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Editorial Staff

The Top Ten Real Property Cases of 2008

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I. INTRODUCTION

The California Real Property Journal annually selects the ten most significant cases that impact the practice of real estate law in California.[1] We look to the state, federal, and bankruptcy courts and highlight a broad array of cases for your review.[2]

This year's list includes the controversial bankruptcy case *Clear Channel Outdoor, Inc. v. Nancy Knupfer (In re: PW, LLC)*, which places in doubt the ability of a buyer at a Bankruptcy Code Section 363 sale to purchase title free and clear of liens. In the area of land use, we consider the California Supreme Court's decision in *Save Tara v. City of West Hollywood*, where the Court clarified the stage of development at which an environmental impact report is required. We also discuss *Treo @ Kettner Homeowners Assn. v. Superior Court*, in which a judicial reference provision in CC&Rs was held to be improper and unenforceable.

You may note the absence from our list of *Thexton v. Steiner*,[3] in which the court of appeal deemed an agreement unenforceable because it granted the buyer a commonly used "free look" period to conduct its due diligence investigations. The California Supreme Court has granted review of this potentially far-reaching case.[4]

We hope you find these summaries useful in keeping you abreast of the latest developments in real estate law.

II. CLEAR CHANNEL OUTDOOR, INC. V. NANCY KNUPFER (IN RE: PW, LLC)[5]

In this case, the Ninth Circuit Bankruptcy Appellate Panel ("BAP") addressed the question of whether, outside a plan of reorganization, U.S. Bankruptcy Code Section 363(f) permits a secured creditor to credit bid its debt and purchase estate property, taking title free and clear of valid, nonconsenting junior liens.[6] The BAP determined that it does not.

PW, LLC owned several parcels of real estate in Burbank, California. DB Burbank, LLC held a claim of more than $40 million secured by a first-priority lien on PW's property, and Clear Channel Outdoor, Inc. held a claim of $2.5 million secured by a junior lien on PW's property.[7] After PW filed for Chapter 11 bankruptcy protection, a trustee was appointed and began to market the property for sale. The trustee and DB entered into an agreement whereby DB would serve as a stalking horse bidder where, if there were no qualified overbidders, DB would purchase PW's property for a certain "strike price" in addition to paying certain administrative fees and expenses to the trustee.[8] The bankruptcy court authorized the arrangement over Clear Channel's opposition. Only three bids were timely received, and none were greater than the agreed upon strike price. The bankruptcy court confirmed the sale to DB free and clear of Clear Channel's lien, and the sale closed without any payments being made to Clear Channel. Clear Channel filed an appeal seeking reversal of the bankruptcy court's order.[9]

As a threshold matter, the BAP addressed the question of whether Clear Channel's appeal was moot. Equitable mootness requires a court to look to the consequences of a remedy and the number of third parties who have relied on the order that is being appealed.[10] The BAP determined that while the review of the *sale of the property* was equitably moot because of the complexity of the matter and the impact on, and reliance by, third parties in connection with such sale, the *lien-stripping aspect* of the sale order was not moot because it raised neither the issue of complexity nor the issue of negative impact on third parties.[11] The lien could be reattached without much difficulty and would have limited impact on other parties. Therefore, the BAP determined that Clear Channel's appeal was not equitably moot.[12]

The BAP also addressed the question of whether the matter was moot pursuant to Section 363(m), which protects certain sales under Section 363 from invalidation and provides additional certainty to such sales. Section 363(m) provides: "The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith …." The court interpreted the provision narrowly, and determined that Section 363(m) applies to the overall sale, but not to the specific terms of the sale (*i.e.*, the "free and clear" aspect of the sale).[13] Thus, the lien-stripping portion of the sale was not protected from review by this provision.

The court next turned to whether Section 363(f) permits the stripping of Clear Channel's lien. Section 363(f) provides that:

> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if … (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; … or … (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.[14]

The BAP rejected DB's and the trustee's argument that Section 363(f)(3) authorizes the sale free and clear of liens in these circumstances. DB and Trustee argued that the "aggregate value of all liens" means the economic value of such liens, rather than the face value of the claims held by creditors who hold a lien or security interest on the property. The BAP rejected that interpretation: "In any case in which the value of the property being sold is less than the total amount of claims held by secured creditors, the total of all allowed secured claims will *equal*, not exceed, the sales price, and the statute requires the price to be 'greater than' the 'value of all liens.'"[15] Thus, the BAP held that Section 363(f)(3) does not authorize the sale free and clear of a lienholder's interest if the price of the property is equal to or less

than the total amount of claims held by creditors with a lien or security interest in the property being sold.[16]

