the property that was *recorded after* the deed of trust you are foreclosing, to extinguish those persons' interests by the foreclosure. See CCP §701.630.

State and Federal Governments

The State of California or the United States or both if either or both hold a *junior* lien. See CC §2931a; 28 USC §2410, 26 USC §7425.

Conditional Vendees

Parties to an installment land sale contract that is recorded, or who are known to lender if not recorded.

IDENTIFY DEFENDANTS NECESSARY FOR DEFICIENCY

Include explanation of status of defendants if you plan to seek a deficiency judgment from:

Trustor/Borrower

All original trustors/borrowers.

Assuming Grantee

Grantees who assumed the obligations under the note and deed of trust. See Glossary for definition of *assuming grantee*.

Endorser or Guarantor

Anyone who endorsed or guaranteed the obligation. See Glossary for definition of *endorser* and *guarantor*.

Further Research: For comprehensive discussion of judicial foreclosure, see Mortgage Deed of Trust Foreclosure §§3.1-3.11 (choosing the remedy), §§3.12-3.22 (prelitigation considerations), §§3.23-3.38 (necessary parties for complete relief), §§3.39-3.54 (drafting the complaint).

JUDICIAL FORECLOSURE CAUSE OF ACTION

WHAT TO INCLUDE IN COMPLAINT

Include in the cause of action for judicial foreclosure:

Facts Regarding Obligation

- a. That defendant executed and delivered (or that defendant assumed) the obligation.
- b. Exact amount remaining unpaid, including, if applicable, principal amount that is accelerated; see below.
- c. That either the note or deed of trust contains an acceleration provision, *e.g.*, that in the event of default, lender can declare the entire principal sum due and can initiate suit for the full amount. See Glossary for definition of *acceleration clause*.
- d. If entitled to a deficiency judgment, either:
 - (1) Facts that show plaintiff is entitled to a deficiency, *e.g.*, type of loan; or
 - (2) That plaintiff waives right to a deficiency judgment.

NOTE

To avoid postsale redemption, plaintiff may elect to waive the right to a deficiency judgment at any time up until the time the judgment is entered.

- e. Consider attaching copies of the note and security agreement as exhibits to the complaint.

Facts Regarding Security Instrument

- a. That defendant executed and delivered the security instrument; and
- b. Date recorded.

Facts Regarding Default

- a. That borrower is in default; and
- b. Particulars of the default, *e.g.*, failure to:

- (1) Make loan or installment payments;
- (2) Make tax payments;
- (3) Keep insurance policy in force; and
- (4) Make payments on an obligation secured by a senior security instrument.

NOTE

Be aware that the defendant has a right to reinstate or redeem the obligation before the judgment of foreclosure. CC §§2903, 2924c; see steps 27-28, above, for discussion of these rights.

Other Procedures

- a. Specify the progress, if any, of nonjudicial foreclosure, including, if appropriate, date notice of default was recorded; and
- b. Consider attaching a copy of the Notice of Default as an exhibit to the complaint.

Remedies Sought

- a. The full amount sought on the obligation, *e.g.*:
 - (1) The amount due under the acceleration clause of the note or deed of trust; or
 - (2) Amount of entire debt should be satisfied by the foreclosure sale because the property cannot be sold in portions (CCP §728).
- b. Any amounts that plaintiff may have to advance to protect plaintiff's interests, including, *e.g.*, attorney fees expended to preserve the property if authorized by the terms of the note or deed of trust (see Passanisi v Merit-McBride Realtors, Inc. (1987) 190 CA3d 1496, 236 CR 59).
- c. Amount of attorney fees and other expenses that the plaintiff seeks to recover.

Further Research: For discussion of general pleading requirements and sample complaint, see Mortgage Deed of Trust Foreclosure §§3.39-3.54, 3.102. See also 4 Witkin, California Procedure, *Pleading* §§378-498 (5th ed 2008), and 5 Witkin, California Procedure, *Pleading* §§675-678 (5th ed 2008).

SPECIFIC PERFORMANCE CAUSE OF ACTION

WHAT TO INCLUDE IN COMPLAINT

If you intend to seek interim relief (see steps 15-18, above), include in the complaint a cause of action for a receivership or for specific performance of the rents-assignment clause in the deed of trust (see Mortgage Deed of Trust Foreclosure §§3.5, 3.55, 6.34, 6.99). Allegations should include:

Incorporated Allegations

Allegations that are incorporated by reference from the foreclosure cause of action (see above).

Authority in Deed of Trust

That the deed of trust provides that if defendant is in default, lender or trustee may enter and take possession of the property to:

- a. Perform acts that defendant has not undertaken; and
- b. Protect the security interest.

Assignment-of-Rents Provision

If applicable, that the deed of trust provides that lender may:

- a. Collect rents, issues, and profits; and
- b. Apply those sums, less operating expenses, to any indebtedness due and owing under the deed of trust.

Cross-Reference: See Glossary for discussion of *assignment-of-rents clause*.

Need for Equitable Relief

That plaintiff has no adequate remedy at law, and the reason(s) that the court should appoint a receiver or grant an injunction.

NOTE

If you seek a receiver or injunctive relief, request that in the prayer of the complaint. For information on what to include in prayer, see below.

Further Research: For discussion of legal bases for appointment of receiver, see Mortgage Deed of Trust Foreclosure §§6.15-6.18 (receivership without rents assignment clause), §§6.32-6.46 (enforcing rents assignment clause through appointment of receiver).

ENFORCEMENT OF GUARANTY OR ENDORSEMENT CAUSE OF ACTION

ADD CAUSE OF ACTION ON GUARANTY

When the complaint for judicial foreclosure is prepared, a cause of action should be added for any guarantor who is obligated to pay the debt or perform a covenant. Typically, a money judgment should be sought against the guarantor in the amount of the unpaid debt less any amount recovered by lender through foreclosure of the security.

NOTE

Review potential guarantor protections; see Mortgage Deed of Trust Foreclosure §§9.94-9.112; depublished opinion, *Bank of S. Cal. v Dombrow* (1995) (ordered not published Mar. 14, 1996; former opinion at 39 CA4th 1457, 46 CR2d 656). By analogy, a guarantor might look to CCP §726(b) after judicial foreclosure of the primary security.

PROSECUTE ACTION DILIGENTLY

Because CCP §726(b) requires lender's application for a deficiency to be filed within 3 months after the sale of the real property, the cause of action on the guaranty should also be prosecuted diligently, either in the foreclosure action or through a separate action against the guarantor after the judicial foreclosure. It appears most efficient for the same judgment to fix both the deficiency judgment against borrower and the liability of the guarantor.

WHAT TO INCLUDE IN COMPLAINT

In cause of action for enforcement of guaranty or endorsement:

Incorporate Allegations

Incorporate by reference allegations from the preceding cause(s) of action.

Plead Facts That Establish Obligation and Default

Plead facts that establish underlying obligation and default if they have not already been incorporated by reference:

- a. That borrower executed and delivered (or borrower assumed) the underlying obligation.
- b. Additional facts relevant to the underlying obligation (*e.g.*, amount of obligation, covenants in loan documents, acceleration). For information on what was included in judicial foreclosure cause of action, see above.
- c. That borrower is in default.
- d. Particulars of the default. On what to include in cause of action, see foreclosure cause of action, above.

Facts Regarding Guaranty or Endorsement and (if Applicable) Security Instrument

- a. That defendant executed and delivered a written instrument (or that the defendant delivered written endorsement) stating defendant's obligation (*e.g.*, the guaranty, the endorsed note).
- b. Particulars of demand made on defendant and statement that defendant has failed (as applicable) to respond on endorsement or to perform under the guaranty.
- c. (If applicable) that defendant executed and delivered a security instrument, date instrument recorded, and pertinent provisions of security instrument.

NOTE

If dealing with guaranty secured by real estate, analyze enforcement of the guaranty obligation as you would enforcement of a note secured by deed of trust. See protections for guarantors, [step 5](#), above.

- d. Consider attaching copies of the underlying documents as exhibits to the complaint.

Further Research: On guarantor liability and defenses, see generally [Mortgage Deed of Trust Foreclosure §§9.88-9.112](#).

DECLARATORY RELIEF CAUSE OF ACTION

WHY TO USE

Consider including a cause of action for declaratory relief seeking a determination by the court of any issues regarding lien perfection or identification of security. With declaratory relief determining these issues, the judgment will be based on a court determination of any impediment to the judicial foreclosure.

WHEN TO USE

Use to liquidate a nonmonetary obligation, when identification or characterization of collateral and lender's rights to it is in dispute.

NOTE

Enforcement may raise issues regarding the applicability and effect of [CCP §726](#) or antideficiency law, including by reason of foreclosure or seizure of property allegedly not subject to lender's lien (see, *e.g.*, [Security Pac. Nat'l Bank v Wozab \(1990\) 51 C3d 991, 275 CR 201](#)) (setoff of bank account); [Ziello v Superior Ct. \(1995\) 36 CA4th 321, 42 CR2d 251](#) (insurance proceeds); see also [step 5](#), above).

WHAT TO INCLUDE IN COMPLAINT

In declaratory relief cause of action:

Incorporate Allegations

Incorporate by reference the allegations from the judicial foreclosure cause of action (see above).

Allege Actual Controversy Allegation

[Code of Civil Procedure §1060](#) authorizes the court to interpret written instruments if an "actual controversy relating to the legal rights and duties of the respective parties" exists. After the (incorporated) allegations relating to the underlying facts, allege that an actual controversy exists and specify the nature of the controversy. See generally [Civ Proc Before Trial, chap 35](#). Identify each issue for which declaratory relief is sought.

CCP §1060

Under [CCP §1060](#), lender may seek a specific form of declaratory relief by pleading that:

a. It desires:

- (1) A judicial determination of its rights and duties under the loan documents; and

(2) A declaration whether lender holds a valid security interest in specified collateral; and

b. A judicial declaration is necessary and appropriate at this time in order that lender may foreclose on its collateral in accordance with applicable law.

See also CCP §1061.

PRAAYER

WHAT TO INCLUDE IN PRAAYER

Include all relief sought, including, *e.g.*:

Amounts Due

- a. Principal sum due;
- b. Amount of interest accrued to the date of filing, and interest rate;
- c. Daily rate of interest that should be added until the judgment is entered;
- d. Other amounts expended;
- e. Costs and attorney fees; and
- f. Any further appropriate relief.

Foreclosure

That security instrument be foreclosed, and sale ordered, proceeds applied, and defendant's rights be terminated (on defendant's right to redeem, see step 44, below).

Deficiency

If available, if the proceeds are not enough to satisfy the amounts due, that judgment of deficiency be entered against the designated defendants (see step 45, below).

Receiver

If applicable, that the court appoint a receiver, pendente lite, to take possession of the real property to conserve and manage it, and to collect rents and profits. See step 15, above, concerning when receiver available.

Injunction

If applicable, that the court grant injunctive relief. See step 16, above, concerning when injunctive relief available.

Further Research: For discussion and sample prayer, see Mortgage Deed of Trust Foreclosure §§3.54, 3.102, 6.99.

Declaration

If applicable, a judicial determination of lender's rights and obligations under loan documents and a declaration that lender holds valid security interest in specified collateral.

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Using Judicial Foreclosure and Other Judicial Remedies/STEP 35. PREPARE, SERVE, AND RECORD LIS PENDENS

STEP 35. PREPARE, SERVE, AND RECORD LIS PENDENS

WHY YOU USE

To give constructive notice that you have filed the legal action to:

- a. All defendants (CCP §405.24);
- b. Anyone to whom borrower transfers borrower's interest after you record the lis pendens (see CCP §§405.24, 1908(a)(2)); and
- c. Any person acquiring any interest in the property after you record the lis pendens (see CCP §§405.24, 1908(a)(2)) *e.g.*, lessees, junior lienholders.

Consequences if Not Recorded

If lis pendens is not recorded, the interests of successors-in-interest and others acquiring an interest are *not affected* by the litigation:

- a. You run the risk that a court may decide that the new party's interest is superior to yours.
- b. To terminate that party's interest, you would have to file another action. *Carpenter v Lewis* (1897) 119 C 18, 50 P 925.

NOTE

To be sure that you comply with the strict requirements for recordation of, serving, and filing the lis pendens, carefully review CCP §§405.20-405.24.

WHAT TO INCLUDE IN LIS PENDENS

The Notice of Action Pending (Lis Pendens) should include (CCP §405.20):

- a. Description of the property affected by the action; and
- b. Names of all parties to the action.

SIGN LIS PENDENS

As the attorney of record, you should sign and "issue" the notice. CCP §405.21.

WHEN TO SERVE

Serve *before* you record the notice. CCP §405.22.

WHOM TO SERVE

Serve:

- a. All parties to whom the real property claim is adverse.
- b. All owners of record as shown by the latest county assessment roll. CCP §405.22.

NOTE

Do not forget to serve any defendants that you later bring into the action. CCP §405.22.

HOW TO SERVE

Send a copy by registered or certified mail, return receipt requested, to *all* known addresses of the parties to whom the real

property claim is adverse and to all owners of record of the real property affected by the real property claim. CCP §405.22.

PREPARE PROOF OF SERVICE

After you serve the lis pendens (CCP §405.22-405.23):

- a. Prepare a proof of service (see CCP §1013a).
- b. If there is no known address for a party or owner, prepare a declaration under penalty of perjury to that effect (CCP §405.22).

WHAT TO RECORD

Record original:

- a. Lis pendens (CCP §405.23); and
- b. Proof of service (CCP §405.23).

WHERE TO RECORD

Record in the county where the property is located. CCP §405.22.

WHEN TO RECORD

Immediately after filing the complaint and serving the notice, record the lis pendens. CCP §405.22. Then send the complaint.

NOTE

Do not wait to record the lis pendens; if you wait, borrower could transfer the property to a new owner in the interim.

FILE COPY WITH COURT

A conformed copy of the lis pendens that was recorded should be filed with the court in which you filed the complaint. CCP §405.22.

Further Research: See Mortgage Deed of Trust Foreclosure §§3.56-3.57; on lis pendens procedures and sample lis pendens forms, see California Real Property Remedies and Damages, chap 13 (2d ed Cal CEB 2002).

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Using Judicial Foreclosure and Other Judicial Remedies/STEP 36. IF YOU NEED APPOINTMENT OF RECEIVER, DETERMINE TYPE OF RECEIVER AND CHOOSE APPROPRIATE RECEIVER

STEP 36. IF YOU NEED APPOINTMENT OF RECEIVER, DETERMINE TYPE OF RECEIVER AND CHOOSE APPROPRIATE RECEIVER

DETERMINE APPROPRIATE RECEIVER TYPE

Review [step 15](#), above, and determine the type of receivership your client needs:

Specific Purpose

If there is no assignment of rents-and-profits clause, you will probably need a receiver for specific and limited purpose, *e.g.*, if defendant is not paying taxes and insurance, the court could appoint a receiver to receive rents and pay taxes and insurance while the foreclosure is pending.

Rents-and-Profits Receiver

If there is an assignment of rents-and-profits clause, a court order appointing receiver can grant the powers enumerated in the deed of trust. See [step 15](#), above.

Further Research: On legal bases for appointment of receiver, see [Mortgage Deed of Trust Foreclosure §§6.15-6.18](#) (receivership without rents assignment clause), [§§6.31-6.44](#) (enforcing rents-assignment clause through appointment of receiver).

REVIEW RECEIVER'S POSSIBLE AUTHORITY

Be aware of what the receiver must do (and cannot do) during the receivership. See [CCP §§568-570](#); [Cal Rules of Ct 3.1177-3.1184](#); [Mortgage Deed of Trust Foreclosure §§6.16, 6.35, 6.40, 6.44](#).

BE PREPARED TO LIMIT AUTHORITY OF RECEIVER

If you seek an ex parte appointment of a receiver, the court will be more likely to grant your request if you limit the request to:

- a. Collecting rents and profits (see [CCP §568](#)); and
- b. Immediate repairs necessary to make premises habitable or preserve value of the property (see, *e.g.*, [CCP §§568.2-568.3](#)).

Further Research: See [Turner v Superior Court \(1977\) 72 CA3d 804, 813, 140 CR 475](#) (receiver is limited to authority in statutes and in security instrument).

INCLUDE RECEIVER'S POWERS IN MOTION

Specify in your application for the receiver the powers you want the receiver to be able to exercise. See above.

REVIEW WHO MAY BE RECEIVER

Review local rules and statutes restricting who may be appointed as receiver, *e.g.*, you should *not* nominate ([CCP §566](#)):

- a. Party to the action;
- b. Attorney of any party to the action;
- c. Any person interested in the action; or
- d. Any person related to any judge of the court.

NOTE

Some courts have lists of approved receivers.

CONTACT RECEIVER BEFORE APPLYING TO COURT

Because you will need to present the receiver's written acceptance and undertaking, contact the receiver before applying to the court to make sure the receiver is willing to act. The receiver is a neutral party, subject to court orders. See CCP §§566-569; Cal Rules of Ct 3.1177-3.1184. Avoid unapproved agreements with receiver regarding payment, property, and future business dealings with lender. Cal Rules of Ct 3.1179(b).

Further Research: See Civ Proc Before Trial, chap 33.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Using Judicial Foreclosure and Other Judicial Remedies/STEP 37. PREPARE APPLICATION FOR APPOINTMENT OF RECEIVER

STEP 37. PREPARE APPLICATION FOR APPOINTMENT OF RECEIVER

CHECK LOCAL AND STATE COURT RULES

Check to see if the court in which you filed the action has policies governing the contents of papers, time for application, and other matters regarding appointment of a receiver. Review Cal Rules of Ct 3.1175-3.1184.

CHECK JUDICIAL COUNCIL FORMS

Check to see if optional Judicial Council forms apply to your application for a receivership; judges are familiar with them and they are appropriate in most situations. They are available online at <http://www.courtinfo.ca.gov/forms/> and in Mortgage Deed of Trust Foreclosure §§6.103-6.106.

DETERMINE BEST PROCEDURE

By Ex Parte Application With Order to Show Cause

- a. Be aware that courts are reluctant to appoint a receiver ex parte because of the short period of notice and time for defendant to respond;
- b. If court grants your ex parte application, you will have to serve the defendant with an order to show cause and return for a scheduled hearing to confirm the appointment, *i.e.*, you will have to make two appearances (for time for hearing to show cause, see below);
- c. Your client will have to post a bond before the court will grant your application (this is in addition to the bond required from the receiver) (CCP §566(b)); for preparing to post undertaking, see below);
- d. You must be able to show that the property will be irreparably injured during the period required for a noticed motion hearing (Cal Rules of Ct 3.1175(a)(1)); for preparing motion and declaration, see below); and
- e. If the court is reluctant to appoint a receiver ex parte, you might be able to obtain a TRO (see step 38, below) to maintain the status quo until you can bring a noticed motion to appoint the receiver.

By Order to Show Cause With Motion

- a. Court issues order to show cause (OSC) on lender's ex parte application, but receiver is not appointed until matter is briefed in full and court conducts hearing after defendant is served with OSC; court more likely to appoint receiver than on ex parte application because defendant has same opportunity to respond as in noticed motion;
- b. Requires two appearances by plaintiff, but allows scheduling and service of motion before defendant makes general appearance; and
- c. The receiver posts a bond that can be reimbursed from funds collected by receiver (CCP §567(b)); your client needs to post a bond only if you seek injunctive relief with the OSC (for preparing to post undertaking, see step 38, below).

By Noticed Motion

- a. Court is more likely to appoint the receiver than on ex parte application because defendant has had time to respond;
- b. Requires only one appearance; and
- c. The receiver posts a bond that can be reimbursed from funds collected by receiver (CCP §567(b)), and your client only needs to post a bond if you seek injunctive relief (for preparing to post undertaking, see step 38, below).

Further Research: The second procedure (OSC with noticed motion) is the most commonly used method. For further discussion and sample forms, including optional Judicial Council forms, see Mortgage Deed of Trust Foreclosure, chap 6; Civ Proc Before Trial, chaps 12-13, 33.

CONSIDER INJUNCTIVE RELIEF WITH RECEIVER APPLICATION

Consider including a request for the TRO and preliminary injunction as part of your application for a receiver (see [step 38](#), below):

- a. Court is more likely to grant a TRO to maintain the status quo and delay deciding whether to appoint a receiver until it can hear a noticed motion (for noticed motion, see [step 38](#), below).
- b. As an alternative to seeking an ex parte appointment of a receiver (for nominating a receiver, see below), ask the court for a TRO, and file a noticed motion for appointment of a receiver (for noticed motion, see [step 38](#), below).

BY EX PARTE APPLICATION

WHEN TO USE

Use ex parte application if you can show that there is an emergency that requires the receiver to be appointed *before* a motion can be heard. [Cal Rules of Ct 3.1175\(a\)\(1\)](#); see [Civ Proc Before Trial, chaps 13, 33](#); for noticed motion, see below.

Example 1: Defendant had an "undisputed insolvent financial status" and had made threats to cease doing business, thereby immediately threatening plaintiffs' interest in the property. [Maggiora v Palo Alto Inn, Inc. \(1967\) 249 CA2d 706, 712, 57 CR 787](#).

Example 2: President of corporation conducted alleged "irregular activities and misappropriations" and immediate sale of corporate real estate was threatened. [People v Christ's Church \(1947\) 79 CA2d 858, 861, 181 P2d 49](#).

PREPARE MOTION

Application

Set forth the grounds for request for receiver (see [Civ Proc Before Trial, chap 33](#)).

Memorandum in Support of Motion

For requirements, see noticed motion procedure, below.

Make this memorandum as complete as possible because the memorandum will serve as support for the hearing on the order to show cause (for information on OSC hearings, see below).

Declarations

In addition to evidence supporting your request for a receiver (for information on competent evidence, see below), provide evidence showing (see [CCP §2015.5](#) regarding declarations):

- a. Why the court should appoint the receiver ex parte ([Cal Rules of Ct 3.1175\(a\)\(1\)](#)), *i.e.*:
 - (1) The "emergency" circumstances; and
 - (2) The irreparable harm that will be suffered if the court does not appoint the receiver ex parte;
- b. Names, addresses, and telephone numbers of ([Cal Rules of Ct 3.1175\(a\)\(2\)](#)):
 - (1) Persons in actual possession of the property; or
 - (2) President, manager, or principal agent of any corporation in possession of the property;
- c. Use being made of the property by the persons in possession ([Cal Rules of Ct 3.1175\(a\)\(3\)](#));
- d. If the property is a part of the plant, equipment, or stock-in-trade of any business ([Cal Rules of Ct 3.1175\(a\)\(4\)](#)):
 - (1) Nature and approximate size or extent of the business; and
 - (2) Facts sufficient to show whether the taking of the property by a receiver would stop or seriously interfere with the operation of the business; and

e. If any of the facts listed in a-d, above, are not known to you or your client after a diligent investigation, fully state (Cal Rules of Ct 3.1175):

- (1) The matters unknown; and
- (2) The efforts you made to acquire the information.

Order Appointing Receiver and to Show Cause

Prepare a proposed order if the court grants your ex parte motion, including:

- a. Appointment of the receiver and setting forth receiver's duties; and
- b. Ordering defendant to show cause on a specific date why the court should not confirm the appointment of receiver.

PREPARE TO POST UNDERTAKINGS

Both plaintiff and the receiver must post undertakings (CCP §§566-567):

Purpose of Undertaking

- a. To compensate defendant for all damages defendant may sustain because lender obtained appointment of the receiver wrongfully, maliciously, or without sufficient cause. CCP §566(b).
- b. To compensate in the event the receiver fails to perform. CCP §567. For preparing to post undertaking, see below.

Determine Reasonable Amount

Contact other attorneys practicing in the county and court to determine if there is a minimum reasonable amount for that area, *e.g.*, court may require a minimum of \$2000.

Include in Moving Papers

Include in your ex parte papers facts concerning the appropriate amount the court should set for the undertaking your client must file *before the court will issue the order*. CCP §566(b). At the hearing, the applicant must propose specific amounts for the required undertakings and state supporting reasons. Cal Rules of Ct 3.1178. These proposals and statements should be included in the papers filed.

Example: Include in your papers the fact that the receiver will only be collecting the rents and putting them in an interest-bearing account for a short period of time; therefore, the defendant will not be damaged and the amount of the undertaking should be minimal, *e.g.*, \$2500-\$5000.

TIME FOR HEARING ON ORDER TO SHOW CAUSE

If the court appoints your receiver ex parte, it must set a hearing to confirm the appointment on a date that is:

- a. As soon as possible; but
- b. Not more than 15 days (or, on a showing of good cause, 22 days) from the issue date of the ex parte order.

Further Research: Cal Rules of Ct 3.1176(a). See also Civ Proc Before Trial, chaps 13, 33.

NOTIFY OPPOSING PARTIES

Within a reasonable time *before* applying for the ex parte order, but absent exceptional circumstances, no later than 10:00 a.m. on the court day before the application is heard, notify the opposing party or opposing party's attorney of the time and place you will be applying for the order. Cal Rules of Ct 3.1203(a); Civ Proc Before Trial, chaps 13, 33.

Prepare Declaration of Notice

State in a declaration (Cal Rules of Ct 3.1204(b); see CCP §2015.5):

- a. That you notified opposing party or opposing party's attorney, giving specific details of how that was done; or

b. That you attempted in good faith to notify opposing party or opposing party's attorney but were unable to do so, including the specifics of your attempts, *e.g.*, "On June 1, 2007, I called opposing party's attorney at 8:30 a.m. and 10:00 a.m., and left messages that I would be seeking this ex parte order"; or

c. Reasons you should not be required to notify the opposing party of the application.

WHEN TO SERVE ORDER TO SHOW CAUSE

No later than 5 days after the court issues the OSC, serve a copy of the complaint, all affidavits, and memorandum in support of motion on *all* adverse parties. Cal Rules of Ct 3.1176(b).

Effect of Failure to Prepare or Serve

If you are unprepared to proceed on the hearing date that is set by the court in the OSC or have failed to exercise due diligence in attempting service, the court may discharge the receiver. Cal Rules of Ct 3.1176(c).

BE PREPARED TO NOMINATE RECEIVER

At the time of the ex parte hearing:

a. You may suggest in writing one or more persons for appointment as receiver, stating the reasons for that suggestion. Cal Rules of Ct 3.1177; for declaration regarding receiver, see below.

NOTE

Check if the court has a list of approved receivers and choose the receiver from that list, if applicable.

b. Also be prepared with the receiver's written oath and undertaking (for posting bonds and oath, see below).

ANTICIPATE CONTINUANCE

Adverse parties are entitled to one continuance of the confirmation hearing (Cal Rules of Ct 3.1176(d)):

a. If the court allows the hearing to be continued, the ex parte order appointing the receiver remains in effect until the date of the continued hearing under Rule 3.1176(d); or

b. If the adverse party requests a continuance from you, offer to stipulate to the continuance on the condition that the opposing party agrees in writing that the ex parte appointment of the receiver remains in effect and ask the court to approve the stipulation.

ANTICIPATE OPPOSITION

Party opposing appointment of the receiver may file verified answers or declarations in response to the OSC.

BY ORDER TO SHOW CAUSE With Motion

WHEN TO USE

Use when you have grounds for a receiver (see step 15, above) but do not want to wait until after defendant appears by answering complaint to schedule and serve noticed motion. You can give the minimum notice required by CCP §1005 before the hearing on the motion by obtaining an order to show cause (OSC) from the court (when you file the complaint) and serving it personally on the defendant with the summons and complaint (see Mortgage Deed of Trust Foreclosure §6.38; Civ Proc Before Trial, chap 13).

NOTE

To set the hearing by this method, prepare all documents required for the appointment of a receiver by noticed motion, below, except use an OSC instead of a notice of motion.

Further Research: See CCP §§527(f)(1), 564-568, 1005, 1014; Cal Rules of Ct 3.1150(a)-(e), 3.1177-3.1179; Civ Proc Before Trial, chap 13.

WHEN TO USE

Use when you have grounds for a receiver (see [step 15](#), above), but can wait until the defendant has appeared to file and serve the noticed motion (for when to serve motion on parties, see below).

Further Research: See [CCP §§564-568](#), [1005](#), [1014](#); [Cal Rules of Ct 3.1177-3.1179](#).

PREPARE MOTION

Follow procedures for motions in general (see [CCP §§1003-1008](#) for general requirements for filing motions; [Mortgage Deed of Trust Foreclosure, chap 6](#) (foreclosure-related receiverships); [Civ Proc Before Trial, chaps 12, 33](#) (noticed motions and receiverships, including forms)), including:

- a. Notice of motion and motion;
- b. Memorandum in support of motion;
- c. Declarations containing competent evidence in support of the motion; and
- d. Proposed order.

INCLUDE MEMORANDUM IN SUPPORT OF MOTION

Comply with [Cal Rules of Ct 3.1113](#) and state the authority for your motion, *e.g.*, that the facts you submit comply with:

- a. [CCP §564\(b\)\(2\)](#), if you seek appointment of receiver in the judicial foreclosure itself without a rents assignment clause (for information on the effect of a receiver, see [step 15](#), above); or
- b. [CCP §564\(b\)\(11\)](#) or (12), if you seek to enforce assignment of rents and profits (for rents-and-profits clause, see [step 15](#), above).

INCLUDE COMPETENT EVIDENCE

Provide facts, not just conclusions, supporting your request for a receiver in either:

- a. A verified complaint; or
- b. Declarations filed with the motion (see [CCP §2015.5](#)).

Further Research: See [Civ Proc Before Trial, chaps 12, 33](#). See [Mortgage Deed of Trust Foreclosure §6.101](#) for sample declaration.

Specific Facts

Include:

- a. The specific provision of the loan instruments containing an assignment-of-rents clause;
- b. Facts showing that a breach has occurred;
- c. That rents and profits are being collected by the defendant; or
- d. That the property is being damaged by vandalism, theft, or neglect, resulting in irreparable injury to lender.

Attach Exhibits

Attach copies of the note and deed of trust as exhibits to the complaint or declaration.

INCLUDE DECLARATION REGARDING RECEIVER

Include a declaration from your nominated receiver (or include facts in your client's or your declaration) that sets forth:

- a. That receiver is disinterested (see [step 36](#), above); and
- b. Receiver's qualifications, including experience, familiarity with property, or type of property, *e.g.*, shopping center.

INCLUDE RECEIVER'S ACCEPTANCE

Include the receiver's written oath (see below).

PREPARE TO POST UNDERTAKING

Include in your moving papers facts concerning the appropriate amount the court should set for the undertaking the receiver must provide before entering on the duties of a receiver. [CCP §567\(b\)](#). At the hearing, the applicant must propose specific amounts for the required undertakings and state supporting reasons. [Cal Rules of Ct 3.1178](#). These proposals and statements should be included in the papers filed. [Civ Proc Before Trial, chaps 12, 33](#). For posting, see below.

Purpose of Undertaking

Purpose of undertaking is to compensate in the event the receiver fails to faithfully discharge the duties of receiver or disobeys the order of the court. See [CCP §567\(b\)](#).

WHEN TO SERVE MOTION ON PARTIES

Serve motion on all parties at least ([CCP §1005\(b\)](#)):

If Personally

16 court days before the hearing.

If by Mail

16 court days before the hearing, and:

- a. Add 5 calendar days, if you mailed it to the party from and to an address in California;
- b. Add 10 calendar days, if you mailed it either from or to an address outside California, but within the United States; or
- c. Add 20 calendar days, if you mailed it either from or to an address outside the United States.

NOTE

If the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the required 16-day period of notice before the hearing shall be increased by 2 calendar days.

WHEN TO FILE PROOF OF SERVICE

5 days before the hearing, file with the court proof under penalty of perjury that you served the moving papers. [Cal Rules of Ct 3.1300\(c\)](#).

BE PREPARED TO NOMINATE RECEIVER

At the time of the hearing on the motion, you may suggest in writing one or more persons for appointment as receiver, stating the reasons for that suggestion. [Cal Rules of Ct 3.1177](#).

IF COURT APPOINTS RECEIVER

DRAFT ORDER

Carefully draft order that defines the receiver's authority (see [step 31](#), above). For further discussion and sample forms of pleadings, including order appointing receiver, see [Mortgage Deed of Trust Foreclosure §§6.38-6.40, 6.44, 6.100-6.107](#).

POST BONDS

Purchase and file all bonds required by the court (for obtaining and posting bonds, see CCP §§566(b), 567(b)).

FILE RECEIVER'S OATH

- a. If you have not already done so, prepare and have receiver execute oath. CCP §567(a).
- b. File oath with court. CCP §567(a).

Sample Forms: For form, see Civ Proc Before Trial, chap 33.

REVIEW RECEIVER'S AUTHORITY

Be aware of what the receiver must do (and cannot do) during the receivership. See CCP §568; Cal Rules of Ct 3.1179-3.1184.

Further Research: See CCP §§564-570; Mortgage Deed of Trust Foreclosure, chaps 6, 10; Civ Proc Before Trial, chap 33.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Using Judicial Foreclosure and Other Judicial Remedies/STEP 38. IF YOU NEED INJUNCTIVE RELIEF, PREPARE APPLICATION FOR INJUNCTIVE RELIEF

STEP 38. IF YOU NEED INJUNCTIVE RELIEF, PREPARE APPLICATION FOR INJUNCTIVE RELIEF

BY EX PARTE TEMPORARY RESTRAINING ORDER (TRO)

WHEN TO USE

Use to prevent great and irreparable loss to lender that would occur before the matter can be heard on a noticed hearing. CCP §527(c); see step 16, above; Miller v Superior Court (1978) 22 C3d 923, 929, 151 CR 6.

PREPARE APPLICATION

Follow the procedures for ex parte applications, temporary restraining orders (TROs) and injunctions in general. See CCP §§525-529; Cal Rules of Ct 3.1150, 3.1200-3.1207; Civ Proc Before Trial, chaps 13, 32.

Combine With Application for Receiver

You might include your request for the TRO and preliminary injunction as part of your application for a receiver, either as an alternative to or in addition to a receiver. See step 15, above.

INCLUDE COMPETENT EVIDENCE

Provide facts, not just conclusions, supporting your request for a TRO in either (CCP §527(a)):

- a. A verified complaint (CCP §526(a)(1)-(2)); or
- b. Declarations filed with the application (CCP §526(a)(2)-(3); see CCP §2015.5).

Further Research: See Civ Proc Before Trial, chap 32.

Declarations

In addition to facts supporting the injunction, provide evidence showing that (CCP §527(c); see CCP §2015.5):

- a. Property is in danger; and
- b. Great irreparable injury would result to your client before the matter could be heard on a noticed motion.

INCLUDE MEMORANDUM IN SUPPORT OF MOTION

Comply with Cal Rules of Ct 3.1113 and state the authority for granting your application, *e.g.*, that the facts you submit comply with:

- a. CCP §526(a)(1), if you seek the injunction in an action for specific performance (for grounds, see step 16, above);
- b. CCP §526(a)(2), if you have prayed for injunctive relief in the complaint (for grounds, see step 16, above); or
- c. CCP §526(a)(3) or §745, in an action for judicial foreclosure (for grounds, see step 16, above).

PREPARE ORDER TO SHOW CAUSE

- a. Include a proposed TRO that includes an order requiring opposing party to show cause at a hearing as to why the injunction should not be granted (CCP §527(d); see also discussion and sample form in Civ Proc Before Trial, chap 32).
- b. Generally, leave the dates for the service of papers, filing of proof of service, filing of opposing and reply papers, and hearing blank; the court will fill in dates when the court grants your TRO.

NOTIFY OPPOSING PARTIES

Within a reasonable time before applying for the TRO, notify the opposing party or opposing party's attorney of the time and place you will be applying for the order. CCP §527(c)(2).

Check Rules of Court

Follow specific notice requirements for ex parte applications, temporary restraining orders (TROs), and injunctions in general. See Cal Rules of Ct 3.1150(g), 3.1200-3.1207.

Prepare Declaration

State in a declaration (CCP §527(c)(1)); see CCP §2015.5 regarding declarations):

- a. That within a reasonable time before you made the application, you notified opposing party or opposing party's attorney of when you would make the application; or
- b. That you attempted in good faith to notify opposing party or opposing party's attorney, but were unable to do so, including the specifics of your attempts, *e.g.*, "On June 1, 2007, I called opposing party's attorney at 8:30 a.m. and 10:00 a.m., and left messages that I would be seeking this TRO"; or
- c. Reasons you should not be required to notify the opposing party of the application.

COMPLETE ORDER TO SHOW CAUSE

If the court issues a TRO, it must issue an order for a hearing on a date that is as soon as possible and not more than (CCP §527(d)):

- a. 15 days from the date of the order; or
- b. 22 days if the court finds there is good cause for the delay.

WHEN TO SERVE PARTIES

At least 2 days before the hearing or within 5 days after the OSC is issued, whichever is earlier, serve the OSC, application (including memorandum in support of motion), complaint, and declarations. CCP §527(d).

Effect of Failure to Serve

If you fail to serve the order to show cause:

- a. The court may dissolve the TRO (CCP §527(d)(3)); or
- b. You may file a declaration asking that the court reissue the TRO to allow you time to serve the defendant. CCP §527(d)(5).

BE PREPARED TO PROCEED WITH HEARING

Be prepared to proceed on the hearing date that is set by the court in the TRO, or expect the court to dissolve the TRO. CCP §527(d)(3).

ANTICIPATE CONTINUANCE

Adverse parties are entitled to one continuance. CCP §527(d)(4).

ANTICIPATE OPPOSITION

If the party opposing the injunction serves declarations in response to the TRO at least 2 days before the hearing, you cannot obtain a continuance because of such service. CCP §527(e).

BY NOTICED MOTION

WHEN TO USE

Use noticed motion when you have grounds for an injunction (CCP §526; see step 16, above), but you can wait:

- a. Until defendant has appeared to file and serve the noticed motion under CCP §1005 (see below); or
- b. To give the minimum notice required by CCP §1005 before the hearing on the motion, by obtaining an order to show cause (OSC) from the court when you file the complaint and satisfying conditions stated in CCP §527(f) (see Chrysler Credit Corp. v Waegle (1972) 29 CA3d 681, 105 CR 914).

Further Research: See CCP §527; Cal Rules of Ct 3.1150 for injunction procedures; Civ Proc Before Trial, chap 32.

PREPARE MOTION

Follow procedures for motions in general. See CCP §§1003-1008 as to general requirements for the filing of motions.

INCLUDE MEMORANDUM IN SUPPORT OF MOTION

Comply with CCP §527 and Cal Rules of Ct 3.1113 and state the authority for your motion, *e.g.*, that the facts you submit comply with statutory and case authority for issuing the injunction (see above).

INCLUDE COMPETENT EVIDENCE

Provide facts, not just conclusions, supporting your request for an injunction in either the:

- a. Complaint (CCP §526(a)(1)-(2)); or
- b. Declarations filed with the motion (CCP §526(a)(2)-(3); see CCP §2015.5 regarding declarations).

Further Research: See Civ Proc Before Trial, chap 32.

INCLUDE PROPOSED ORDER

Include a proposed order granting the preliminary injunction that sets forth the relief you are requesting from the court.

WHEN TO SERVE MOTION ON PARTIES

Unless a TRO was issued first, serve motion on all parties at least (CCP §1005(b)):

If Personally

16 court days before the hearing.

If by Mail

16 court days before the hearing, and:

- a. Add 5 calendar days, if you mailed it to the party from and to an address in California;
- b. Add 10 calendar days, if you mailed it either from or to an address outside California, but within the United States; or
- c. Add 20 calendar days, if you mailed it either from or to an address outside the United States.

NOTE

If the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the required 16-day period of notice before the hearing shall be increased by 2 calendar days.

Further Research: See Civ Proc Before Trial, chaps 12, 32.

PREPARE TO POST UNDERTAKING

Include in your moving papers facts concerning the appropriate amount the court should set for the undertaking should it grant an injunction. At the hearing, the applicant must propose specific amounts for the required undertakings and state supporting reasons. Cal Rules of Ct 3.1178. These proposals and statements should be included in the papers filed.

Purpose of Undertaking

Purpose of undertaking is to compensate defendant for all damages defendant may sustain if the court determines lender was not entitled to the injunction. CCP §529.

WHEN TO FILE PROOF OF SERVICE

5 court days before the hearing, file with the court proof under penalty of perjury that you served the moving papers. Cal Rules of Ct 3.1300(c).

PRESENT WRITTEN ORDER AND UNDERTAKING

Within 1 day after judge grants the injunction (or within the time set by the judge when the injunction was granted), present to the judge (Cal Rules of Ct 3.1150(f)):

- a. An order granting the preliminary injunction for the judge to sign; and
- b. A *written* undertaking in the amount set by the judge.

Further Research: See Civ Proc Before Trial, chaps 12, 32.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Using Judicial Foreclosure and Other Judicial Remedies/STEP 39. IF YOU NEED CLAIM AND DELIVERY FOR PERSONAL PROPERTY, PREPARE APPLICATION FOR CLAIM AND DELIVERY

STEP 39. IF YOU NEED CLAIM AND DELIVERY FOR PERSONAL PROPERTY, PREPARE APPLICATION FOR CLAIM AND DELIVERY

WHAT IT IS

- a. Claim and delivery of personal property (see [step 17](#), above) is governed by [CCP §§511.010-516.050](#). It is a provisional remedy under which a writ of possession issues.
- b. The writ of possession permits a creditor to recover specifically identified property for which the creditor can establish "the probable validity" of its claim to possession of the property. See generally [Debt Collection, chap 6](#); 6 Witkin, Procedure, *Prov Rem* §§245-273.