The BAP also analyzed Section 363(f)(5) to determine whether Clear Channel's lien could be stripped. As an initial matter, the BAP determined that Clear Channel's lien was an "interest" under this section.[17] With respect to whether Clear Channel could be compelled to accept a money satisfaction for its interest, the court assumed that the question was not whether the applicable lien could be satisfied by paying the money owed, but rather, whether the Clear Channel could be compelled to take *less* than the value of the lien (*i.e.*, whether a mechanism exists to extinguish the lien without paying the interest in full).[18] Examples of such mechanisms include a liquidated damages clause in a contract, or a buy-out arrangement among partners. Further, subsection (5) requires that a proceeding exist by which Clear Channel can be compelled to release its lien for less than the full value of such lien. The BAP determined that neither the parties nor the bankruptcy court had identified such a proceeding. Thus, the BAP reversed the order that held that the sale was free and clear of Clear Channel's lien, and remanded the case to allow the parties to identify, if any, a qualifying proceeding under nonbankruptcy law that would allow the property to be sold to DB free and clear of Clear Channel's lien under Section 363(f)(5).[19]

Comment:

The BAP's controversial decision in *Clear Channel* places in doubt the ability of a buyer at a Section 363 sale to purchase good title to an asset free and clear of liens, claims, or interests. Sections 363(f) and 363(m) encourage buyers to participate in auctions and give assurance to creditors and buyers that the sale is made free and clear of all liens. The BAP's decision strips away such assurance and may encourage buyers to lower the offered purchase price, or may discourage buyers from participating in such auctions altogether.

III. SAVE TARA V. CITY OF WEST HOLLYWOOD[20]

In *Save Tara*, the California Supreme Court addressed the question of what stage of a private development is an agency deemed to have granted its approval of the project such that an environmental impact report (EIR) is required pursuant to the California Environmental Quality Act (CEQA). In answering the question, the supreme court rejected two possible bright-line rules: (1) approval is deemed granted upon the execution of an unconditional agreement irrevocably vesting development rights; and (2) approval is deemed granted upon the execution of any agreement for the development of a well-defined project. Rather, the supreme court opted for the general principle that agencies should not take any action that significantly furthers a project in a way that forecloses alternatives or mitigation measures that would ordinarily be part of the CEQA review process. In applying this principle, the supreme court advised courts to consider not only the specific terms of a conditional development agreement, but also the surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to a project in such a way as to preclude alternatives, mitigation measures, or the option to disapprove of a project.

In this matter, developers wanted to develop approximately 35 housing units for low-income seniors on the project site, which was owned by the City of West Hollywood. The developers submitted an application to the U.S. Department of Housing and Urban Development ("HUD"). In order to make the application more competitive, the city granted the Developers an option to purchase the property, and expressed in a letter to a HUD official that the City intended to contribute land and funds worth $2.5 million towards the development of the project. The city's mayor announced HUD's approval of a $4.2 million grant for the project and the city's intent to construct the project in an email to city residents and in a city newsletter.[21] Furthermore, the city began to take preliminary steps in connection with the relocation of existing tenants.[22] On May 3, 2004, the city voted to approve a Conditional Agreement for Conveyance and Development of Property between the city and the developers, which agreement included a $1 million loan to the developer.[23] Under the agreement, the city's obligation to convey the property was made expressly subject to the satisfaction of all applicable requirements under CEQA, as reasonably determined by the city manager. A certain portion of the loan, estimated to be about $475,000, was allocated for predevelopment purposes and was not subject to the CEQA compliance condition.[24] Save Tara, an organization of city residents opposed to the project, filed a complaint claiming that the City had violated CEQA by failing to prepare an EIR before the approval of the agreement and the loan.

Public Resources Code Section 21100(a) provides that "[a]ll lead agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they *propose to carry out or approve* that may have a significant effect on the environment." The supreme court had, in prior cases, recognized two issues of policy that affected the timing of preparing an EIR: first, an EIR should not be required before the project is well enough defined to allow for meaningful environmental review; and second, an EIR should not be delayed beyond the time when it serves, as a practical matter, to inform and guide decision-makers.[25]

The city and the developers argued that because the agreement contained a CEQA compliance condition, it eliminated the need to prepare an EIR before the approval of such agreement.[26] Save Tara, on the other hand, argued that an EIR should be required prior to entering into any agreement, whether conditional or unconditional, as long as the project was sufficiently well defined.[27] The supreme court elected to take the intermediate position that agencies should not take any actions that commit the public agency to the project, as a practical matter. In doing so, the supreme court acknowledged that while a CEQA compliance condition can be a legitimate part of a preliminary agreement for the exploration of a proposed project, if the agreement, for all practical purposes, commits the public agency to the project, the insertion of the CEQA compliance condition alone would not save the agreement from being deemed an approval. However, the supreme court also acknowledged that requiring that an EIR be performed prior to entering into any preliminary agreements with respect to a project would place an unnecessary burden on public and private planning.