Example 1: Creditor holds deed of trust on mixed collateral including a warehouse and inventory in warehouse. Creditor may apply for a writ of possession under which a levying officer will take possession of the inventory and deliver to creditor.

Example 2: Creditor with perfected security interest in deposit accounts seeks to recover cash in account. Creditor may not be able to recover cash under claim and delivery unless it can be specifically identified. See *Hillyer v Eggers* (1917) 32 CA 764, 766, 164 P 27.

NOTE

Claim and delivery is rarely used in conjunction with real property foreclosures because the procedure is risky and foreclosing on mixed collateral security is complicated (see [step 9](#), above). For example, if foreclosing on property judicially, be certain that issuance of writ of possession does not violate [CCP §726](#). For security-first and one-action rule, see [step 5](#), above; in this context, see generally *Mills v Brown* (1928) 205 C 38, 41, 269 P 636. See also *Security Pac. Nat'l Bank v Wozab* (1990) 51 C3d 991, 275 CR 201; *Shin v Superior Court* (1994) 26 CA4th 542, 31 CR2d 587; [Mortgage Deed of Trust Foreclosure §§4.6-4.22, 9.2, 9.12-9.19](#).

CHECK LOCAL RULES

Check to see if the court in which you filed the action has rules governing the contents of papers, time for application, and other matters regarding issuance of a writ of possession. See, e.g., LA Super Ct Rules 9.19-9.23.

JUDICIAL FORMS

[Code of Civil Procedure §516.020](#) authorizes the Judicial Council to prescribe the form of application notices, orders, and other documents relating to claim and delivery. Those forms should be consulted and used as appropriate. See Judicial Council Forms CD-100—CD-200.

BE AWARE OF SANCTIONS FOR WRONGFUL ISSUANCE OF A WRIT OF POSSESSION

A defendant whose property has been levied upon or otherwise taken may apply for an order quashing the writ and releasing such property. If the application is granted, the writ is quashed, the property must be released, and the court "shall" award any damages sustained by the defendant that were proximately caused by the levy and the defendant's loss of the property. [CCP §§512.020, 512.120](#).

DETERMINE BEST PROCEDURE TO REQUEST ISSUANCE

By Ex Parte Application

- a. Be aware that courts are reluctant to issue a writ of possession ex parte because of the short period of notice and time for defendant to respond (see [Sea Rail Truckloads, Inc. v Pullman, Inc.](#) (1982) 131 CA3d 511, 515, 182 CR 560 (ex parte issuance of writs of possession "disfavored"));
- b. If court grants your ex parte application, the defendant is entitled to apply for an order quashing the writ of possession and releasing any property levied upon under the writ, i.e., you may have to make two appearances ([CCP §512.020\(b\)\(3\)](#));

c. You must be able to show that the property was:

(1) Feloniously taken;

(2) A credit card; or

(3) Not necessary for the support of the defendant and his or her family, in immediate danger of becoming unavailable for levy, and in need of an ex parte writ for protection (CCP §512.020(b)(3)); and

d. If the court is reluctant to issue the writ ex parte, you might be able to obtain a TRO (for ex parte TRO, see step 38, above) to maintain the status quo until you can bring a noticed motion for the issuance of a writ of possession.

By Noticed Motion

a. Court is more likely to issue the writ because defendant has had time to respond; and

b. Requires only one appearance.

BE AWARE OF STATUTORY REQUIREMENTS FOR DELIVERY OF WRITS AND LEVIES

Code of Civil Procedure §§514.010-514.050 set forth various requirements that must be observed by the levying officer when delivering writs and levies on property. After the writ issues, it is good practice to confirm that these requirements will be or have been satisfied.

Further Research: For full discussion of claim and delivery procedures and related forms, see Debt Collection §§6.111-6.166.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Using Judicial Foreclosure and Other Judicial Remedies/STEP 40. IF PREJUDGMENT ATTACHMENT AVAILABLE, PREPARE APPLICATION FOR WRIT OF ATTACHMENT

STEP 40. IF PREJUDGMENT ATTACHMENT AVAILABLE, PREPARE APPLICATION FOR WRIT OF ATTACHMENT

WHAT IT IS

- a. Attachment is governed by CCP §§481.010-493.060.
- b. It is a provisional remedy (see step 18, above), under which a writ of attachment issues.
- c. The writ of attachment permits a creditor to levy on nonexempt property as security for the eventual satisfaction of a judgment on a liquidated business contract claim of not less than \$500. CCP §483.010(a); see generally Debt Collection, chap 6; 6 Witkin, Procedure, *Prov Rem* §§46-244.
- d. Attachment is available for claims secured by real or personal property only if, among other things, the security has become worth less than the claim. CCP §483.010(b).

Example: Lender holds deed of trust on real property collateral that has diminished in value. As a result, lender is undersecured by \$10,000. Borrower holds deposits in a local bank exceeding \$10,000. Lender may apply to the court to attach borrower's accounts.

NOTE

When foreclosing on property judicially, be cautious of violations of CCP §726. See generally step 5, above. Notwithstanding the specific statutory provisions for attachment where real property security exists, there is little decisional law specifically supporting the proposition that a plaintiff may attach unpledged property in a judicial foreclosure of real property. See *Shin v Superior Court* (1994) 26 CA4th 542, 551, 31 CR2d 587 (CCP §483.010 not a safe harbor from CCP §726 violations through Korean attachment action). If the plaintiff obtains an attachment, it must expect that the defendant will assert CCP §726 as a defense or sanction in the judicial foreclosure action.

WHAT MAY BE ATTACHED

Code of Civil Procedure §487.030 lists attachable and exempt property. See also Debt Collection, chap 6. Note that exemptions available to individuals are not available to corporations.

PROCEDURAL OVERVIEW

There are three essential steps to attaching property:

Right to Attach Order (RTAO)

Before obtaining a writ of attachment, the plaintiff must obtain a right to attach order (RTAO). The RTAO shall issue if the court finds:

- a. The claim is one upon which an attachment may be issued;
- b. The plaintiff has established the probable validity of the claim on which the attachment is based; and
- c. The attachment is sought for a proper purpose (CCP §484.090).

NOTE

The RTAO, if entered, must state the amount to be secured under the attachment and, if any of the defendant's property is exempt, describe and prohibit attachment of such property. See Judicial Council Form AT-120.

Writ of Attachment

The writ of attachment constitutes directions to the levying officer and is issued by the clerk of the court. It can only issue on the

clerk's receipt of an RTAO upon the filing of an undertaking. For the form of the writ of attachment, see CCP §488.010 and Judicial Council Form AT-135. Additional writs may issue, if necessary, under the statutorily prescribed procedure. See CCP §§484.310-484.370 (regularly noticed applications); CCP §§485.510-485.540 (ex parte applications).

Levy

Once the writ of attachment issues, a levying officer is charged with effecting the attachment under CCP §§488.010-488.740.

CHECK LOCAL RULES

Check to see if the court in which you filed the action has rules governing the contents of papers, time for application, application fees, and other matters regarding issuance of a writ of attachment. See *e.g.*, LA Super Ct Rules 9.19-9.23.

JUDICIAL FORMS

Code of Civil Procedure §482.030 authorizes the Judicial Council to prescribe the form of application notices, orders, and other documents relating to attachments. Those forms should be consulted and used as appropriate. See Judicial Council Forms AT-105—AT-180.

LIABILITY FOR WRONGFUL ISSUANCE OF WRIT

a. Be aware of liability for the wrongful issuance of a writ of attachment. Wrongful attachment is defined as an:

- (1) "Unauthorized" attachment;
- (2) Attachment that is released by a judgment for defendant; or
- (3) Attachment of exempt property. CCP §490.010.

b. If a plaintiff wrongfully attaches a defendant's property, the plaintiff may be liable to the defendant for damages proximately caused, plus certain costs and expenses. CCP §490.020.

c. Plaintiffs unfamiliar with enforcement of judgment laws should be particularly wary of homestead and other exemptions available to individual defendants. See CCP §§487.020, 703.010-704.995.

d. These remedies are nonexclusive (CCP §490.010); defendants may also:

- (1) Bring actions for the torts of malicious prosecution or abuse of process in appropriate circumstances (see generally *White Lightning Co. v Wolfson* (1968) 68 C2d 336, 66 CR 697); or
- (2) Possibly raise as defense or sanction a waiver of lender's real property security under the CCP §726 rule (see *Shin v Superior Court* (1994) 26 CA4th 542, 31 CR2d 587).

Further Research: See generally Debt Collection, chap 6; Mortgage Deed of Trust Foreclosure, chap 4.

BY NOTICED MOTION (CCP §§484.010-484.110)

WHEN TO USE

Use when you are entitled to attach property, but can wait:

- a. Until the defendant has appeared to file and serve the noticed motion giving minimum notice required by CCP §1005 (for when to serve application on parties, see below); or
- b. If seeking an ex parte temporary protective order (TPO; see below), to give the minimum notice required by CCP §1005 before the attachment hearing on the motion by obtaining an order to show cause (OSC) from the court when you file the complaint (see Civ Proc Before Trial, chaps 13, 32).

PREPARE PAPERS

Follow general requirements for filing motions (see CCP §§1003-1008) in filing application. See Civ Proc Before Trial, chap 12 (noticed motions). Be certain to include:

- a. Application and supporting affidavit setting forth availability of attachment remedy, statement of, *e.g.*, amount to be secured by attachment (see CCP §§484.020 and 484.030; see Judicial Council Form AT-105);
- b. Notice of application and hearing (CCP §484.050) containing each of the matters set forth in that section, including:
 - (1) Time and location of the hearing;
 - (2) Basis upon which a writ will issue;
 - (3) What the defendant must do to oppose the application; and
 - (4) Statutory statement of the defendant's entitlement to seek the advice of an attorney (see Judicial Council Form AT-115);
- c. Memorandum in support of motion (see below); and
- d. Declarations containing competent evidence in support of the motion (CCP §484.030; see below).

INCLUDE MEMORANDUM IN SUPPORT OF MOTION

- a. Statute provides for the service and filing of memorandum in support of motion to be relied on at the hearing on the application for the writ. CCP §484.090(d).
- b. Comply with Cal Rules of Ct 3.1113 and state the authority for your application, *e.g.*, argument supporting the assertion that the plaintiff will probably prevail in its claim and that the attachment is sought for a proper purpose CCP §484.090(a).

INCLUDE COMPETENT EVIDENCE

Provide facts, not just conclusions, supporting your request for a writ of attachment in either:

- a. The verified complaint; or
- b. The declarations filed with the application (see CCP §484.090(d) regarding declarations).

Specific Facts

Include:

- a. Loan instruments, including any specific provisions containing the grant of a security interest in personal property;
- b. Facts showing that a breach of the underlying obligation has occurred and the amount to be secured;
- c. That the secured party is entitled to attach property; and
- d. A description of the property to be attached (for individual defendants, must be specific).

Further Research: See CCP §§484.020(a), 484.030(a).

Attach Exhibits

Attach copies of the security agreement or applicable instrument as exhibits to the complaint or declaration.

PREPARE TO POST UNDERTAKING

- a. No writ of attachment may issue unless the plaintiff has posted an undertaking. CCP §489.210.
- b. Include in your moving papers facts concerning the appropriate amount the court should set for the undertaking if greater than the \$10,000 statutory minimum. CCP §489.220.
- c. Be certain that the undertaking comports with the requirements of Cal Rules of Ct 3.1130. See also Judicial Council Form AT-160.

SERVICE OF PAPERS

See CCP §484.040 (requiring service of summons and complaint, notice of the application and hearing, the application, and

affidavits in support of the application). See also CCP §§482.070, 1005(a)(2).

WHEN TO SERVE APPLICATION ON PARTIES

Serve papers on all parties at least (CCP §1005(b)):

If Personally

16 court days before the hearing.

If by Mail

16 court days before the hearing, and:

- a. Add 5 calendar days, if you mailed it to the party from and to an address in California;
- b. Add 10 calendar days, if you mailed it either from or to an address outside California, but within the United States; or
- c. Add 20 calendar days, if you mailed it either from or to an address outside the United States.

NOTE

If the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the required 16-day period of notice before the time appointed for the hearing shall be increased by 2 calendar days.

WHEN TO FILE PROOF OF SERVICE

5 days before the hearing, file with the court proof under penalty of perjury that you served the moving papers. Cal Rules of Ct 3.1300(c).

ANTICIPATE OPPOSITION

Parties opposing issuance of a writ may file memorandum in opposition to motion or declarations in response to the application no fewer than 5 days before the hearing. CCP §484.060.

CONSIDER INJUNCTIVE RELIEF WITH APPLICATION FOR WRIT

Consider including an ex parte request for a temporary protective order (TPO) and preliminary injunction as part of your application for writ of attachment (CCP §§486.010-486.110; for TPO as alternate, see below). The court is more likely to grant a TPO to maintain the status quo (pending the hearing on the writ of attachment by a noticed motion) than to grant an ex parte writ of attachment.

BY EX PARTE APPLICATION (CCP §§485.010-485.240)

WHEN TO USE

- a. Use if you can establish that "great or irreparable injury" would result if the matter were delayed until it were heard on notice. CCP §485.010(a).
- b. "Great and irreparable injury" includes instances in which:
 - (1) There is a danger that the property to be attached would be concealed, impaired in value, or otherwise made unavailable for levy;
 - (2) The defendant is generally not paying his or her debts as they come due; or
 - (3) A sale is anticipated under a bulk sales notice or an escrow for a liquor license. CCP §485.010(b).

PREPARE PAPERS

Application

Set forth the grounds for request for issuance of writ of attachment (for how to prepare papers, see below). See Judicial Council Form AT-105.

Memorandum in Support of Motion

See above.

Declarations

See above.

NOTIFY OPPOSING PARTIES

Within a reasonable time *before* applying for the ex parte order, but absent exceptional circumstances, no later than 10:00 a.m. on the court day before the application is heard, notify the opposing party or opposing party's attorney of the time and place you will be applying for the order. Cal Rules of Ct 3.1203(a).

Prepare Declaration

State in a declaration (Cal Rules of Ct 3.1204(b)-(c); see also CCP §2015.5):

- a. That you notified opposing party or opposing party's attorney; or
- b. That you attempted to notify opposing party or opposing party's attorney but were unable to do so, including the specifics of your attempts, *e.g.*, "On June 1, 2007, I called opposing party's attorney at 8:30 a.m. and 10:00 a.m., and left messages that I would be seeking this ex parte writ"; or
- c. Reasons you should not be required to notify the opposing party of the application.

BE PREPARED FOR, *E.G.*, A MOTION TO QUASH IF THE APPLICATION IS GRANTED EX PARTE

If a writ of attachment issues ex parte, the defendant may move to:

- a. Set aside the RTAO, quash the writ of attachment, and release the property levied upon; or
- b. Reduce the amount secured by the attachment. CCP §485.240; see Judicial Council Form AT-175.

ALTERNATIVELY, CONSIDER A TPO

a. A court may issue a temporary protective order (TPO) ex parte if the plaintiff establishes the probable validity of its claim, provides an undertaking, is otherwise authorized to issue the writ of attachment, and will suffer "great or irreparable injury." CCP §486.020.

(1) Although these requirements are substantially identical to those relating to the issuance of an ex parte writ of attachment, courts are generally less apprehensive about issuing a TPO than issuing a writ of attachment ex parte.

(2) In fact, courts are authorized to issue a TPO when the plaintiff requests a writ of attachment ex parte. CCP §486.030.

b. The TPO may prohibit the defendant from:

- (1) Transferring any interest in property (except for certain farm products and inventory);
- (2) Concealing or removing the property; or
- (3) Impairing the value of the property (CCP §486.050).

c. Special rules apply to checking accounts. See CCP §486.060.

Further Research: See Judicial Council Forms AT-105, AT-140.

EFFECT THE ATTACHMENT

LEVY

- a. Once a writ of attachment issues to the levying officer, the officer is required to act in accordance with the exact terms of the writ. Code of Civil Procedure §§488.010-488.740 set forth various requirements that must be observed by the levying officer.
- b. Once the writ issues, it is good practice to confirm that these requirements have been satisfied.

TURNOVER ORDER

The court is also authorized to enter an order directing the defendant to turn over specific property (or documents of title) to the levying officer. CCP §482.080.

PROCEDURE

The plaintiff must take a number of actions to effect a levy, including providing the levying officer with instructions and a deposit. For a detailed description of levying procedure, see Debt Collection, chap 6.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Using Judicial Foreclosure and Other Judicial Remedies/STEP 41. FILE AND SERVE COMPLAINT AND APPLICATIONS FOR PROVISIONAL REMEDIES

STEP 41. FILE AND SERVE COMPLAINT AND APPLICATIONS FOR PROVISIONAL REMEDIES

CHOOSE PROPER COURT

For property located in California, file in the superior court (Cal Const art VI, §10) or in appropriate federal district court on the basis of diversity jurisdiction under 28 USC §1332.

If One Parcel or Two Contiguous Parcels

If obligation is secured by one parcel or two contiguous parcels, file in the county where the property, or some part of it, is located. CCP §392(a)(2).

If Two Noncontiguous Parcels in Different Counties

If obligation is secured by two deeds of trust on two noncontiguous parcels in different counties, file in either county. Court has authority to order sale in another county. CCP §726(d).

NOTE

Even if you intend to seek a deficiency judgment against borrower, file the complaint in the county where the property is located, not in the county where borrower lives. See Appel v Hubbard (1957) 155 CA2d 639, 643, 318 P2d 164.

Further Research: See Mortgage Deed of Trust Foreclosure §§3.12-3.14.

SERVE ALL PARTIES

To terminate the interest of a party, *serve* the summons and complaint in the same manner as in other civil actions. See CCP §§410.10-418.11; Monterey S.P. Partnership v W.L. Bangham, Inc. (1989) 49 C3d 454, 459, 261 CR 587 (must *serve* necessary parties to terminate their interest; not sufficient to serve trustee under deed of trust and omit beneficiaries; now see CC §2937.7); Handling Service of Process (Serving Summons in Civil Proceedings) (Cal CEB Action Guide November 2009). See also Mortgage Deed of Trust Foreclosure §3.15.

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/If Using Judicial Foreclosure and Other Judicial Remedies/STEP 42. OBTAIN A JUDGMENT IN THE JUDICIAL FORECLOSURE ACTION

STEP 42. OBTAIN A JUDGMENT IN THE JUDICIAL FORECLOSURE ACTION

TRIAL

WHAT TO PRESENT

Generally, introduce as evidence at a trial or default hearing on the judicial foreclosure action:

Promissory Note

Original promissory note or obligation.

Security

- a. Original mortgage or deed of trust; or
- b. Certified copy of the recorded mortgage or deed of trust; and
- c. Proof of the recording date of mortgage or deed of trust (so court knows which liens are junior and should be terminated).

Assignment

If plaintiff is an assignee, original or certified copy of the assignment.

Assumption

If defendant is an assuming grantee of the original borrower, the written assumption agreement (CC §1624(a)(6)) or an admission of assumption.

Amount Due

Statement of the amount owed by defendant, including:

- a. Date of original default;
- b. Last date interest was credited, and amount of interest owing; and
- c. Unpaid balance of the obligation.

Further Research: See Mortgage Deed of Trust Foreclosure §3.65.

JUDGMENT

WHAT TO INCLUDE IN JUDGMENT

Include in the judgment that (CCP §726(a)):

Sale Directed

- a. Sale of all or part of the property is directed.
- b. Sale proceeds be applied to:
 - (1) Court costs and expenses of levy and sale; and

(2) Amount due to plaintiff, including attorney fees, if provided in the security instrument.

Officer Appointed to Conduct Sale

The sheriff or a receiver is appointed (CCP §712.060) to sell the property in a manner provided for execution of judgments, *i.e.*:

- a. Deficiency waived or prohibited (in effect precluding defendant from redemption) (CCP §§716.020, 726(b)); or
- b. Deficiency permitted (meaning that defendant has a right of redemption; for explanation, see step 44, below; CCP §§726(b), 729.010-729.090).

Cross-Reference: See step 43, below, concerning the procedures to enforce the judgment.

Amount Due

Amount of debt and either (CCP §726(b)):

- a. Personal liability of any defendant subject to a deficiency judgment; or
- b. Deficiency judgment is waived or prohibited.

Jurisdiction to Determine Deficiency

A statement reserving jurisdiction so that the court can conduct a hearing to determine the fair value of the property and if any deficiency is due. See step 45, below.

NOTE

Because the judgment must declare if the deficiency judgment is waived or prohibited (see CCP §729.010), lender must decide before the judgment is entered if it wishes to pursue a deficiency judgment.

Further Research: See Mortgage Deed of Trust Foreclosure §§3.64-3.70.

TERMINATE NONJUDICIAL FORECLOSURE PROCEEDING

WHY YOU TERMINATE

Entry of judgment of judicial foreclosure by the trial court constitutes an election of remedies and lender must immediately stop proceeding nonjudicially. Flack v Boland (1938) 11 C2d 103, 77 P2d 1090; Vlahovich v Cruz (1989) 213 CA3d 317, 261 CR 565.

WHEN TO TERMINATE

As soon as practicable, lender should record in the office of the county recorder where the real property is situated a "Notice of Rescission of Notice of Default and Election to Sell Under Deed of Trust" setting forth in its body full identification of the Notice being rescinded. Failure to do so can give rise to claims of clouding of title.

Further Research: See Mortgage Deed of Trust Foreclosure §§2.13, 3.11.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/After Judicial Foreclosure Judgment/STEP 43. EXECUTE ON THE JUDGMENT; CONDUCT FORECLOSURE SALE

After Judicial Foreclosure Judgment

STEP 43. EXECUTE ON THE JUDGMENT; CONDUCT FORECLOSURE SALE

HOW TO EXECUTE ON JUDGMENT

Execute on the judgment of foreclosure (see CCP §§716.020, 729.010-729.090), *e.g.*:

- a. Obtain a writ of sale from the clerk (CCP §§712.010-712.020; see Mortgage Deed of Trust Foreclosure §3.72).
- b. Forward the writ to the levying officer appointed in the judgment with instructions (CCP §712.030).

NOTICE OF LEVY

HOW TO LEVY AND PROCEED TO SALE

Levying officer levies on the real property by serving a notice of levy, and gives notice of the sale:

- a. If deficiency waived or prohibited (defendant has no right of redemption), gives notice under CCP §716.020:
 - (1) A levying officer must wait 120 days *after* serving a notice of levy on the judgment debtor before serving a notice of sale (CCP §§700.015, 701.545);
 - (2) After the 120 days has run, a notice of sale giving 20 days' notice must be given (CCP §701.540) (the debtor receives a minimum of 140 days' notice before the foreclosure sale); and
 - (3) During this 140-day presale period, the debtor retains its right to redeem the property (CC §2903).
- b. If deficiency permitted (defendant has right of redemption), gives notice under CCP §729.010 (see step 36, above):
 - (1) No waiting period (120 days as set forth above) is required between serving the notice of levy and the notice of sale (CCP §729.010(b)(2)), although a notice of levy must still be recorded and served (CCP §701.540); and
 - (2) A 20-day notice of sale also must be recorded and served (CCP §701.540), but the notice of sale may be given immediately upon entry of judgment (CCP §729.010(b)(2)).

Further Research: See Enforcement of Judgments Law (CCP §§680.010-724.260); Mortgage Deed of Trust Foreclosure §§3.71-3.76; Enforcing Civil Money Judgments (Cal CEB Action Guide November 2008), referred to throughout this Action Guide as Money Judgments.

NOTE

Do *not* execute on any money portion of the judgment by executing on property other than through the foreclosure sale or you will violate the CCP §726 one-action rule. See *Carnation Co. v Lampi (In re Kristal)* (9th Cir 1985) 758 F2d 454. See step 5, above, for discussion of the one-action rule; for discussion of the amount due, see below.

WORKING WITH THE LEVYING OFFICER

WHO SHOULD CONDUCT FORECLOSURE SALE

Consider whether to seek the appointment by the court of a levying officer with experience in selling real property. The sheriff and the sheriff's office staff are not always equipped to handle the questions from interested parties; the appointment of a real

property receiver as the levying officer may be preferred. CCP §§564(b)(4), 712.060. Consider also specific authorization for the levying officer to contract for professional services to meet notice and publication requirements.

NOTICE OF SALE

WHAT TO INCLUDE IN NOTICE OF SALE

Include in the notice:

- a. If applicable, that the sale is subject to a right of redemption (CCP §729.010(b)(1));
- b. Amount of debt, including interest and costs (CCP §729.010(b)(1));
- c. Date, time, and place of sale (CCP §701.540(a));
- d. The interest to be sold (CCP §701.540(a));
- e. Legal description of real property (CCP §701.540(a)); and
- f. Street address of the property, or if no street address or common designation (CCP §701.540(a)):
 - (1) Statement that directions to its location may be obtained from the levying officer; or
 - (2) In discretion of levying officer, the directions to the property.

Further Research: See Mortgage Deed of Trust Foreclosure §§3.71-3.76.

WHEN TO GIVE NOTICE OF SALE

Levying officer serves, posts, or mails the notice of sale:

Earliest

If deficiency waived (no right of redemption), you must wait 120 days after the notice of levy was served on defendant. CCP §701.545.

Latest

20 days before the sale date. See CCP §701.540(b).

NOTE

If deficiency is available (right of redemption), levying officer may serve notice of sale at the same time as notice of levy. CCP §729.010(b)(2).

GIVE NOTICE

Serve Judgment Debtor

Serve defendant (CCP §701.540(c)):

- a. Personally; or
- b. By mail.

Post

Post:

- a. In a public place in the city where the property is located or, if it is not within a city, in the judicial district where the property is located (CCP §701.540(d)(1)); and

b. At a conspicuous place on the property (CCP §701.540(d)(2)).

NOTE

Levying Officer might photograph the posted notice to defeat any later claim that the notice was not posted or that the posting did not comply with statutory requirements.

Serve Occupant

On the same day as the posting, serve the notice on one occupant of the property by (CCP §701.540(e)):

- a. Leaving notice with occupant personally; or
- b. Leaving notice with any person of suitable age and discretion found on the property who is:
 - (1) Employee or agent of occupant; or
 - (2) Member of occupant's household.

Mail Notice to Lienholders

Levying officer will mail notice to lienholders (CCP §701.540(h)):

- a. If deficiency is waived (no right to redemption), the *judgment creditor* must wait 30 days after the notice of levy and then give the levying officer the names and addresses of all persons having liens on the real property (CCP §701.540(h)); or
- b. If deficiency is available (right to redemption), the *judgment creditor* must give the levying officer the names and addresses of all persons having liens on the real property at the time of entry of judgment (CCP §729.010(b)(3)).

Mail Notice to All Other Interested Persons

At the time of posting, levying officer will mail a copy of the notice to all persons who have filed requests for special notice with the clerk of the court. CCP §701.550.

WHEN TO PUBLISH NOTICE

Publish the notice of sale in a newspaper of general circulation in the city where the property is located (or in the judicial district in which the property is located, if not within a city) (CCP §701.540(g)):

- a. First publication must occur at least 20 days before the sale date (CCP §701.540(g)); and
- b. Every week for 3 consecutive weeks (Govt C §6063).

SALE AND BIDDING

WHEN LEVYING OFFICER CONDUCTS SALE

Levying officer must conduct sale (CCP §701.570(a)):

Time

Between the hours of 9:00 a.m. and 5:00 p.m.

When

On a business day.

Where

In the county where the property is located.

Further Research: See CCP §§701.590 (bidding procedure), 701.810 (payment of sale proceeds); Mortgage Deed of Trust

BIDDING

Stress that lender's attendance at the sale to make the minimum bid and presale preparation is crucial. See Amalgamated Bank v Superior Court (2007) 149 CA4th 1003, 57 CR3d 686.

CONSIDER POSTPONING SALE

If you and the debtor agree and send a written request to the levying officer, the levying officer must postpone the sale, *e.g.*, if you are attempting to settle the case, you might both agree to postpone. See CCP §701.580; Mortgage Deed of Trust Foreclosure §3.78.

AFTER SALE

LEVYING OFFICER DUTIES

Deed

- a. If property sold without the right of redemption (no deficiency judgment available), levying officer executes and delivers to the buyer a deed of sale. CCP §701.660. This deed of sale may not be set aside if delivered to a third party purchaser, although the debtor may bring an action for damages against the foreclosing creditor.
- b. An action to set aside a sale to the foreclosing creditor, however, is permitted, but only for sale irregularities, and the action must be filed within 90 days of the sale date. CCP §701.680; First Fed. Bank v Fegen (2005) 131 CA4th 798, 31 CR3d 853 (failure to file suit within 90 days renders sale absolute and irreversible). See also Mortgage Deed of Trust Foreclosure §3.84.
- c. If property sold to a third party, foreclosing creditor has no right under §701.680 to set aside sale for irregularities. Amalgamated Bank v Superior Court (2007) 149 CA4th 1003, 57 CR3d 686.

Notice of Right to Redeem

If property is sold subject to right of redemption (deficiency judgment available), promptly after the sale, the levying officer or trustee gives notice to debtor that he or she has the right to redeem. CCP §729.050. See Mortgage Deed of Trust Foreclosure §3.84.

Certificate

If property is sold subject to the right of redemption, the levying officer or trustee also executes and delivers to the buyer a certificate of sale (CCP §729.040):

- a. Indicating that the property is subject to a right of redemption; and
- b. Specifying the applicable redemption period (for when the property may be redeemed, see step 44, below).

EFFECT OF DEED

The deed transfers all of borrower's right, title, and interest to the purchaser, *i.e.*, purchaser's title is:

- a. Subject to any liens that had priority over the deed of trust; but
- b. Free and clear of any liens or interests junior to the foreclosed deed of trust (see CCP §701.630 (junior interests are extinguished)).

Further Research: See CCP §729.080(e); 4 Miller & Starr §10:231.

EFFECT OF CERTIFICATE

Since the property is sold subject to the right of redemption (deficiency judgment available):

Time of Sale

Purchaser at the sale takes title subject to the rights of the former borrowers or their successors-in-interest to redeem the property. See CCP §729.020.

During Time of Redemption

Purchaser at the sale is not entitled to possession until the time of redemption expires, but purchaser is entitled to (CCP §729.090):

- a. Rents and profits of the property during the redemption period (for when property may be redeemed, see step 44, below);
- b. Enter the property during reasonable hours to repair and maintain the property; and
- c. A court order restraining waste of the property.

After Time of Redemption

If redemption period (for when property may be redeemed, see step 44, below) expires without a valid redemption, levying officer gives the purchaser a deed. CCP §§701.670, 729.080(a). See 4 Miller & Starr §10:231.

EFFECT OF REDEMPTION

If the defendant or successors-in-interest redeem, the effect of the sale is terminated. CCP §729.080(d). See 4 Miller & Starr §10:227.

Further Research: On postsale redemption, its effect, and rights to possession and rents during redemption period, see Mortgage Deed of Trust Foreclosure §§3.90-3.101.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/After Judicial Foreclosure Judgment/STEP 44. IF LENDER ENTITLED TO A DEFICIENCY JUDGMENT, ANTICIPATE THAT PROPERTY MAY BE REDEEMED (STATUTORY REDEMPTION)

STEP 44. IF LENDER ENTITLED TO A DEFICIENCY JUDGMENT, ANTICIPATE THAT PROPERTY MAY BE REDEEMED (STATUTORY REDEMPTION)

WHEN LIKELY TO ARISE

AVAILABILITY OF REDEMPTION

Borrower may redeem property if (see [CCP §729.020](#)):

- a. Lender has a right to a deficiency judgment (see below); and
- b. Property is sold at a judicial foreclosure sale.

WHEN LENDER *NOT* ENTITLED TO DEFICIENCY

Lender is not entitled to a deficiency judgment:

- a. If lender waives the right to recover a deficiency as determined in the foreclosure judgment ([CCP §726\(e\)](#), [729.010](#));
- b. If lender nonjudicially foreclosed any of the real property security ([CCP §580d](#)); or
- c. If the foreclosed lien is a purchase money mortgage ([CCP §580b](#)).

Further Research: See [CCP §§701.660](#) and [729.010-729.090](#); [Mortgage Deed of Trust Foreclosure §§3.4, 3.8, 3.59, 3.62, 3.86-3.89](#).

WHO MAY REDEEM

The property may be redeemed only by ([CCP §729.020](#)):

Trustor/Borrower

Judgment debtor who is the trustor/borrower.

Successors-in-Interest

Successors-in-interest of the defendant. The statute provides that a foreclosure sale purchaser is *not* a successor-in-interest entitled to redeem.

NOTE

Old system of "scramble redemption" was eliminated in 1983 and junior lienholders are no longer entitled to redeem the property. See [Mortgage Deed of Trust Foreclosure §§3.90-3.91](#); former CCP §701.

WHEN PROPERTY MAY BE REDEEMED

Property may be redeemed within ([CCP §729.030](#)):

If Proceeds Sufficient

3 months after sale, if the sale proceeds are enough to satisfy the indebtedness with interest and costs;

If Proceeds Insufficient

1 year after sale, if the proceeds are insufficient.

Further Research: See Mortgage Deed of Trust Foreclosure §3.92.

NOTE

Be aware that right of redemption was upheld on equitable grounds even *after* expiration of statutory redemption period. See 4 Witkin, Summary, *Sec Trans Real Prop* §233; Smith v Schuler Knox Co. (1948) 85 CA2d 96, 192 P2d 34 (on showing of fraud or mutual mistake).

HOW PROPERTY IS REDEEMED

Before redemption period expires, redeeming person (CCP §729.060(a)):

- a. Deposits the redemption price with the levying officer; and
- b. If redeeming person is a successor-in-interest to the defendant, files evidence of interest, *e.g.*, certified copy of conveyance.

HOW TO CALCULATE THE REDEMPTION PRICE

The redeeming person must pay (CCP §§685.010, 729.060(b)) total sales price as adjusted by the following:

Add Purchaser's Out-of-Pocket

Add any amounts purchaser paid:

- a. For:
 - (1) Taxes;
 - (2) Insurance premiums; and
 - (3) Maintenance;
- b. To:
 - (1) Any senior lienholders to protect the purchaser's interest in the property;
 - (2) Any junior lienholders paid by the purchaser.

Add Interest

Add interest on all of the above amounts at the legal rate (CCP §685.010 (legal rate is 10 percent)).

Offset Rents and Profits

Subtract any rents and profits paid to the purchaser.

Offset Value of Use

Subtract any value of the "use and occupancy" of the property to the purchaser. CCP §729.060(c).

IF DISAGREEMENT OVER REDEMPTION PRICE

If the purchaser at the sale disagrees with the redemption price or right of redemption, the redeeming party may deposit the undisputed portion of the redemption price and file a petition in court *before* the redemption period expires, asking court to determine (CCP §729.070):

- a. Right of redemption; or
- b. Redemption price.

EFFECT OF REDEMPTION

After redemption, the redeeming party is restored to title without the junior liens (because junior liens were extinguished by sale and do not reattach). CCP §729.080(d)-(e).

Further Research: On postsale redemption, procedures to redeem, its effect, and rights to possession and rents during redemption period, see Mortgage Deed of Trust Foreclosure §§3.90-3.101.

IF PURSUING A DEFICIENCY JUDGMENT

WHEN TO PURSUE

Lender may pursue deficiency judgment if (see Mortgage Deed of Trust Foreclosure §§3.86-3.89):

- a. Deficiency judgment is not prohibited by statute or contract (*e.g.*, CCP §580b prohibits deficiency in certain cases involving purchase money financing; see Mortgage Deed of Trust Foreclosure, chap 5; for when lender not entitled to deficiency, see above).
- b. Judgment in the judicial foreclosure action provided that a defendant would be liable for a deficiency (CCP §726(b); see Mortgage Deed of Trust Foreclosure §3.67; for amount due, see step 42, above).
- c. Lender received from the foreclosure sale less than the full amount declared due in the judgment (CCP §726(b); see step 42, above).
- d. Lender makes an application to the court within 3 months after the sale and establishes that the fair value of the property is less than the debt (CCP §726(b)).

DEADLINE

No later than 3 months after the sale, plaintiff must make application for the deficiency judgment. CCP §726(b).

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/After Judicial Foreclosure Judgment/STEP 45. REVIEW PROCEDURE AND STRATEGY FOR FAIR-VALUE HEARING TO ESTABLISH A DEFICIENCY

STEP 45. REVIEW PROCEDURE AND STRATEGY FOR FAIR-VALUE HEARING TO ESTABLISH A DEFICIENCY

WHAT IT IS

Code of Civil Procedure §§580a and 726(b), applicable to nonjudicial and judicial foreclosures, respectively, limit the ability of a lender to recover a deficiency from a borrower (or, in certain instances, other obligor) to the lesser of:

- a. The difference between the unpaid debt and the fair value of the security; and
- b. The difference between the unpaid debt and the price paid at the sale of the security.

WHEN AVAILABLE

- a. Deficiency judgment must not be prohibited by contract or statute (*e.g.*, nonrecourse note; CCP §580b purchase money deficiency bar; CCP §580d bar after nonjudicial foreclosure of lender's deed of trust);
- b. Judgment in lender's judicial foreclosure action must provide that a defendant or defendants is or are liable for a deficiency (CCP §726(b); see step 42, above); and
- c. Lender receives from the foreclosure sale less than the full amount declared due in the judgment (CCP §726(b); see step 42, above).

NOTE

Junior lienholder seeking judgment on its note after purchasing real property security at senior lienholder's sale will be treated as seeking a deficiency judgment and therefore subject to "fair value" procedures (*Walter E. Heller W., Inc. v Bloxham* (1985) 176 CA3d 266, 273, 221 CR 425 (applying CCP §580a)).

CONSIDER STRATEGIC ISSUES

- a. Have foreclosure judgment against borrower and judgment against guarantor or surety included all necessary elements for appropriate procedure and authorization to obtain deficiency judgment?
- b. Have restrictive time limits been taken into account? (Fair-value hearing must be held within 3 months from date of sale under the deed of trust or writ of execution (CCP §§580a, 726(b)) and, if desired by a party, the appointment of a probate referee must be applied for at least 10 days before the date of the trial or hearing (CCP §§580a, 726(b))).
- c. Has the amount of the credit bid or cash received at the foreclosure sale been considered in planning for the fair-value hearing?
- d. Has appropriate asset identification and evaluation been conducted? Are unencumbered assets of sufficient value?
- e. Have evidentiary problems for hearing been anticipated? Have appraisals been performed? Are environmental assessments advisable?

Further Research: On fair-value standards, see Mortgage Deed of Trust Foreclosure, chaps 3, 5.

STEP 46. PREPARE FOR AND NOTICE FAIR-VALUE HEARING

SELLING REAL PROPERTY IN ANTICIPATION OF A DEFICIENCY

NONJUDICIAL FORECLOSURE

- a. When proceeding with a trustee's sale, lender must comply with statutory requisites; see steps 19-33, above.
- b. However:
 - (1) CCP §580d bars lender from recovering a deficiency against borrower; and
 - (2) CCP §580d and doctrine of estoppel bar lender from recovering a deficiency against guarantor (*i.e.*, by using trustee's sale, lender extinguished certain guarantor rights), *unless* guarantor executed an enforceable waiver of its right to invoke §580d defense. See discussion under protections for guarantors in step 5, above.

JUDICIAL FORECLOSURE

Code of Civil Procedure sets forth a detailed scheme for the sale of real property under a foreclosure judgment:

- a. To enforce the judgment, lender must obtain a writ of sale that must set forth a description of:
 - (1) Real property to be sold;
 - (2) Date of the issuance of the writ;
 - (3) Title of the court and the cause and number of the action;
 - (4) Name and address of the creditor, the judgment debtor, and any person requesting notice of sale under the judgment;
 - (5) Date of the judgment (and any renewals), and the amount required to satisfy the money judgment on the date the writ is issued and interest accruing thereon; and
 - (6) Any other information required by the court. CCP §§712.020, 716.010.

NOTE

The foreclosure judgment should include this information to avoid uncertainty or ambiguity in obtaining and executing on the writ of sale.

- b. Once the writ of sale issues, it is delivered to the levying officer for execution. The levying officer must then execute on the writ in accordance with CCP §§700.010-700.200. See CCP §§716.020, 726(e), 729.010(b). See generally Money Judgments.

NOTE

If lender desires a levying officer other than the sheriff or marshal, the judgment should provide for appointment of an alternative levying officer. CCP §§564(b)(4), 712.060. Consider also specific authorization for the levying officer to contract with professional services to meet notice and publication requirements.

- c. In addition to the general sale procedures, if lender seeks a deficiency judgment the sheriff must sell the real estate subject to borrower's right of redemption. See CCP §§726(e), 729.010-730.50.

NOTE

There are three critical differences that arise when a sale is made subject to the right of redemption:

- The levying officer's or trustee's notice of sale must state that the property will be sold subject to the right of redemption

and the amount of the secured indebtedness, with interest and costs. CCP §729.010(b)(1).

- Certain notice periods that would otherwise precede the sale are not applicable. CCP §729.010(b)(2), (3).
- After the sale, the levying officer or trustee must serve notice of the right of redemption on borrower. CCP §729.050.

PROCEDURE FOR SETTING AND NOTICING HEARING AFTER SALE

IF JUDICIAL FORECLOSURE

Code of Civil Procedure §726(b) governs the procedure for setting and noticing the fair-value hearing after the judicial sale of real property.