In this case, the supreme court concluded that the city approved the project in substance. The agreement demonstrated the city's commitment to the project, both in its stated intent, and the terms requiring the city to lend the developer nearly

half-million dollars for predevelopment work, which loan was not conditioned on CEQA compliance.[28] Further, the circumstances surrounding the city's approval—the city's letter to HUD, the mayor's announcement of the project, and the city newsletter stating that the grant would be used to redevelop the property—indicated that the city was committed to moving forward with the project.[29] Finally, the city moved forward with tenant relocation plans prior to the conveyance of the property under the assumption that the property would be redeveloped.[30] Such actions, taken together, demonstrated that the city was committed to moving forward with the project prior to conducting the required environmental review. As a result, the supreme court remanded the case to the court of appeal to order the city to set aside its prior approval of the project, and to reconsider such decisions taking into account a legally adequate EIR for the project.[31]

Comment:

The supreme court's decision in *Save Tara* requires that parties analyze, on a case-by-case basis, the circumstances surrounding any agreements entered into and any actions taken by public agencies. While no bright-line rule exists, in *Save Tara*, several factors led the court to determine that approval had been granted: (1) the public agency unconditionally committed a large amount of funds to the project; (2) the agency officials made public statements regarding their commitment to the project; and (3) the agency took irrevocable actions indicating that the project was approved. Agencies and developers should review and analyze their actions at each stage of a development to determine whether environmental review of their project is required.

IV. TREO @ KETTNER HOMEOWNERS ASSN. V. SUPERIOR COURT[32]

This case addresses enforceability of a provision in a declaration of covenants, conditions, and restrictions ("CC&Rs") mandating disputes between a developer and a homeowners association be resolved by general judicial reference pursuant to Code of Civil Procedure Section 638.[33] The court of appeal held that a judicial reference provision incorporated into CC&Rs is contractually insufficient to waive the association's right to a jury trial.

In 2007, the Treo @ Kettner Homeowners Association sued developer Intergulf Construction Corporation alleging construction defects in their homes. Intergulf moved to submit the case to a judicial referee on the basis of a provision in the CC&Rs requiring disputes to be determined by a judicial reference pursuant to Section 638. The Association opposed Intergulf's motion, asserting CC&Rs are not a contract as required by Section 638 and that, even if they are, the provision is unconscionable and unenforceable. The trial court granted Intergulf's motion and the Association appealed.

The court of appeal first looked to Section 638, which provides: "A referee may be appointed … upon the motion of a party to a *written contract* … that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties."[34] In analyzing whether the CC&Rs were a written contract, the court considered the nature of CC&Rs as equitable servitudes as well as the specific characteristics of the subject CC&Rs. The Treo @ Kettner CC&Rs were drafted by the developer, recorded in public records prior to execution of any purchase agreements and were not executed by the association. The CC&Rs primarily addressed matters related to governance and operation of the association but included the subject dispute resolution terms, including, in all capital letters, an express agreement to waive the right to a jury trial, an agreement to resolve any dispute between the Intergulf and the association pursuant to mediation and, if unsuccessful, pursuant to judicial reference. The CC&Rs expressly prohibited amendment of the dispute resolution provisions without Intergulf's written consent.[35]

Under Civil Code Section 1354(a), CC&Rs are enforceable equitable servitudes that "unless unreasonable, shall inure to the benefit of and bind all owners of separate interests in the development" and, unless otherwise stated, may be enforced by any owner of a separate interest, by the association, or both. [36] The court cited *Nahrstedt v. Lakeside Village Condominium Assn.*[37] in which the supreme court held that recorded CC&Rs are binding equitable servitudes enforceable against subsequent purchasers of land regardless of whether the purchaser has actual notice of the restrictions.[38] The *Nahrstedt* court reasoned that equitable servitudes permit courts to enforce promises restricting land use even when there is no privity of contract between parties and noted this underlying principle is essential to maintaining the viability of common interest developments.[39]