File Motion for Fair-Value Hearing

The motion for fair-value hearing must be filed within 3 months after the foreclosure sale. CCP §726(b). The court is directed to take evidence on the fair value of the property.

Serve Motion and Notice of Hearing on Motion

Notice of hearing on the motion for deficiency "shall be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, *at least 15 days before the date set for the hearing.*" CCP §726(b) (emphasis added).

Present Evidence of Fair Value

At the hearing, lender should present evidence establishing the fair value of the property as of the date of sale.

Apply for Appointment of Probate Referee

Any party may apply for appointment of, or the court on its own motion may appoint, a probate referee. Any application for a probate referee must be filed at least 10 days before the fair-value hearing. CCP §726(b). The costs of such referee may be taxed and allowed as other costs.

Further Research: On obtaining deficiency judgment, including forms, see Mortgage Deed of Trust Foreclosure §§3.86-3.89, 3.111-3.113. For discussion of fair-value statutes, see Mortgage Deed of Trust Foreclosure §§5.16-5.23.

IF NONJUDICIAL FORECLOSURE

Code of Civil Procedure §580a governs the procedure for setting and noticing the fair-value hearing after the nonjudicial sale of real property.

Note Limited Application of CCP §580a

Because lender waives its right to seek a deficiency after conducting a nonjudicial foreclosure (CCP §580d), no fair-value hearing is held. California courts have acknowledged two instances in which CCP §580a still applies:

- a. Borrowers may invoke CCP §580a against junior lienholders seeking to enforce a note after entering the successful bid at the senior lienholder's foreclosure sale. Walter E. Heller W., Inc. v Bloxham (1985) 176 CA3d 266, 221 CR 425.
- b. One decision—now depublished—held guarantors entitled to a fair-value hearing after nonjudicial foreclosure on the primary security. Bank of S. Cal. v Dombrow (1995) (ordered not published Mar. 14, 1996; former opinion at 39 CA4th 1457, 46 CR2d 656).

File (or Amend) Complaint

- a. Any action for a deficiency after a trustee's sale "must be brought within 3 months of the time of sale under the deed of trust or mortgage." CCP §580a. See Citrus State Bank v McKendrick (1989) 215 CA3d 941, 263 CR 781.
- b. The complaint must allege the entire amount of the secured indebtedness at the time of the trustee's sale, the amount for which the real property was sold and "the fair market value thereof" at the date of sale, and the date of sale. If a complaint is brought after sale, include all appropriate parties, including judgment debtors, guarantors, and endorsers of a secured promissory note (see Com C §3204; but see Engelman v Gordon (1966) 242 CA2d 510, 51 CR 627 (one-action and antideficiency protections not

available to endorser(s)).

Apply for Appointment of Probate Referee

Any party may apply for appointment of, or the court on its own motion may appoint, a probate referee. Any application for a probate referee must be filed at least 10 days before trial. CCP §580a. The costs of such referee may be taxed and allowed as other costs.

PREPARING FOR FAIR-VALUE HEARING

REASON FOR HEARING

The sole evidentiary issue before the court in a fair-value hearing is the determination of the "fair value" of the real property.

Definition of "Fair Value"

Unlike CCP §580a, which refers to the more commonly understood "fair market value," CCP §726(b) refers to "fair value of the property." Case law has established that no difference exists between the two concepts. See Roseleaf Corp. v Chierighino (1963) 59 C2d 35, 39, 27 CR 873 (phrases identical); San Paolo U.S. Holding Co. v 816 S. Figueroa Co. (1998) 62 CA4th 1010, 73 CR2d 272 (value of collateral for purposes of determining deficiency is fair-market value, without adjustment for adverse effect of foreclosure and 1-year redemption right; rejecting concept of higher "intrinsic value" of collateral posited by Rainer Mortgage v Silverwood, Ltd. (1985) 163 CA3d 359, 366 n5, 209 CR 294). See also Mortgage Deed of Trust Foreclosure §5.18. In practice, courts generally look to appraisals of the fair-market value of property.

Value "as of the Date of Sale"

Under CCP §§580a and 726(b), the value of the property shall be determined "as of the date of sale."

Retain an Expert and Obtain an Appraisal

Although §§580a and 726(b) permit parties to request (or the court to appoint) a "probate referee" to aid the court in determining the fair value of the property, the probate referee is not an advocate and will not assist lender in:

- a. Determining a reasonable range of values for the property; or
- b. Examining and criticizing evidence submitted by borrower (or other obligor) and its expert.

NOTE

Investigate extraordinary issues that may affect the fair-value determination, *e.g.*, whether the property is subject to a lis pendens. See Nelson v Oroasco (1981) 117 CA3d 73, 79, 172 CR 457. May environmental remediation be required?

STEP 47. CONDUCT FAIR-VALUE HEARING

DETERMINE SCOPE OF ISSUES AND EVIDENCE

Compare Appraisals

If each party does not agree on the nature and extent of the property being valued, understand the reasons for the differences and be prepared to address them at the hearing.

Real Property Valuation

a. Experts employ three approaches for valuing real property holdings. Different techniques may be more or less appropriate depending on the nature of the property being valued.

(1) *Income Approach:*

(a) Used primarily for investment properties;

(b) Value is determined by projecting the cash flows expected to be derived from the property over a steady period, adjusted for the time value of money;

(c) The net present value of the cash flow should be equal to the value of the property (discounted cash flow); or

(d) The value of the property may be determined by applying an overall capitalization rate for the expected cash flows during a fixed period (capitalization-rate analysis).

(2) *Comparable Sales Approach:* Sales information relating to similar properties should indicate the value of the property after adjustments are made for the differences between the property and the comparables.

(3) *Cost Approach:* For unique properties, the cost of building an identical structure may approximate the value.

b. Valuation is at best an inexact science. Values derived by any valuation method will vary significantly depending on the assumptions made in applying any particular technique.

Personal Property Valuation

a. Code of Civil Procedure §726(b) does not provide for a fair-value determination of personal property collateral. Nonetheless, if lender foreclosed real and personal property together in a unified judicial sale (see [step 9](#), above, on dealing with mixed collateral), some allocation of the prevailing bid at the foreclosure needs to be made between real and personal property to calculate the deficiency judgment. The better approach may be for:

(1) Such allocation to be made by the court at the valuation hearing;

(2) The amount of the debt to be reduced by the portion of the bid allocated to the personal property; and

(3) The deficiency judgment to then be calculated as CCP §726(b) provides.

b. When personal property was physically transferred with the real property, but not separately noticed for sale, issues of proper notice and allocation may be raised by borrower, but would not be initiated by lender. With respect to cash collected by lender or paid over to lender by a receiver, such sums will typically have been previously applied to reduce the debt and thus should not be at issue during the valuation hearing; however, if lender followed a minority practice of selling property accounts as an item at a mixed collateral foreclosure, then such accounts would be included in the allocation described above.

Remember Trial Fundamentals

The fair-value hearing is an "evidentiary hearing." CCP §726(b). Accordingly, counsel should prepare to properly qualify experts as such and to prepare an adequate foundation to admit exhibits into evidence.

Further Research: On obtaining deficiency judgment, including forms, see Mortgage Deed of Trust Foreclosure §§3.86-3.89, 3.111-3.113. For discussion of fair-value statutes, see Mortgage Deed of Trust Foreclosure §§5.16-5.23.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/After Judicial Foreclosure Judgment/STEP 48. OBTAIN DEFICIENCY JUDGMENT

STEP 48. OBTAIN DEFICIENCY JUDGMENT

WHAT IT IS

- a. After the fair-value hearing, the court may enter a deficiency judgment.
- b. The judgment should be fixed in an amount equal to the amount of the indebtedness less the property's fair value (or the amount paid at the sale, if greater than the property's fair value), plus interest and costs of levy and sale.

EFFECT

- a. A deficiency is a money judgment and may be enforced as any money judgment. See generally Money Judgments.
- b. It appears that the lien of a deficiency judgment may not attach to the foreclosed real property if a borrower redeems the property after sale, although application of the relevant statute is the subject of dispute. CCP §729.080(e); see generally Mortgage Deed of Trust Foreclosure §§3.96-3.98.
- c. If deficiency judgment will be not be enforced in the immediate future, review procedures on renewing judgment. See CCP §683.150; Kinsmith Fin. Corp. v Gilroy (2003) 105 CA4th 447, 129 CR2d 478.

© The Regents of the University of California

Consider Taking Possession of Foreclosed Property

STEP 49. REVIEW WHEN TO USE UNLAWFUL DETAINER FOLLOWING FORECLOSURE

UNLAWFUL DETAINER FOLLOWING FORECLOSURE

The following is an overview of issues for lenders considering an unlawful detainer action to take possession of foreclosed property. For a detailed explanation of unlawful detainer practice, see [Unlawful Detainers; Landlord-Tenant, chaps 8-14](#).

When to Use

An action for unlawful detainer is appropriate when the foreclosure sale purchaser is entitled to immediate possession of the property following a:

- a. Nonjudicial foreclosure or a deed-in-lieu (see [Mortgage Deed of Trust Foreclosure §§2.100, 6.83, 7.6, 7.12](#)); or
- b. Judicial foreclosure if in the judgment lender has waived its right to seek a deficiency ([CCP §§726\(e\), 729.010-729.090](#); see [Mortgage Deed of Trust Foreclosure §§3.84, 3.101, 6.73](#)).

NOTE

During trustor's postsale redemption period, absent a receiver appointment, trustor is entitled to possession of the property and unlawful detainer is unavailable as a remedy. If the redemption expires before trustor redeems the property, trustor (and, subject to exceptions stated below, persons claiming under trustor) may be evicted. See [Mortgage Deed of Trust Foreclosure §§3.99, 3.101](#).

Proper Uses of Unlawful Detainer Actions

The purchaser at the foreclosure sale (referred to as the "lender" in the unlawful detainer portions of this Action Guide) may:

- a. *Use against owner:* Use unlawful detainer under [CCP §1161a](#) to terminate on 3 days' notice the occupancy of an owner who fails to vacate real property after losing title to it in foreclosure. (Owner referred to as *former borrower* (see [Glossary](#)) in the unlawful detainer portion of this Action Guide.)

Further Research: See [Landlord-Tenant, chaps 8-9](#); [Rosenkranz v Pellin \(1950\) 99 CA2d 650, 652, 222 P2d 249](#).

- b. *Use against others:* Anyone claiming a right to occupancy under the former borrower may also be evicted on 3 days' notice under [CCP §1161a](#), e.g.:

- (1) Successor-in-interest to the former borrower;
- (2) Nontenant relative or friend of the former borrower;
- (3) Commercial tenant of the former borrower, unless an exception applies (see below);
- (4) Former junior encumbrancer; and
- (5) Any owner/borrower of the property previous to the owner/borrower of the property at the time of the foreclosure sale.

- c. *Use against residential tenant:* Use unlawful detainer under [CCP §1161b](#) to terminate on 60 days' notice the occupancy of tenants of residential real property that has been sold in foreclosure, unless an exception applies (see [§1161b](#) and note, below; see also [When Tenant May Not Be Evicted Under CCP §§1161a, 1161b](#), below).

NOTE

Until December 31, 2012, a preemptive federal law increases this 60 days to 90 days for month-to-month tenants. See 12 USC §5220(a)(1). Tenants holding possession under a residential lease have the right to possession until the end of the lease term,

unless the purchaser will occupy the unit as a primary residence, in which case a 90-day notice applies. 12 USC §5220(a)(2).

When Tenant May Not Be Evicted Under CCP §§1161a, 1161b

There are three situations in which a tenant of the former borrower may remain on the property:

- a. *If lease senior to foreclosed deed of trust:* If the lease, or an abstract (summary) of it, was recorded at the county recorder's office before the recordation of the foreclosing lender's deed of trust. See *Fahrenbaker v E. Clemens Horst Co.* (1930) 209 C 7, 9, 284 P 905.
- b. *If lender had constructive notice of lease:* If the tenant was openly occupying the property when lender recorded its deed of trust, giving foreclosing lender constructive notice of tenant's interest. See *Evans v Faught* (1965) 231 CA2d 698, 705, 42 CR 133.
- c. *If rent-controlled property:* If the property is subject to a rent control ordinance that restricts eviction following foreclosure. See Landlord-Tenant, chap 7.

Further Research: On evictions following foreclosure and priorities between leases and secured loans, see Landlord-Tenant §§8.68A-8.68F; Mortgage Deed of Trust Foreclosure §§6.91-6.98.

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/Consider Taking Possession of Foreclosed Property/STEP 50. DETERMINE IF UNLAWFUL DETAINER ACTION IS APPROPRIATE

STEP 50. DETERMINE IF UNLAWFUL DETAINER ACTION IS APPROPRIATE

EVALUATE FORECLOSING LENDER'S NEEDS

Before initiating action, review the applicable law (see [Unlawful Detainers](#)) and confer with foreclosing lender by determining the foreclosing lender's needs and wants, *e.g.*, does lender want to:

- a. Live on the property;
- b. Change the use of the property, or
- c. Have a steady income from a reliable tenant (who may be the former borrower's tenant).

DISCUSS OPTIONS

Discuss the various options available to the foreclosing lender:

- a. Accept rent from the occupant and continue with the tenancy, which may be advisable for a commercial tenant or a multiunit apartment building in good repair.
- b. Begin unlawful detainer procedure:
 - (1) As the purchaser at the foreclosure sale, if former borrower (or one claiming through the former borrower) is the occupant;
 - (2) As the landlord if the tenancy has survived the sale (for information on when tenant may not be evicted, see above), if you can meet the usual unlawful detainer requirements and defenses, *e.g.*, if the tenant is delinquent in the payment of rent. See generally [Unlawful Detainers](#). See also [Landlord-Tenant, chap 8](#).
- c. Sell property as occupied, which may reduce the value of certain types of property (*e.g.*, residential property in a rent-controlled area).

IF UNLAWFUL DETAINER APPROPRIATE

Determine whether lender's counsel will handle the action or whether efficiencies and idiosyncrasies of local practice (*e.g.*, local rent and eviction controls) suggest the matter be referred out.

© The Regents of the University of California

GLOSSARY

ACCELERATION CLAUSE

The provision in a note or deed of trust that allows the lender to accelerate the maturity of the loan (*i.e.*, declare the entire balance to be due immediately) on the occurrence of certain events.

ADVANCES

In real property financing, refers to:

- a. Sums paid by lender to third parties to protect lender's position (*e.g.*, payment of property taxes or installments on a loan secured by a senior deed of trust); or
- b. Additional sums lent to borrower and secured by a future-advance clause in the deed of trust. See Real Estate Finance, chap 4.

ANTIDEFICIENCY PROTECTION

In secured lending, refers to legal protections that may limit or shield a borrower from personal liability for the balance of the debt if the value of the collateral is insufficient to satisfy the secured obligation.

ASSIGNMENT-OF-RENTS-AND-PROFITS CLAUSE

California comprehensively rewrote its law for assignments of rents and their enforcement, effective for contracts entered into after December 31, 1996. Senate Bill 947 (Stats 1996, ch 49) repealed former CC §§2938 and 2938.1, enacted a different CC §2938, and amended CCP §564 regarding rents receivers. In sum, under the 1996 law the effect of a rental assignment will depend on the steps followed to enforce it, rather than on the label ("absolute," "conditional," "for security purposes") attached to it. More particularly, SB 947 provides as follows:

All written assignments of rents made in connection with a mortgage create, as of the date of execution and delivery, a security interest in existing and future leases, rents, issues, and profits of the real property and the proceeds thereof (CC §2938(a));

Recordation of the assignment gives constructive notice and constitutes perfection, regardless of whether enforcement of the assignment is deferred by law or contract until a later event, such as the assignor's default or the assignee's taking possession of the real property or having a receiver appointed (CC §2938(b));

On default, the assignee may enforce the assignment by (1) obtaining appointment of a receiver; (2) obtaining possession of the rents; (3) making written demand in the specified form on one or more tenants for a turnover of rents; and/or (4) making a written demand on the assignor for a turnover of rents. From the date the assignee takes the first of these steps, it has the right to all accrued uncollected rents and all subsequently accruing rents (CC §2938(c));

If the assignee delivers to the assignor's tenant a duly executed demand for turnover of rents, the tenant must pay the rents to the assignee within 10 days. If the tenant pays rent to the assignor (its landlord) after receiving the assignee's notice, the tenant (unless he or she occupies the premises for residential purposes) remains liable to pay the rent to the assignee (CC §2938(d));

Neither enforcement of the assignment nor collection or application of rents constitutes an "action" for purposes of the one-action rules, violates CCP §726, bars a deficiency judgment, or makes the assignee a mortgagee in possession unless it takes actual possession of the real property. Rents collected by the assignee are to be applied to the debt or otherwise in accordance with the loan documents and must go to cure monetary defaults; however, neither the application of rents to the debt nor the failure to do so will exonerate any lien or the underlying obligation, violate CCP §726, or otherwise limit the lender's rights in the collateral (CC §2938(e));

The enforcing assignee may bring and collect on an action to compel turnover of the rents without foreclosing its mortgage, and this does not violate CCP §726 or otherwise limit its rights in the collateral. As against third parties, the senior assignee has the paramount right to rents and proceeds that are either segregated or commingled but traceable using the lowest intermediate balance method or other method determined to be equitable (CC §2938(f));

The assignor may demand that the assignee use collected rents to pay taxes, insurance, and make code repairs; however, this does not shift management or mortgagee-in-possession responsibility to the assignee or limit its right to seek a receiver (CC §2938(g));

When there are two or more assignees, the senior assignee has the paramount right to rents. However, the junior assignee that enforces its interests before the senior does may keep all rents it collects before the senior assignee's enforcement actions. When the senior assignee begins its enforcement actions, the junior assignee must notify the tenants that the junior is canceling its demand for turnover of rents (CC §2938(h));

Former CC §§2938 and 2938.1 govern contracts entered into before January 1, 1997 (CC §2938(i));

Senate Bill 947 governs all assignments of rents executed after December 31, 1996 (CC §2938(i)); and

The statute sets out the required form for rent turnover demands on tenants. CC §2938(k).

For further discussion, see Mortgage Deed of Trust Foreclosure, chap 6.

ASSUMING GRANTEE

Refers to someone who, on purchasing real property, "assumes" an existing debt that is secured by a deed of trust or mortgage on the property, *i.e.*, agrees in writing to perform the obligations of the promissory note and deed of trust.

BENEFICIARY

In secured real property transactions, the holder of the beneficial interest under the deed of trust, *i.e.*, the secured creditor. Can be the lender or a successor who acquired the original lender's interest. In this Action Guide, "lender" is used interchangeably with "beneficiary."

BENEFICIARY STATEMENT

The document that lender furnishes to borrower and other creditors, describing the unpaid balance and status of the obligation secured by lender's deed of trust. See CC §2943.

BORROWER

The party who obtains the loan and signs the promissory note. The borrower usually, but not always, is also the trustor, *i.e.*, the party who provides the security interest in real property by executing the deed of trust. For ease of reference, in this Action Guide, "borrower" is used interchangeably with "trustor" and refers to the owner of the real property at the time of the foreclosure, unless specified otherwise. See Former Borrower, below.

DEED OF TRUST

The document usually used in California to create a security interest in real property. Creates a triangular relationship in which trustor conveys to a "trustee" a power to cause sale of the security as a means of enforcing an obligation due from trustor to the beneficiary.

DUE-ON-ENCUMBRANCE CLAUSE

A provision in a note or deed of trust providing that the secured lender may accelerate the maturity of the loan (declare all sums to be due and payable immediately) if trustor further mortgages the real property or incurs additional liens on it without lender's consent. Often combined with a due-on-sale clause.

DUE-ON-SALE CLAUSE

A provision in a note or deed of trust that the lender may accelerate the loan if trustor sells or conveys an interest in the real property security without lender's consent.

ENCUMBRANCE

Includes taxes, assessments, and all liens on real property (see Lien, below). CC §1114. Also includes a *deed of trust* and any other right to, or interest in, property which may subsist in another to the diminution of its value but consistent with the passing of the fee, and everything that charges, burdens, obstructs, or impairs the property's use or impedes its transfer. Evans v Faught (1965) 231 CA2d 698, 706, 42 CR 133.

ENCUMBRANCER

One who holds the beneficial interest in an encumbrance, *e.g.*, the beneficiary of a deed of trust, the owner of easement rights, or a creditor who has recorded a judgment lien.

ENDORSEMENT

The written words and signature that a holder (see Holder, below) places on or attaches to a promissory note or other instrument to transfer it to a different holder.

- In Blank:** a. Endorsement that does not specify an endorsee (transferee); usually simply the signature of the endorser. Com C §3205(b). See 4 Witkin, Summary, *Neg Instr* §23.
b. Effect is to make the instrument payable to bearer (the person who possesses it). See Com C §§3203(b), 3205(b).
- Special:** Endorsement that specifies to whom the instrument is to be paid, *e.g.*, "Pay to the order of Sally Smith" (followed by signature of endorser). Com C §3205(a).
- Restrictive:** Endorsement that limits or conditions the transfer or payment of the note in some way. See Com C §3206(a)-(c); 4 Witkin, Summary, *Neg Instr* §24.
- Without Recourse:** Endorsement qualified by the phrase "without recourse" that limits the endorser's liability so that no recourse may be had against him or her if the obligor dishonors the instrument. See Com C §3415(b).