As agreement to judicial reference necessarily waives the right to a jury trial, the court reflected on the policy considerations applicable to a civil jury trial waiver as detailed in *Grafton Partners v. Superior Court*.[40] Specifically, the *Grafton* court opined that the right to a trial by jury must be prescribed by the legislature because it is "too sacred in its character to be frittered away or committed to the uncontrolled caprice of every judge or magistrate in the State." *Grafton Partners* emphasized that the right to a trial by jury is a fundamental right that must be "zealously guarded" in the case of a claimed waiver.[41]

The court distinguished *Villa Milano Homeowners Assn. v. Il Davorage*,[42] which held that an arbitration clause in CC&Rs was a sufficient agreement to require claims between a developer and homeowners association to be submitted to arbitration, though it ultimately held the subject agreement unconscionable and unenforceable.[43] *Villa* reinforced that owners are deemed to intend and agree to be bound by recorded CC&Rs, as they have constructive notice of the CC&Rs when they purchase their homes. The court concurred with the *Villa* court that CC&Rs can reasonably be construed as an enforceable contract in some circumstances, for instance, when analyzing a controversy involving the governance of an association or relationships between or among owners and the association. However, it departed from *Villa* in finding the contractual agreement created by CC&Rs inadequate to establish waiver of a right as significant as the right to a trial by jury. There was no "meeting of the minds," as the developer drafted the CC&Rs long before interests in the project were conveyed and the purchasers and successors comprising the association membership had to accept the terms, including the judicial reference agreement and jury trial waiver. That the CC&Rs were not executed by the association, and the dispute resolution provisions could not be amended without Intergulf's consent, reinforced the notion that the association did not

voluntarily asset to the terms. Because the court concluded the CC&Rs were not a proper contract for waiving the right to a jury trial, it did not determine whether the judicial reference provision was unconscionable.[44]

Comment:

Developers often include binding alternative resolution provisions like judicial reference in CC&Rs in an effort to decrease potential exposure to an unfavorable jury award in a construction defect case. *Treo @ Kettner* establishes that a developer-drafted jury trial waiver included in CC&Rs is improper and unenforceable. The holding will likely frustrate developers, as it may encourage homeowners associations to pursue a jury trial even if their CC&Rs provide that the right was waived. Parties holding interests in common interest developments should review their CC&Rs to see whether this case may affect their rights or expectations. While courts typically encourage voluntary agreements to participate in alternative dispute resolution, *Treo @ Kettner* is indicative of a more recent general trend in which courts have declined to enforce alternative dispute resolution provisions that may appear substantively or procedurally drafted to favor one party at the expense of another.[45]

V. MCCLAIN V. OCTAGON PLAZA, LLC[46]

Notwithstanding lease provisions stating that a tenant accepted the accuracy of the square footage of her leased premises and a disclaimer that the tenant had satisfied herself regarding the premises, the court of appeal held that a landlord may be liable to a commercial tenant for misrepresentation of the square footage of the leased premises. The court's ruling also established that the tenant had rights to review common area expense information to confirm operating expenses but stopped short of implying an audit right in favor of the tenant where none was included in the lease.

In 2003, Kelly McClain, doing business as A+ Teaching Supplies, entered into a lease with Octagon Plaza, LLC for a commercial premises in a shopping center. The lease was prepared using a standard printed form and provided a five-year term with an option to extend for two additional five-year terms. The lease specified that the premises contained "approximately 2,624 square feet," which was repeated in an attached exhibit.[47] It also stated that "any statement of size set forth in this Lease, or that may have been used in calculating rent is an approximation which the Parties agree is reasonable and any payments based thereon are not subject to revision whether or not the actual size is more or less." Finally, the lease contained a tenant acknowledgement that the tenant "has been advised. . . . to satisfy itself with respect to the condition of the Premises… Lessee had made such investigation as it deems necessary with reference to such matters and assumes all responsibility therefore as the same relate to its occupancy of the Premises…."[48] Under the lease, McClain was responsible for a fixed base rent and, based on the square footage of the premises relative to the total shopping center area, additional rent equal to 23% of the common area operating expenses incurred by Octagon, which additional rent was due 10 days after receipt of a "reasonably detailed statement of actual expenses." Octagon had the option to estimate common area expenses and require McClain to pay an estimated prorated monthly share. If this option was selected, Octagon had to provide a "reasonably detailed" statement of actual expenses within 60 days after the end of the year.[49]