ENDORSER

A former holder of a promissory note or other instrument who has endorsed the instrument to transfer it to another. See Endorsement, above; Holder, below.

FORMER BORROWER

As used in this Action Guide in the context of a postforeclosure unlawful detainer, "former borrower" means the owner of the real property at the time of the foreclosure.

GUARANTOR

One who promises to answer for the debt or default of another or who pledges property as security for the debt. CC §2787.

HOLDER

Someone who possesses a promissory note or other instrument that is drawn, issued, or endorsed:

- a. To him or her;
- b. To his or her order;
- c. To bearer; or
- d. In blank (see Endorsement, above).

Com C §1201(20); 4 Witkin, Summary, *Neg Instr* §9.

HOLDER IN DUE COURSE

A holder (see Holder, above) who acquires a negotiable promissory note (or other instrument) for value, in good faith, and without notice that it is overdue or has been dishonored or of any defense against or claim to it by any person. Com C §3302(2); 4 Witkin, Summary, *Neg Instr* §27. If lender qualifies as a holder in due course, he or she acquires the note free of any personal defenses of borrower. Com C §§3306.

INSTRUMENT

A formal legal document such as a note, deed of trust, bill of sale, affidavit, or acknowledgment.

JUNIOR ENCUMBRANCE

An encumbrance (see Encumbrance, above) that holds lower legal priority relative to other interests in the same property, under the laws that determine priority of interests in real property.

- Effect on Senior Encumbrances:** A junior encumbrancer who acquires the property by foreclosing on his or her encumbrance takes title subject to all senior encumbrances (*i.e.*, those holding higher

Senior's Foreclosure Wipes Out: priority).
A junior encumbrance will be "wiped out" by the foreclosure of a senior encumbrance, *i.e.*, the junior encumbrancer's security interest in the property will be extinguished.

JUNIOR LIEN

A lien (see Lien, below) that holds lower legal priority relative to other interests in the same property, under the laws that determine priority of interests in real property. A junior lien will be extinguished by the foreclosure of a senior encumbrance; or, if junior lienholder acquires the property by foreclosing on his or her lien, the junior lienholder will take title subject to all senior encumbrances. See Junior Encumbrance, above.

LENDER

As used in this Action Guide, "lender" refers to the secured creditor who holds the beneficial interest under the deed of trust, unless specified to the contrary. See Beneficiary, above.

LIEN

A charge imposed on property (other than by transfer in trust) by which it is made security for performance of some act. CC §2872. Includes, *e.g.*, attachment liens, judgment liens, and mortgages, but not deeds of trust. See Encumbrance, above.

LIQUIDATED DAMAGES

The sum agreed on by parties to a contract as compensation for breach of the contract.

LITIGATION GUARANTY

A form of insurance policy obtained by the lender/beneficiary in connection with judicial foreclosure (or by the plaintiff in other legal proceedings involving title to real property); guarantees the accuracy of information provided, *e.g.*, the vesting of title, legal description of the land, and names of all necessary defendants. See Title Ins, chap 9.

MAKER

The person who executes a promissory note, *i.e.*, the obligor or borrower.

MATURE

In the context of a loan, "mature" means to become due and payable. An individual installment matures on the date it is due under the terms of the promissory note. The scheduled maturity date of the note is the date specified in the note on which the entire remaining balance of principal and interest must be paid. The note's maturity can be accelerated. See Acceleration Clause, above.

MORTGAGE

In secured real property transactions, refers to an instrument that creates a security interest in real property by giving lender a lien on the property rather than conveying an interest to a trustee as in a deed of trust. May be foreclosed nonjudicially if mortgage contains a power of sale.

MORTGAGED PROPERTY

As used in this Action Guide, refers to the property encumbered by the deed of trust or other security instrument.

NEGOTIABLE NOTE

A promissory note that can be acquired by a creditor free of any personal defenses of borrower, if the creditor is a holder in due course. See Holder in Due Course, above.

NEGOTIATE

In commercial transactions, negotiation is the transfer of a note or other instrument in such form that the transferee becomes a holder. See Com C §3201(a)-(b). Delivery alone is not enough; the instrument must be issued or endorsed to the transferee, or to his or her order, or to bearer, or in blank. Com C §1201(20). See Endorsement, above.

NONMONETARY DEFAULT

Typically refers to borrower's failure to perform loan obligations other than the payment obligations under the promissory note, *e.g.*, failure to insure the real property as required by deed of trust.

NONPURCHASE MONEY

In secured real property transactions, refers to a secured obligation that is *not* purchase money in character (see Purchase Money, below) and therefore not subject to the deficiency bar of CCP §580b. If the loan is nonpurchase money in character, lender may seek a deficiency judgment if lender forecloses judicially.

NONRECOURSE

In secured lending, refers to a loan or a loan provision that limits borrower's personal liability on the debt. A nonrecourse clause restricts or prohibits lender's recourse against borrower if the real and personal property collateral is insufficient to satisfy the debt. Most nonrecourse clauses contain exceptions for borrower's willful misconduct.

NOTE

See Promissory Note, below.

ONE-ACTION RULE

Restricts the remedies available to a creditor whose debt is secured by real property. Under CCP §726, the creditor may pursue only *one action* in court to enforce the secured obligation; *one form of action* (judicial foreclosure) is the action required, and the creditor must exhaust its *security first*.

OVERSECURED CREDITOR

Often used in bankruptcy to refer to a secured creditor when the value of the property exceeds the balance owed to the creditor

PRINCIPAL

The basic amount of the debt, as distinguished from interest; the amount on which interest is paid.

PRIORITY

The order of precedence between competing interests in real property. See Junior Encumbrance, above.

PROMISSORY NOTE

The loan document, signed by borrower, that sets forth borrower's promise to pay, the amount to be paid, and terms of the payment.

PURCHASE MONEY

In secured real property transactions, refers to two special classes of secured loans that are effectively made nonrecourse by application of CCP §580b. See Nonpurchase Money, above.

REO

Stands for "real estate owned," the term used by a financial institution to refer to real property acquired by the institution through foreclosing on its secured loans or through deeds in lieu of foreclosure. Sometimes called "OREO" (other real estate owned) to distinguish it from properties acquired intentionally, and perhaps to make it more palatable.

RECEIVER

A person who is appointed by a court to perform specific duties of management and control of the mortgaged property, *e.g.*, collect rents from tenants. The receiver reports to and is supervised by the court, not the lender.

SECURED OBLIGATION

As used in this Action Guide, refers to the debt stated in the promissory note plus borrower's obligations under the deed of trust, *e.g.*, maintaining the property in good condition, keeping property taxes paid current, maintaining hazard insurance.

SECURITY

In secured lending, refers to the collateral that lender can reach if borrower defaults on the loan.

SENIOR LIEN

A lien (see Lien, above) that holds higher priority relative to other interests in the same property, under the laws that determine priority of interests in real property.

SUBORDINATION

In secured real property transactions, refers to arranging the relative priority of two encumbrances by agreement of the parties.

TRUSTEE

The party appointed in the deed of trust who has the power to sell the property to satisfy the debt if lender accelerates the loan following a default by borrower. Not a true trustee.

TRUSTEE'S SALE GUARANTY (TSG)

An insurance policy that the trustee obtains to make sure he or she is mailing and publishing the trustee's sale notices and to the parties as required by law. Insurance benefits may also run directly in favor of the beneficiary if the TSG names beneficiary as an additional "assured" party. Compare with Litigation Guaranty, above.

TRUSTOR

Party who owns the real property and executes the deed of trust to provide lender with a security interest in the property. Usually, the trustor is also the borrower; if trustor is not the borrower and is executing the deed of trust to secure someone else's debt, trustor is a guarantor of that debt to the extent of the security granted. See [CC §2787](#).

TSG

See Trustee's Sale Guaranty, above.

UNDERSECURED CREDITOR

A creditor whose security is inadequate to satisfy the debt.

USURY

The lending of money at a rate of interest that is unlawfully high. Certain lenders are exempt from usury law and certain loans may qualify for exemption by reason of backer arrangement under [CC §1916.1](#).

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/TABLE OF STATUTES, REGULATIONS, AND RULES

TABLE OF STATUTES, REGULATIONS, AND RULES

CALIFORNIA

Constitution

Art VI, §10: [Step 41](#)

Art XV, §1: [Step 6](#)

Statutes

BUSINESS AND PROFESSIONS CODE

10000: [Step 6](#)

10242.5: [Step 6](#)

CIVIL CODE

7.1: [Step 27](#)

9: [Step 27](#)

47(c)(1): [Step 25](#)

880.020-887.090: [Step 11](#)

882.020: [Step 11](#)

890(a): [Step 30](#)

891(c): [Step 30](#)

891(g): [Step 30](#)

1058.5(a): [Steps 9, 10](#)

1058.5(b): [Step 14](#)

1107: [Step 8](#)

1114: [Glossary](#)

1170: [Step 8](#)

1213-1215: [Step 8](#)

1217: [Steps 1, 2, 8](#)

1501: [Step 27](#)

1624(a)(6): [Step 42](#)

1632: [Step 25](#)

1632(b)(4): [Step 25](#)

1670.5: [Step 6](#)

1671: [Step 6](#)

1671(b): [Step 6](#)
1671(c)(2): [Step 6](#)
1675-1681: [Step 6](#)
1801-1812.20: [Steps 25, 30](#)
1803.6: [Step 6](#)
1916-2 (West 1985): [Step 6](#)
1916-3(a) (West 1985): [Step 6](#)
1916.1: [Step 6](#), [Glossary](#)
1917.005: [Step 6](#)
1917.220: [Step 6](#)
1917.616: [Step 6](#)
1917(b): [Step 6](#)
2076: [Step 27](#)
2787: [Step 1](#), [Glossary](#)
2819: [Step 10](#)
2845: [Steps 1, 5](#)
2847-2848: [Step 5](#)
2850: [Step 5](#)
2856: [Step 5](#)
2872: [Glossary](#)
2876: [Steps 1, 25](#)
2897: [Step 8](#)
2898: [Step 8](#)
2899: [Step 11](#)
2903: [Steps 28, 34, 43](#)
2903-2904: [Step 28](#)
2903-2906: [Step 28](#)
2905: [Step 28](#)
2910: [Step 30](#)
2922: [Step 4](#)
2923.5: [Step 25](#)
2923.52: [Step 26](#)
2923.52-2923.55: [Step 26](#)

2923.53: Step 26

2923.54: Step 26

2923.55: Step 26

2924: Steps 20, 25, 26, 30

2924-2924h: Step 1

2924-2924l: Steps 11, 20

2924.6: Step 25

2924.7: Step 25

2924.8: Step 26

2924(a): Step 25

2924(a)(1)(A): Step 25

2924(a)(1)(B): Step 25

2924(a)(1)(C): Step 25

2924(a)(1)(D): Step 25

2924(a)(2): Step 26

2924b: Steps 21, 25

2924b(a): Steps 2, 25

2924b(b): Step 30

2924b(b)(1): Step 25

2924b(b)(2): Step 26

2924b(b)(3): Step 25

2924b(b)(3)): Step 25

2924b(b)(4): Step 25

2924b(c): Step 23

2924b(c)(1): Step 25

2924b(c)(1)-(4): Step 26

2924b(c)(2)(A)-(F): Step 25

2924b(c)(3): Step 26

2924b(c)(4): Step 26

2924b(d): Step 25

2924b(e): Step 25

2924c: Steps 6, 25, 34

2924c(a)(1): Steps 9, 25, 27

2924c(a)(1)(A): Step 27

2924c(a)(1)(B): Step 27

2924c(a)(1)(C): Step 27

2924c(a)(2): Step 27

2924c(b)(1): Step 25

2924c(c): Step 27

2924c(c)-(d): Step 31

2924c(d): Step 27

2924c(e): Steps 27, 29

2924d: Step 6

2924d(b): Steps 11, 31

2924e(b): Step 19

2924e(c): Step 19

2924e(d): Step 19

2924f: Steps 21, 23, 26

2924f(b): Step 26

2924f(b)(1): Steps 21, 26, 30

2924f(b)(2): Step 26

2924f(c): Steps 25, 30

2924f(c)(3): Steps 25, 26

2924f(c)(4): Step 30

2924g-2924h: Step 1

2924g(a): Step 30

2924g(b): Steps 9, 30

2924g(c)(1): Step 29

2924g(c)(2): Step 29

2924g(d): Step 29

2924g(e): Step 29

2924h: Steps 26, 30

2924h(b): Steps 26, 30

2924h(c): Step 14

2924h(d): Step 26

2924h(g): [Steps 20, 30](#)

2924j(c)-(d): [Step 31](#)

2924j(e): [Step 31](#)

2924j(h): [Step 31](#)

2924k: [Steps 1, 31](#)

2924k(a): [Step 31](#)

2924k(b): [Step 31](#)

2929: [Step 30](#)

2929.5: [Steps 5, 15](#)

2930: [Step 30](#)

2931a: [Step 34](#)

2934: [Step 8](#)

2934a: [Steps 1, 21](#)

2934a(a)(1): [Step 21](#)

2934a(a)(2): [Step 21](#)

2934a(b): [Step 21](#)

2934a(c): [Step 21](#)

2934a(d): [Step 21](#)

2934a(e): [Step 21](#)

2936: [Step 2](#)

2937.7: [Steps 1, 41](#)

2938: [Step 14](#), [Glossary](#)

2938 (former): [Glossary](#)

2938.1 (former): [Glossary](#)

2938(a): [Glossary](#)

2938(b): [Glossary](#)

2938(c): [Step 15](#), [Glossary](#)

2938(d): [Glossary](#)

2938(e): [Glossary](#)

2938(f): [Glossary](#)

2938(g): [Glossary](#)

2938(h): [Glossary](#)

2938(i): Glossary

2938(k): Glossary

2943: Step 24, Glossary

2943(a)(2): Step 24

2943(a)(4): Step 24

2943(a)(5): Step 24

2943(a)(6)-(8): Step 24

2943(b)(1): Step 24

2943(b)(2): Step 24

2943(c)(1): Step 24

2943(c)(2): Step 24

2943(d)(1): Step 24

2943(d)(3): Step 24

2943(e)(1): Step 24

2943(e)(2): Step 24

2943(e)(3): Step 24

2943(e)(4): Step 24

2943(e)(6): Step 24

2953: Step 5

2954.10: Step 6

2954.4(a): Step 6

2954.4(b): Step 6

2954.4(e): Step 6

2954.5: Step 6

2954.5(a): Step 6

3054: Step 1

3134: Steps 8, 30

3275: Step 6

3415(b): Step 2

3433: Step 11

CODE OF CIVIL PROCEDURE

22: Step 5

337: Steps 9, 11, 12

351: [Step 9](#)

360: [Steps 9, 11](#)

369(a): [Step 1](#)

392(a)(2): [Step 41](#)

405.20: [Step 35](#)

405.20-405.24: [Step 35](#)

405.21: [Step 35](#)

405.22: [Step 35](#)

405.22-405.23: [Step 35](#)

405.23: [Step 35](#)

405.24: [Step 35](#)

410.10-418.11: [Step 41](#)

431.70: [Step 1](#)

481.010-493.060: [Step 40](#)

482.030: [Step 40](#)

482.070: [Step 40](#)

482.080: [Step 40](#)

483.010: [Steps 5, 18, 40](#)

483.010(a): [Step 40](#)

483.010(b): [Steps 18, 40](#)

483.012: [Step 5](#)

484.020: [Step 40](#)

484.020(a): [Step 40](#)

484.030: [Step 40](#)

484.030(a): [Step 40](#)

484.040: [Step 40](#)

484.050: [Step 40](#)

484.060: [Step 40](#)

484.090: [Step 40](#)

484.090(a): [Step 40](#)

484.090(d): [Step 40](#)

484.310-484.370: [Step 40](#)

485.010(a): [Step 40](#)

485.010(b): [Step 40](#)

485.240: [Step 40](#)

485.510-485.540: [Step 40](#)

486.010-486.110: [Step 40](#)

486.020: [Step 40](#)

486.030: [Step 40](#)

486.050: [Step 40](#)

486.060: [Step 40](#)

487.010: [Step 18](#)

487.010(a)-(b): [Step 18](#)

487.020: [Step 40](#)

487.030: [Step 40](#)

488.010: [Step 40](#)

488.010-488.740: [Step 40](#)

488.300-488.485: [Step 18](#)

489.210: [Step 40](#)

489.220: [Step 40](#)

490.010: [Step 40](#)

490.020: [Step 40](#)

511.010-516.050: [Step 39](#)

512.020: [Step 39](#)

512.020(b)(3): [Step 39](#)

512.120: [Step 39](#)

514.010-514.050: [Step 39](#)

516.020: [Step 39](#)

525-526: [Step 16](#)

525-529: [Step 38](#)

526: [Step 38](#)

526(a)(1): [Steps 16, 38](#)

526(a)(1)-(2): [Step 38](#)

526(a)(2): [Steps 16, 38](#)

526(a)(2)-(3): [Step 38](#)

526(a)(3): Steps 16, 38

527: Steps 16, 38

527(a): Step 38

527(c): Step 38

527(c)(1): Step 38

527(c)(2): Step 38

527(d): Step 38

527(d)(3): Step 38

527(d)(4): Step 38

527(d)(5): Step 38

527(e): Step 38

527(f): Step 38

527(f)(1): Step 37

529: Step 38

564: Step 15, Glossary

564-568: Step 37

564-570: Step 37

564(b)(2): Steps 15, 37

564(b)(4): Steps 43, 46

564(b)(8) (former): Step 15

564(b)(9): Step 15

564(b)(11): Steps 5, 15, 37

564(b)(12): Steps 15, 37

564(c): Step 15

564(d): Steps 5, 15

566: Step 36

566-567: Step 37

566-569: Step 36

566(b): Step 37

567: Step 37

567(a): Step 37

567(b): Step 37

568: [Steps 36, 37](#)

568-570: [Step 36](#)

568.2-568.3: [Step 36](#)

580(c): [Step 6](#)

580(d): [Step 6](#)

580.5: [Step 1](#)

580.7: [Step 1](#)

580a: [Steps 5, 9, 45, 46](#)

580a-580b: [Step 9](#)

580b: [Steps 1, 5, 9, 12, 24, 44, 45, Glossary](#)

580d: [Steps 1, 2, 5, 9, 44, 45, 46](#)

680.010-724.260: [Step 43](#)

683.150: [Step 48](#)

685.010: [Step 44](#)

700.010-700.200: [Step 46](#)

700.015: [Step 43](#)

701 (former): [Step 44](#)

701.540: [Step 43](#)

701.540(a): [Step 43](#)

701.540(b): [Step 43](#)

701.540(c): [Step 43](#)

701.540(d)(1): [Step 43](#)

701.540(d)(2): [Step 43](#)

701.540(e): [Step 43](#)

701.540(g): [Step 43](#)

701.540(h): [Step 43](#)

701.545: [Step 43](#)

701.550: [Step 43](#)

701.570(a): [Step 43](#)

701.580: [Step 43](#)

701.590: [Step 43](#)

701.630: [Steps 5, 34, 43](#)

701.660: [Steps 43, 44](#)

701.670: [Step 43](#)

701.680: [Step 43](#)

701.810: [Steps 12, 43](#)

703.010-704.995: [Step 40](#)

712.010-712.020: [Step 43](#)

712.020: [Step 46](#)

712.030: [Step 43](#)

712.060: [Steps 42, 43, 46](#)

716.010: [Step 46](#)

716.020: [Steps 42, 43, 46](#)

725a: [Step 34](#)

726: [Steps 1, 2, 5, 9, 10, 11, 12, 14, 15, 18, 24, 34, 39, 40, 43, Glossary](#)

726 (former): [Step 5](#)

726.5(a): [Steps 5, 9](#)

726.5(b): [Step 9](#)

726.5(c): [Step 9](#)

726.5(d): [Step 9](#)

726.5(e)(3): [Step 9](#)

726.5(e)(5): [Step 9](#)

726.5(g): [Step 9](#)

726(a): [Steps 1, 9, 15, 42](#)

726(b): [Steps 1, 5, 9, 30, 34, 42, 44, 45, 46, 47](#)

726(c): [Step 34](#)

726(d): [Steps 9, 41](#)

726(e): [Steps 46, 49](#)

726(e), 729.010: [Step 44](#)

728: [Step 34](#)

729.010: [Steps 42, 43](#)

729.010-729.090: [Steps 42, 43, 44, 49](#)

729.010-730.50: [Step 46](#)

729.010(b): [Step 46](#)

729.010(b)(1): [Steps 43, 46](#)

729.010(b)(2): [Steps 43, 46](#)

729.010(b)(3): [Steps 43, 46](#)

729.020: [Steps 43, 44](#)

729.030: [Step 44](#)

729.040: [Step 43](#)

729.050: [Steps 43, 46](#)

729.060(a): [Step 44](#)

729.060(b): [Step 44](#)

729.060(c): [Step 44](#)

729.070: [Step 44](#)

729.080(a): [Step 43](#)

729.080(d): [Step 43](#)

729.080(d)-(e): [Step 44](#)

729.080(e): [Steps 5, 43, 48](#)

729.090: [Step 43](#)

730: [Step 6](#)

736: [Steps 5, 9](#)

736(b)(4): [Step 9](#)

736(c): [Step 9](#)

736(e): [Step 9](#)

736(f)(4): [Step 9](#)

745: [Steps 16, 38](#)

1003-1008: [Steps 37, 38, 40](#)

1005: [Steps 37, 38, 40](#)

1005(a)(2): [Step 40](#)

1005(b): [Steps 37, 38, 40](#)

1013a: [Step 35](#)

1014: [Step 37](#)

1021: [Step 6](#)

1060: [Step 34](#)

1061: [Step 34](#)

1161a: [Step 49](#)

1161b: [Step 49](#)

1908(a)(2): [Step 35](#)

2015.5: [Steps 37, 38, 40](#)

COMMERCIAL CODE

1201(20): [Step 4](#), [Glossary](#)

1304: [Step 9](#)

1309: [Step 9](#)

3104: [Step 1](#)

3104(1): [Step 4](#)

3201(a)-(b): [Glossary](#)

3203-3204: [Step 2](#)

3203(b): [Glossary](#)

3204: [Step 46](#)

3205(a): [Glossary](#)

3205(b): [Glossary](#)

3206(a)-(c): [Glossary](#)

3302: [Step 4](#)

3302(1): [Step 4](#)

3302(2): [Glossary](#)

3305: [Step 4](#)

3305-3306: [Step 4](#)

3306: [Glossary](#)

3415(a): [Step 1](#)

3415(b): [Step 1](#), [Glossary](#)

3601: [Step 4](#)

3605(e): [Step 9](#)

3606 (former): [Step 9](#)

5114: [Step 1](#)

8102: [Step 1](#)

9102(a)(29): [Step 1](#)

9104: [Step 1](#)

9201: [Step 1](#)

9301-9306: [Step 1](#)

9304: [Step 1](#)

9310(b)(8): [Step 1](#)

9312: [Step 1](#)

9314: [Step 1](#)

9501 (former): [Steps 5, 9](#)

9501(4)(a)(ii) (former): [Step 9](#)

9515: [Step 1](#)

9603: [Step 9](#)

9604: [Steps 1, 9](#)

9604(a)(2): [Step 9](#)

9607: [Step 9](#)

9610: [Step 9](#)

9610-9611: [Step 9](#)

9615: [Step 9](#)

9624: [Step 9](#)

CORPORATIONS CODE

25211.5: [Step 6](#)

FINANCIAL CODE

779: [Step 30](#)

1504: [Step 6](#)

1716: [Step 6](#)

4970-4979.8: [Step 4](#)

4995.1: [Step 6](#)

7459-7460: [Step 30](#)

7675: [Step 6](#)

14000: [Step 6](#)

15102: [Step 30](#)

18000: [Step 6](#)

22002: [Step 6](#)

22050(a): [Step 6](#)

22203: [Step 6](#)

22303: [Step 6](#)

24410: [Step 6](#)

GOVERNMENT CODE

6043: [Step 26](#)

6063: [Step 43](#)

16187: [Step 26](#)

27280-27336: [Step 8](#)

HEALTH AND SAFETY CODE

25189: [Step 9](#)

25323.5: [Step 9](#)

INSURANCE CODE

1100.1: [Step 6](#)

REVENUE AND TAX CODE

17144.5: [Step 10](#)

20581-20586: [Steps 23, 26](#)

ACTS BY POPULAR NAME

California Foreclosure Prevention Act (CFPA): [Step 26](#)

Enforcement of Judgments Law: [Step 43](#)

Marketable Record Title Act: [Step 11](#)

Senior Citizens and Disabled Citizens Property Tax Postponement Law: [Steps 23, 26](#)

Unruh Act: [Steps 25, 30](#)

SESSION LAWS

Stats 1996, ch 49: [Glossary](#)

PROPOSED LEGISLATION

SB 1055: [Step 10](#)

SB 947: [Glossary](#)

SB 401: [Step 10](#)

Rules

CALIFORNIA RULES OF COURT

3.1113: [Steps 37, 38, 40](#)

3.1130: [Step 40](#)

3.1150: [Step 38](#)

3.1150(a)-(e): [Step 37](#)

3.1150(f): [Step 38](#)

3.1150(g): [Step 38](#)

3.1175: [Step 37](#)

3.1175-3.1184: [Step 37](#)

3.1175(a)(1): [Step 37](#)

3.1175(a)(2): [Step 37](#)

3.1175(a)(3): [Step 37](#)

3.1175(a)(4): [Step 37](#)

3.1176(a): [Step 37](#)

3.1176(b): [Step 37](#)

3.1176(c): [Step 37](#)

3.1176(d): [Step 37](#)

3.1177: [Step 37](#)

3.1177-3.1179: [Step 37](#)

3.1177-3.1184: [Step 36](#)

3.1178: [Steps 37, 38](#)

3.1179: [Step 15](#)

3.1179-3.1184: [Step 37](#)

3.1179(b): [Step 36](#)

3.1200-3.1207: [Step 38](#)

3.1203(a): [Steps 37, 40](#)

3.1204(b): [Step 37](#)

3.1204(b)-(c): [Step 40](#)

3.1300(c): [Steps 37, 38, 40](#)

Local Court Rules

LOS ANGELES COURT RULES

9.19-9.23: [Steps 39, 40](#)

UNITED STATES

Constitution

Art IV, §1: [Step 9](#)

Statutes

UNITED STATES CODE

Title 11

Chap 7: [Step 14](#)

Chap 11: [Step 14](#)

Chap 13: [Step 14](#)

101(5): [Step 14](#)

101(12): [Step 14](#)

105: [Step 14](#)

108(b): [Step 14](#)

109(b): [Step 14](#)

109(d): [Step 14](#)

109(e): [Step 14](#)

362: [Step 14](#)

362(a): [Step 23](#)

362(b): [Step 14](#)

362(b)(20)-(21): [Step 14](#)

362(b)(21)(B): [Step 14](#)

362(d): [Step 14](#)

362(d)(3): [Step 14](#)

362(h): [Step 14](#)

363: [Step 14](#)

502(a): [Step 14](#)

503(b)(1): [Step 14](#)

507(a)(1): [Step 14](#)

524(a): [Step 14](#)

544: [Steps 2, 14](#)

547: [Step 2](#)

547(e)(2)(C): [Step 14](#)

548: [Step 30](#)

549: [Step 14](#)

549(c): [Step 14](#)

552(b): [Step 14](#)

701-766: [Step 14](#)

727: [Step 14](#)

1111(a): [Step 14](#)

1111(b)(2): [Step 14](#)

1141(d): [Step 14](#)

1301-1330: [Step 14](#)

1322(c): [Step 14](#)

1328(a): [Step 14](#)

Title 12

347c: [Step 6](#)

1701j-3: [Step 25](#)

1701x(c)(4)-(6): [Step 19](#)

1707-1715z-20: [Step 19](#)

1735f-7: [Step 6](#)

1823(e): [Step 4](#)

5220(a)(1): [Step 49](#)

5220(a)(2): [Step 49](#)

Title 15

1601-1667f: [Step 6](#)

1692-1692p: [Step 5](#)

Title 21

881(h): [Step 8](#)

Title 26

7425: [Step 34](#)

Title 28

1332: [Step 41](#)

2410: [Step 34](#)

2410(d): [Step 33](#)

Title 38

3701-3736: [Step 19](#)

Title 42

9601-9675: [Step 9](#)

9601(20)(A): [Step 9](#)

9601(20)(E)-(G): [Step 9](#)

9601(20)(F): [Step 9](#)

9607(a)(1): [Step 9](#)

9607(b)(3): [Step 9](#)

9607(n): [Step 9](#)

Title 50

532(a)(1): [Step 9](#)

App: [Step 9](#)

INTERNAL REVENUE CODE

108(a)(1)(E): [Step 10](#)

108(h): [Step 10](#)

7425: [Steps 23, 26, 33](#)

7425(b)(1): [Step 33](#)

7425(c)(1): [Step 33](#)

7425(c)(2): [Step 33](#)

7425(d): [Step 33](#)

7425(d)(1): [Step 33](#)

7425(d)(3): [Step 33](#)

ACTS BY POPULAR NAME

Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996: [Step 9](#)

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA): [Step 14](#)

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA): [Step 9](#)

Employee Retirement Income Security Act (ERISA): [Step 6](#)

Fair Debt Collection Practices Act: [Step 5](#)

Federal Reserve Act

§§13-13A: [Step 6](#)

Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA): [Step 4](#)

Garn-St. Germain Depository Institutions Act of 1982: [Step 25](#)

Mortgage Forgiveness Debt Relief Act of 2007: [Step 10](#)

Servicemembers Civil Relief Act: [Step 9](#)

Truth in Lending Act (TILA): [Step 6](#)

SESSION LAWS

Pub L 110-142, 121 Stat 1803: [Step 10](#)

Pub L 109-8, 119 Stat 23: [Step 14](#)

Pub L 104-208, 110 Stat 3009-462: [Step 9](#)

Court Rules

FEDERAL RULES OF BANKRUPTCY PROCEDURE

3001: [Step 14](#)

3003: [Step 14](#)

4001(a)(3): [Step 29](#)

9021: [Step 29](#)

UNITED STATES CIRCUIT COURTS OF APPEALS RULES

Ninth Circuit

36-3: [Step 29](#)

Regulations

CODE OF FEDERAL REGULATIONS

Title 12

226.35(a): [Step 6](#)

226.35(b)(2): [Step 6](#)

Pt 556: [Step 25](#)

Pts 590-591: [Step 25](#)

591.5(b): [Step 25](#)

591.5(b)(1): [Step 25](#)

Title 16

Pt 433: [Step 4](#)

Pt 433.2: [Step 4](#)

Title 26

301.7425-3(a)(1): [Step 33](#)

Title 40

300.1100 (former): [Step 9](#)

© The Regents of the University of California

Source: Real Property/Handling a Real Property Foreclosure (Action Guide)/TABLE OF CASES

TABLE OF CASES

40235 Washington St. Corp. v Lusardi (In re 40235 Washington St.) (9th Cir 2003) 329 F3d 1076: [Step 14](#)

A

Acosta, In re (D Ariz 1995) 181 BR 477: [Step 29](#)

Alcock v Small Bus. Admin. (In re Alcock) (9th Cir 1995) 50 F3d 1456: [Step 9](#)

Alliance Mortgage Co. v Rothwell (1995) 10 C4th 1226, 44 CR2d 352: [Steps 5, 30](#)

Amalgamated Bank v Superior Court (2007) 149 CA4th 1003, 57 CR3d 686: [Step 43](#)

Anolik v EMC Mortgage Corp. (ordered not published August 10, 2005; former opinion at 128 CA4th 1581, 28 CR3d 759): [Step 25](#)

Aozora Bank Ltd. v 1333 N. Cal. Blvd. (2004) 119 CA4th 1291, 15 CR3d 340: [Step 6](#)

Aplanap v Forte (1990) 225 CA3d 609, 275 CR 144: [Step 5](#)

Appel v Hubbard (1957) 155 CA2d 639, 318 P2d 164: [Step 41](#)

Aspen Enters., Inc. v Bodge (1995) 37 CA4th 1811, 44 CR2d 763: [Step 9](#)

Atkinson v Foote (1919) 44 CA 149, 186 P 831: [Step 31](#)

Auerbach v Great W. Bank (1999) 74 CA4th 1172, 88 CR2d 718: [Step 4](#)

B

Bank of America v Century Land & Water Co. (1937) 19 CA2d 194, 65 P2d 109: [Step 1](#)

Bank of America v La Jolla Group (2005) 129 CA4th 706, 28 CR3d 825: [Steps 20, 27](#)

Bank of Hemet v U.S. (9th Cir 1981) 643 F2d 661: [Step 5](#)

Bank of S. Cal. v Dombrow (1995) (ordered not published Mar. 14, 1996; former opinion at 39 CA4th 1457, 46 CR2d 656): [Steps 34, 46](#)

Bank of Woodland v Stephens (1904) 144 C 659, 79 P 379: [Step 15](#)

Barclay's Bank v Superior Court (1977) 69 CA3d 593, 137 CR 743: [Step 15](#)

Baypoint Mortgage Corp. v Crest Premium Real Estate Inv. Retirement Trust (1985) 168 CA3d 818, 214 CR 531: [Step 3](#)

Beal Bank v Crystal Props. (In re Crystal Props.) (9th Cir 2001) 268 F3d 743: [Step 6](#)

Bebensee-Wong v FNMA (In re Bebensee-Wong) (BAP 9th Cir 2000) 248 BR 820: [Step 14](#)

Bell v Roy (1986) 187 CA3d 694, 232 CR 83: [Step 30](#)

Bevan v Social Communications Sites (In re Bevan) (9th Cir 2003) 327 F3d 994: [Step 33](#)

BFP v Resolution Trust Corp. (1994) 511 US 531, 128 L Ed 2d 556, 114 S Ct 1757: [Step 30](#)

Boerner v Colwell Co. (1978) 21 C3d 37, 145 CR 380: [Step 6](#)

Bogart v George K. Porter Co. (1924) 193 C 197, 223 P 959: [Step 1](#)

Bouyer v Countrywide Bank (ND Cal, June 25, 2009, No. C 08-5583) 2009 US Dist Lexis 53940: [Step 4](#)

Brice v Walker (1920) 50 CA 49, 194 P 721: [Step 5](#)

Brown v Jensen (1953) 41 C2d 193, 259 P2d 425: [Step 5](#)

Bruntz v Alfaro (1989) 212 CA3d 411, 260 CR 488: [Step 27](#)

Buck v Barb (1983) 147 CA3d 920, 195 CR 461: [Step 6](#)

Burkart v Coleman (In re Tippett) (9th Cir 2008) 542 F3d 684: [Step 14](#)

C

C.I.T. Corp. v PANAC (1944) 25 C2d 547, 154 P2d 710: [Step 4](#)

Cadle Co. II v Harvey (2000) 83 CA4th 927, 100 CR2d 150: [Step 5](#)

Cal-Western Reconveyance Corp. v Reed (2007) 152 CA4th 1308, 62 CR3d 244: [Step 31](#)

Cameron v Security First Nat'l Bank (1967) 251 CA2d 450, 59 CR 563: [Step 4](#)

Capital Mortgage & Loan, Inc., In re (Bankr ED Cal 1983) 35 BR 967: [Step 14](#)

Carboni v Arrospide (1991) 2 CA4th 76, 2 CR2d 845: [Step 6](#)

Carl I. Brown & Co. v Anderson (In re Anderson) (BAP 9th Cir 1996) 195 BR 87: [Step 29](#)

Carnation Co. v Lampi (In re Kristal) (9th Cir 1985) 758 F2d 454: [Step 43](#)

Carpenter v Lewis (1897) 119 C 18, 50 P 925: [Step 35](#)

Carpenter v Smallpage (1934) 220 C 129, 29 P2d 841: [Step 30](#)

Carpenter v Title Ins. & Trust Co. (1945) 71 CA2d 593, 163 P2d 73: [Steps 11, 13](#)

Caruso v Great W. Savings (1991) 229 CA3d 667, 280 CR 322: [Step 6](#)

Cathay Bank v Lee (1993) 14 CA4th 1533, 18 CR2d 420: [Step 5](#)

Christ's Church, People v (1947) 79 CA2d 858, 181 P2d 49: [Step 37](#)

Chrysler Credit Corp. v Waegele (1972) 29 CA3d 681, 105 CR 914: [Step 38](#)

Citizens Bank v Strumpf (1995) 516 US 16, 133 L Ed 2d 258, 116 S Ct 286: [Step 14](#)

Citrus State Bank v McKendrick (1989) 215 CA3d 941, 263 CR 781: [Steps 5, 46](#)

Coast Bank v Minderhout (1964) 61 C2d 311, 38 CR 505: [Step 2](#)

Cohen v Marshall (1925) 197 C 117, 239 P 1050: [Step 5](#)

Coleman, In re (Bankr D NJ 1988) 82 BR 15: [Step 14](#)

Consolidated Capital Income Trust v Khaloghli (1986) 183 CA3d 107, 227 CR 879: [Step 9](#)

Copsey v Sacramento Bank (1901) 133 C 659, 66 P 7: [Step 1](#)

Cornelison v Kornbluth (1975) 15 C3d 590, 125 CR 557: [Steps 5, 30](#)

Crummer v Whitehead (1964) 230 CA2d 264, 40 CR 826: [Step 20](#)

CTC Real Estate Servs. v Lepe (2006) 140 CA4th 856, 44 CR3d 823: [Step 31](#)

D

D'Oench, Duhme & Co. v FDIC (1942) 315 US 447, 86 L Ed 956, 62 S Ct 676: [Step 4](#)

Dawson v Washington Mut. Bank, F.A. (In re Dawson) (9th Cir 2004) 390 F3d 1139: [Step 14](#)

DeBerard Props., Ltd. v Lim (1999) 20 C4th 659, 85 CR2d 292: [Steps 5, 10](#)

DMC, Inc. v Downey Sav. & Loan Ass'n (2002) 99 CA4th 190, 120 CR2d 761: [Step 30](#)

Dockrey v Gray (1959) 172 CA2d 388, 341 P2d 746: [Step 31](#)

Dover Mobile Estates v Fiber Form Prods., Inc. (1990) 220 CA3d 1494, 270 CR 183: [Step 30](#)

Duarte v Lake Gregory Land & Water Co. (1974) 39 CA3d 101, 113 CR 893: [Step 30](#)

Dyer Law & Collection Co. v Abbott (1921) 52 CA 545, 199 P 340: [Step 5](#)

E

Eastland Sav. & Loan Ass'n v Thornhill & Bruce, Inc. (1968) 260 CA2d 259, 66 CR 901: [Step 30](#)

Ellis v U.S. (MD NC 2005) 2005-2 USTC ¶50,518, 96 AFTR2d 5535: [Step 33](#)

Engelbertson v Loan & Bldg. Ass'n (1936) 6 C2d 477, 58 P2d 647: [Step 25](#)

Engelman v Gordon (1966) 242 CA2d 510, 51 CR 627: [Step 46](#)

Eskanos & Adler v Leetien (9th Cir 2002) 309 F3d 1210: [Step 14](#)

Estate of Yates v West End Fin. Corp. (1994) 25 CA4th 511, 32 CR2d 53: [Step 25](#)

Evans v California Trailer Court, Inc. (1994) 28 CA4th 540, 33 CR2d 646: [Step 2](#)

Evans v Faught (1965) 231 CA2d 698, 42 CR 133: [Glossary, 49](#)

Everts v Matteson (1942) 21 C2d 437, 132 P2d 476: [Step 1](#)

F

Fahrenbaker v E. Clemens Horst Co. (1930) 209 C 7, 284 P 905: [Step 49](#)

Felton v West (1894) 102 C 266: [Step 9](#)

Fidelity Fed. Sav. & Loan Ass'n v de la Cuesta (1982) 458 US 141, 73 L Ed 2d 664, 102 S Ct 3014: [Step 25](#)

Fidelity Fed. Sav. & Loan Ass'n v U.S. (MD Tenn 1978) 445 F Supp 683: [Step 30](#)

First Fed. Bank v Fegen (2005) 131 CA4th 798, 31 CR3d 853: [Step 43](#)

First Fed. Sav. & Loan Ass'n v Lehman (1984) 159 CA3d 537, 205 CR 600: [Step 30](#)

First-Trust Joint Stock Land Bank v Meredith (1936) 5 C2d 214, 53 P2d 958: [Step 9](#)

Fischer v First Int'l Bank (2003) 109 CA4th 1433, 1 CR3d 162: [Step 1](#)

Flack v Boland (1938) 11 C2d 103, 77 P2d 1090: [Steps 9, 11, 32, 42](#)

Florio v Lau (1998) 68 CA4th 637, 80 CR2d 409: [Steps 5, 9](#)

Foreclosure Cases, In re (ND Ohio Oct. 31, 2007, No. 1-07CV2282) 2007 US Dist Lexis 84011: [Step 4](#)

Franklin v Commonwealth Fin. Corp. (In re Franklin) (9th Cir 1991) 922 F2d 536: [Step 30](#)

Freedland v Greco (1955) 45 C2d 462, 289 P2d 463: [Step 5](#)

French v Mortgage Guar. Co. (1940) 16 C2d 26, 104 P2d 655: [Step 6](#)

Friery v Sutter Buttes Sav. Bank (1998) 61 CA4th 869, 72 CR2d 32: [Step 10](#)

G

Garrett v Coast & S. Fed. Sav. & Loan Ass'n (1973) 9 C3d 731, 108 CR 845: [Step 6](#)

Ghirardo v Antonioli (1996) 14 C4th 39, 57 CR2d 687: [Step 24](#)

Ghirardo v Antonioli (1994) 8 C4th 791, 35 CR2d 418: [Step 6](#)

Gluskin v Atlantic Sav. & Loan Ass'n (1973) 32 CA3d 307, 108 CR 318: [Steps 8, 10](#)

GOCO Realty Fund I, In re (Bankr ND Cal 1993) 151 BR 241: [Step 14](#)

Grafton Partners LP v Superior Court (2005) 36 C4th 944, 32 CR3d 5: [Step 4](#)

Guild Mortgage Co. v Heller (1987) 193 CA3d 1505, 239 CR 59: [Step 30](#)

H

Hamblen v Federal Sav. & Loan Ins. Corp. (In re Thomas J. Grosso Inv.) (9th Cir 1972) 457 F2d 168: [Step 14](#)

Hamburger v Ellingson (1934) 139 CA 311, 33 P2d 850: [Step 1](#)

Hamel v Gootkin (1962) 202 CA2d 27, 20 CR 372: [Step 1](#)

Harper v Gordon (1900) 128 C 489, 61 P 84: [Step 5](#)

Hatch v Security-First Nat'l Bank (1942) 19 C2d 254, 120 P2d 869: [Step 9](#)

Hayward Lumber & Inv. Co. v Naslund (1932) 125 CA 34, 13 P2d 775: [Step 4](#)

Heald v Friis-Hansen (1959) 52 C2d 834, 345 P2d 457: [Step 6](#)

Heintz v Jenkins (1995) 514 US 291, 131 L Ed 2d 395, 115 S Ct 1489: [Step 5](#)

Heritage Oaks Partners v First Am. Title Ins. Co. (2007) 155 CA4th 339, 66 CR3d 510: [Step 21](#)

Hersch & Co. v C & W Manhattan Assocs. (9th Cir 1982) 700 F2d 476: [Step 9](#)

Hicks v E.T. Legg & Assocs. (2001) 89 CA4th 496, 108 CR2d 10: [Step 29](#)

Hill v East Asiatic Co. (In re Bergsoe Metal Corp.) (9th Cir 1990) 910 F2d 668, 671: [Step 9](#)

Hillyer v Eggers (1917) 32 CA 764, 164 P 27: [Step 39](#)

Hotaling v Montieth (1900) 128 C 556, 61 P 95: [Step 6](#)

I

I.E. Assocs. v Safeco Title Ins. Co. (1985) 39 C3d 281, 216 CR 438: [Steps 1, 25](#)

In re _____ (*see* name of party)

J

Johnson v First Nat'l Bank (8th Cir 1983) 719 F2d 270: [Step 14](#)

Johnson v Long Beach Mortgage Loan Trust (2006) 451 F Supp2d 16, 55: [Step 4](#)

Jones v First Am. Title Ins. Co. (2003) 107 CA4th 381, 131 CR2d 859: [Step 21](#)

Jones v Union Bank (2005) 127 CA4th 542, 25 CR3d 783: [Step 6](#)

Jones v Wagner (2001) 90 CA4th 466, 108 CR2d 669: [Step 30](#)

Jones v Wells Fargo Bank (2003) 112 CA4th 1527, 5 CR3d 835: [Step 6](#)

K

K.M.C. Co. v Irving Trust Co. (6th Cir 1985) 757 F2d 752: [Step 19](#)

Kachlon v Markowitz (2008) 168 CA4th 316, 85 CR3d 532: [Step 25](#)

Karlsen v American Sav. & Loan Ass'n (1971) 15 CA3d 112, 92 CR 851: [Step 20](#)

Karoutas v HomeFed Bank (1991) 232 CA3d 767, 775, 283 CR 809: [Step 30](#)

Kearney v Solomon Smith Barney, Inc. (2006) 39 C4th 95, 45 CR3d 730: [Step 9](#)

Kerivan v Title Ins. & Trust Co. (1983) 147 CA3d 225, 195 CR 53: [Step 9](#)

Kertesz v Ostrovsky (2004) 115 CA4th 369, 8 CR3d 907: [Step 23](#)

KFC W. Inc. v Meghrig (1994) 23 CA4th 1167, 28 CR2d 676: [Step 9](#)

Kinsmith Fin. Corp. v Gilroy (2003) 105 CA4th 447, 129 CR2d 478: [Step 48](#)

Kirkpatrick v Westamerica Bank (1998) 65 CA4th 982, 76 CR2d 876: [Step 5](#)

Kish v Bay Counties Title Guar. Co. (1967) 254 CA2d 725, 62 CR 494: [Step 9](#)

Knapp v Doherty (2004) 123 CA4th 76, 20 CR3d 1: [Steps 20, 26](#)

Knupfer v Lindblade (In re Dyer) (9th Cir 2003) 322 F3d 1178: [Step 14](#)

Kolodge v Boyd (2001) 88 CA4th 349, 105 CR2d 749: [Step 30](#)

Krueger v Bank of America (1983) 145 CA3d 204, 193 CR 322: [Steps 5, 9](#)

L

Lakeview Meadows Ranch v Bintliff (1973) 36 CA3d 418, 111 CR 414: [Step 6](#)

Lange v Aver (1966) 241 CA2d 793, 50 CR 847: [Step 5](#)

Lennar Northeast Partners v Buice (1996) 49 CA4th 1576, 57 CR2d 435: [Step 10](#)

Little v Duncombe (In re Duncombe) (Bankr CD Cal 1992) 143 BR 243: [Step 14](#)

Lo v Jensen (2001) 88 CA4th 1093, 106 CR2d 443: [Step 30](#)

Locke v Klunker (1898) 123 C 231, 55 P 993: [Step 15](#)

Lopez v Bell (1962) 207 CA2d 394, 24 CR 626: [Steps 4, 19, 20](#)

Lovelady v Bryson Escrow, Inc. (1994) 27 CA4th 25, 32 CR2d 371: [Step 12](#)

Lupertino v Carbahal (1973) 35 CA3d 742, 111 CR 112: [Steps 19, 20, 25](#)

M

Madigan v Potrans Int'l, Inc. (In re Madigan) (BAP 9th Cir 1991) 122 BR 103: [Step 5](#)

Maggiore v Palo Alto Inn, Inc. (1967) 249 CA2d 706, 57 CR 787: [Steps 27, 37](#)

Mariners Sav. & Loan Ass'n v Neil (1971) 22 CA3d 232, 99 CR 238: [Steps 5, 9](#)

Martin v Midgett (Ariz 1966) 413 P2d 754: [Step 9](#)

Maryland Cas. Co. v Nottingham (1936) 18 CA2d 135, 63 P2d 864: [Step 9](#)

Massey-Ferguson Credit Corp. v Casaulong (1976) 62 CA3d 1024, 133 CR 497: [Step 9](#)

McConnell v Merrill Lynch, Pierce, Fenner & Smith, Inc. (1978) 21 C3d 365, 146 CR 371: [Step 6](#)

McElroy v Chase Manhattan Mortgage Corp. (2005) 134 CA4th 388, 36 CR3d 176: [Step 27](#)

Melendrez v D & I Inv., Inc. (2005) 127 CA4th 1238, 26 CR3d 413: [Steps 20, 27](#)

Metz v Malley (1957) 155 CA2d 848, 318 P2d 843: [Step 1](#)

Middlebrook-Anderson Co. v Southwest Sav. & Loan Ass'n (1971) 18 CA3d 1023, 96 CR 338: [Step 8](#)

Miller v Cote (1982) 127 CA3d 888, 179 CR 753: [Step 25](#)

Miller v Superior Court (1978) 22 C3d 923, 151 CR 6: [Step 38](#)

Mills v Brown (1928) 205 C 38, 269 P 636: [Step 39](#)

Montclair Retail Ctr. v Bank of the West (In re Montclair Retail Ctr.) (BAP 9th Cir 1995) 177 BR 663: [Step 14](#)

Monterey S.P. Partnership v W.L. Bangham, Inc. (1989) 49 C3d 454, 261 CR 587: [Steps 1, 41](#)

N

Neal v Juarez (SD Cal, July 23, 2007, No. 06cv0055) 2007 US Dist Lexis 98068, 2007 WL 2140640, aff'd (9th Cir 2008) 301 Fed Appx 683 (unpublished opinion): [Step 4](#)

Nedlloyd Lines B.V. v Superior Court (1992) 3 C4th 459, 11 CR2d 330: [Step 9](#)

Nelson v Orosco (1981) 117 CA3d 73, 172 CR 457: [Step 46](#)

Newhall Land & Farming Co. v Superior Court (1993) 19 CA4th 334, 23 CR2d 377: [Step 9](#)

Nghiem v Ghazvini (In re Nghiem) (BAP 9th Cir 2001) 264 BR 557, aff'd (9th Cir 2002) 53 Fed Appx 489: [Step 29](#)

Nguyen v Calhoun (2003) 105 CA4th 428, 129 CR2d 436: [Step 10](#)

Nicolopoulos v Superior Court (2003) 106 CA4th 304, 130 CR2d 626: [Step 11](#)

Nippon Credit Bank, Ltd v 1333 N. Cal. Blvd. (2001) 86 CA4th 486, 103 CR2d 421: [Step 30](#)

Nomellini Constr. Co. v Modesto Sav. & Loan Ass'n (1969) 275 CA2d 114, 79 CR 717: [Step 30](#)

Nuetzel v Mackie (1927) 80 CA 768, 253 P 166: [Step 1](#)

O

O'Melveny & Myers v FDIC (1994) 512 US 79, 129 L Ed 2d 67, 114 S Ct 2048: [Step 4](#)

Otto v Long (1900) 127 C 471, 59 P 895: [Step 5](#)

Ould v Stoddard (1880) 54 C 613: [Step 9](#)

P

Palm v Schilling (1988) 199 CA3d 63, 244 CR 600: [Step 5](#)

Passanisi v Merit-McBride Realtors, Inc. (1987) 190 CA3d 1496, 236 CR 59: [Steps 6, 27, 34](#)

People v Christ's Church (1947) 79 CA2d 858, 181 P2d 49: [Step 37](#)

Pierson v Fischer (1955) 131 CA2d 208, 280 P2d 491: [Step 20](#)

Poseidon Dev., Inc. v Woodland Lane Estates (2007) 152 CA4th 1106, 62 CR3d 59: [Step 6](#)

Powell v Goldsmith (1984) 152 CA3d 746, 199 CR 554: [Steps 1, 8](#)

Prestige Ltd. Partnership-Concord v East Bay Car Wash Partners (In re Prestige Ltd. Partnership-Concord) (9th Cir 1999) 164 F3d 1214: [Step 5](#)

Pro Value Props., Inc. v Quality Loan Serv. Corp. (2009) 170 CA4th 579, 88 CR3d 381: [Step 21](#)

Q

Qmect, Inc. v Burlingame Capital Partners II, LP (In re Qmect, Inc.) (Bankr ND Cal 2007) 368 BR 882: [Step 14](#)

R

Raedeke v Gibraltar Sav. & Loan Ass'n (1974) 10 C3d 665, 111 CR 693: [Step 10](#)

Rainer Mortgage v Silverwood, Ltd. (1985) 163 CA3d 359, 366 209 CR 294: [Step 46](#)

Ralph C. Sutro Co. v Paramount Plastering, Inc. (1963) 216 CA2d 433, 31 CR 174: [Step 30](#)

Redingler v Imperial Sav. & Loan Ass'n (1975) 47 CA3d 48, 120 CR 575: [Steps 5, 30](#)

Residential Capital, LLC v Cal-Western Reconveyance Corp. (2003) 108 CA4th 807, 134 CR2d 162: [Step 29](#)

Resolution Trust Corp. v BVS Dev. Inc. (9th Cir 1994) 42 F3d 1206: [Step 8](#)

Riddle v Lushing (1962) 203 CA2d 831, 21 CR 902: [Step 5](#)

Ridgley v Topa Thrift & Loan Ass'n (1998) 17 C4th 970, 73 CR2d 378: [Step 6](#)

River Bank Am. v Diller (1995) 38 CA4th 1400, 45 CR2d 790: [Step 5](#)

River E. Plaza v Variable Annuity Life Ins. Co. (7th Cir 2007) 498 F3d 718: [Step 6](#)

Roseleaf Corp. v Chierighino (1963) 59 C2d 35, 27 CR 873: [Steps 5, 46](#)

Rosenblatt v Exxon Co. USA (Md 1994) 642 A2d 180: [Step 9](#)

Rosenkranz v Pellin (1950) 99 CA2d 650, 222 P2d 249: [Step 49](#)

Rosenthal v Great W. Fin. Svcs. (1996) 14 C4th 394, 58 CR2d 875: [Step 4](#)

S

San Paolo U.S. Holding Co. v 816 S. Figueroa Co. (1998) 62 CA4th 1010, 73 CR2d 272: [Step 46](#)

Schoolcraft v Ross (1978) 81 CA3d 75, 146 CR 57: [Step 25](#)

Sea Rail Truckloads, Inc. v Pullman, Inc. (1982) 131 CA3d 511, 182 CR 560: [Step 39](#)

Secrest v Security Nat'l Mortgage Loan Trust 2002-2 (2008) 167 CA4th 544, 84 CR3d 275: [Step 4](#)

Security Pac. Nat'l Bank v Wozab (1990) 51 C3d 991, 275 CR 201: [Steps 1, 5, 34, 39](#)

Security-First Nat'l Bank v Chapman (1939) 31 CA2d 182, 87 P2d 724: [Steps 1, 5](#)

Shin v Superior Court (1994) 26 CA4th 542, 31 CR2d 587: [Steps 5, 18, 39, 40](#)

Simon v Superior Court (1992) 4 CA4th 63, 5 CR2d 428: [Step 2](#)

Smith v Miller (In re Dominguez) (9th Cir 1993) 995 F2d 883: [Step 6](#)

Smith v Schuler Knox Co. (1948) 85 CA2d 96, 192 P2d 34: [Step 44](#)

Smith, Valentino & Smith v Superior Court (1976) 17 C3d 491, 131 CR 374: [Step 9](#)

SNTL Corp. v Centre Ins. Co. (In re SNTL Corp.) (9th Cir 2009) 571 F3d 826: [Step 14](#)

Somerset S. Props., Inc. v American Title Ins. Co. (SD Cal 1994) 873 F Supp 355: [Step 30](#)

Southwest Concrete Prods. v Gosh Constr. Corp. (1990) 51 C3d 701, 274 CR 404: [Step 6](#)

Spangler v Memel (1972) 7 C3d 603, 102 CR 807: [Steps 5, 8](#)

Stephenson v Lawn (1957) 155 CA2d 669, 318 P2d 132: [Step 1](#)

Sternberg v Johnston (9th Cir 2009) 582 F3d 1114: [Step 14](#)

Stoneridge Parkway Partners, LLC v MW Hous. Partners III LP (2007) 153 CA4th 1373, 64 CR3d 61: [Step 6](#)

Stork, In re (Bankr ND Cal 1997) 212 BR 970: [Step 14](#)

Streiff v Darlington (1937) 9 C2d 42, 68 P2d 728: [Step 30](#)

Strutt v Ontario Sav. & Loan Ass'n (1972) 28 CA3d 866, 105 CR 395: [Step 20](#)

Sumitomo Bank v Taurus Developers, Inc. (1986) 185 CA3d 211, 229 CR 719: [Step 30](#)

System Inv. Corp. v Union Bank (1971) 21 CA3d 137, 98 CR 735: [Steps 20, 25](#)

T

Tahoe Nat'l Bank v Phillips (1971) 4 C3d 11, 92 CR 704: [Step 2](#)

Talbott v Hustwit (2008) 164 CA4th 148, 78 CR3d 703: [Step 5](#)

Tan v California Fed. Sav. & Loan Ass'n (1983) 140 CA3d 800, 189 CR 775: [Step 6](#)

Taxel v Chase Manhattan Bank (In re Deuel) (BAP 9th Cir 2006) 361 BR 509: [Step 2](#)

Thompson v Allert (1991) 233 CA3d 1462, 285 CR 367: [Step 5](#)

Title Guar. & Trust Co. v Monson (1938) 11 C2d 621, 81 P2d 944: [Step 5](#)

Toby v Oregon Pac. R.R. (1893) 98 C 490, 33 P 550: [Step 5](#)

Tomczak v Ortega (1966) 240 CA2d 902, 50 CR 20: [Step 25](#)

Tome v Baer (In re Tome) (CD Cal 1990) 113 BR 626: [Step 29](#)

Torrey Pines Bank v Hoffman (1991) 231 CA3d 308, 323, 282 CR 354: [Step 5](#)

Track Mortgage Group v Crusader Ins. Co. (2002) 98 CA4th 857, 120 CR2d 228: [Step 1](#)

Travelers Cas. & Surety Co. v PG&E (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199: [Steps 6, 14](#)

Treat v Craig (1901) 135 C 91, 67 P 7: [Step 1](#)

Trigg v Arnott (1937) 22 CA2d 455, 71 P2d 330: [Step 9](#)

Trust One Mortgage Corp. v Invest Am. Mortgage Corp. (2005) 134 CA4th 1302, 37 CR3d 83: [Step 1](#)

Tully v World Sav. & Loan Ass'n (1997) 56 CA4th 654, 65 CR2d 545: [Steps 19, 27](#)

Turner v Superior Court (1977) 72 CA3d 804, 140 CR 475: [Steps 15, 36](#)

U

U.S. Fin. v Sullivan (1974) 37 CA3d 5, 112 CR 18: [Step 30](#)

U.S. Hertz, Inc. v Niobrara Farms (1974) 41 CA3d 68, 116 CR 44: [Step 21](#)

U.S. v 2659 Roundhill Dr. (9th Cir 1999) 194 F3d 1020: [Step 8](#)

U.S. v Fleet Factors Corp. (SD Ga 1993) 821 F Supp 707: [Step 9](#)

Union Bank v Dorn (1967) 254 CA2d 157, 61 CR 893: [Step 5](#)

Union Bank v Gradsky (1968) 265 CA2d 40, 71 CR 64: [Step 5](#)

Union Bank v Wendland (1976) 54 CA3d 393, 126 CR 549: [Step 1](#)

United Bank of Denver v K & W Trucking Co. (1983) 147 CA3d 217, 195 CR 49: [Step 9](#)

United Cal. Bank v Maltzman (1974) 44 CA3d 41, 118 CR 299: [Step 5](#)

United Sav. Ass'n v Inwood Forest Assocs., Ltd (1988) 484 US 365, 98 L Ed 2d 740, 108 S Ct 626: [Step 14](#)

Universal Mortgage Co. v Prudential Ins. Co. (9th Cir 1986) 799 F2d 458: [Step 30](#)

V

Valinda Builders v Bissner (1964) 230 CA2d 106, 40 CR 735: [Step 5](#)

Valley Invs. LP v BancAmerica Commercial Corp. (2001) 88 CA4th 816, 106 CR2d 689: [Step 8](#)

Vlahovich v Cruz (1989) 213 CA3d 317, 261 CR 565: [Steps 13, 32, 42](#)

W

Walker v Community Bank (1974) 10 C3d 729, 111 CR 897: [Steps 1, 5, 11, 12](#)

Walter E. Heller W., Inc. v Bloxham (1985) 176 CA3d 266, 221 CR 425: [Steps 45, 46](#)

Webber v Inland Empire Invs., Inc. (1999) 74 CA4th 884, 88 CR2d 594: [Step 30](#)

West Coast Constr. Co. v Oceano Sanitary Dist. (1971) 17 CA3d 693, 95 CR 169: [Step 16](#)

Western Fed. Sav. & Loan Ass'n v Sawyer (1992) 10 CA4th 1615, 13 CR2d 639: [Step 5](#)

Western Sec. Bank v Superior Court (1997) 15 C4th 232, 62 CR2d 243: [Step 1](#)

White Lightning Co. v Wolfson (1968) 68 C2d 336, 66 CR 697: [Step 40](#)

Whitman v Transtate Title Co. (1985) 165 CA3d 312, 211 CR 582: [Step 20](#)

WRI Opportunity Loans II, LLC v Cooper (2007) 154 CA4th 525, 65 CR3d 205: [Steps 5, 6](#)

Wurlz v Holloway (1996) 46 CA4th 1740, 54 CR2d 512: [Step 4](#)

Z

Ziello v Superior Ct. (1995) 36 CA4th 321, 42 CR2d 251: [Step 34](#)

© The Regents of the University of California