In 2005, McClain obtained a copy of Octagon's application for earthquake insurance disclosing that the premises contained 2,438 square feet, 186 less than represented in the lease, and the shopping center contained 12,800 square feet, 965 more than the amount used to calculate her share of common area expenses. McClain filed suit against Octagon for negligent or intentional misrepresentation, breach of the covenant of good faith and fair dealing, and with respect to an operating expense statement for the 2004 calendar year, McClain sought an accounting from Octagon.[50] McClain alleged the rent she agreed to pay was determined based on the represented square footage. She asserted that before the lease was signed, Octagon repeatedly affirmed the accuracy of the square footage and actively discouraged confirming measurements. McClain argued she was induced to pay excessive rent by Octagon's misstatements. The trial court entered judgment in favor of Octagon, sustaining its demurrer to the misrepresentation claims, and concluded that the lease, by its terms, barred the claims, and the trial court denied McClain an accounting.

The court of appeal reviewed the complaint to ascertain whether there was a cause of action under any available legal theory and whether the plaintiff could amend the complaint to state a cause of action.[51] The court concurred that when reviewed pursuant to this standard, the allegations were sufficient to establish a claim for intentional or negligent misrepresentation. It reasoned that there was misrepresentation regarding the square footage, as Octagon knew or had reason to know its representations were materially inaccurate, McClain justifiably relied on the inaccuracies and, as a result, entered into the lease obligating her to pay $90,000 more over the lease term than she would have agreed had she the benefit of accurate information.[52]

The court then considered whether the lease terms rendered McClain's fraud claim untenable. Civil Code Section 1668 provides contracts that have for their object, "directly or indirectly, to exempt anyone from responsibility for their own fraud,… whether willful or negligent, are against the policy of the law."[53] Accordingly, courts ignore contract provisions that absolve a party from fraud and permit parol evidence of misrepresentations because fraud renders the whole agreement voidable, including any waiver provision.[54] The court cited cases holding that "as-is" contract terms do not bar claims of fraud or establish that reliance on misrepresentations is unjustifiable. It correlated these provisions to the disclaimer in the lease that McClain had an adequate opportunity to review the premises, and as a result, found that the claim was not untenable.[55]

The court relied on *E.H. Morrill Co. v. State of California*,[56] in analyzing whether fraud claims are barred by lease provisions in which the parties agree lease statements regarding size are approximate and reasonable and payments based on size estimates will not later be adjusted. Finding this case analogous to *E.H. Morrill Co.*, the court concluded the exculpatory language does not insulate Octagon from fraud liability nor prevent McClain from showing her reliance is justified.[57] *E.H. Morrill Co*. involved a construction contract that described the subsurface conditions of a project but stated the description contained approximations and obligated the contractor to make its own investigation.

The contract also included express disclaimers regarding the limitations of the subsurface conditions information provided. Regardless, the *E.H. Morrill Co*. court concluded the description in the contract was a positive assertion of fact adequate to support a claim for fraudulent misrepresentation.[58] Accordingly, the court in this case concluded that despite the exculpatory and disclaimer provisions in the lease, repeated inclusion of square footage figures was a sufficient factual assertion to support the fraud claims. Additionally, the court cited *Furla v. Jon Douglas Co.*,[59] in which contractual disclaimers regarding square footage approximations in a residential purchase contract did not preclude the buyer from establishing reasonable reliance when the actual square footage discrepancy was *grossly inaccurate*. Following *Furla*, the court reasoned the discrepancies between the represented approximate sizes of the premises (inflated by 7.6%) and the shopping center (understated by 8.1%) were significant and cannot, as a matter of law, be considered de minimis.[60]

With respect to her demand for an accounting, McClain asserted the lease provisions along with the implied covenant of good faith and fair dealing entitled her to audit Octagon's common expenses records. The parties agreed Octagon had provided McClain with "a reasonably detailed statement" when requested, but subsequent requests for documentation and auditor access to Octagon's records had been denied. The court held the implied covenant of good faith and fair dealing is applicable to the cost-sharing provisions but only within the scope of the lease terms. As McClain's share of operating expenses under the lease was based on actual expenses incurred, she was entitled to the information required to permit her to verify that such expenses were, in fact, incurred and that the listed amounts are accurate.[61] However, McClain was not entitled to audit Octagon's records or to an explanation regarding Octagon's decisions to incur the expenses.

In sum, the lease did not bar McClain from asserting her fraud claims or from showing the misrepresentations reasonably induced her to accept the lease. Thus, Octagon may be held liable for negligent or intentional misrepresentation despite inclusion in the lease of "as-is" and exculpatory provisions. McClain was also entitled to documentation showing common area expenses were actually incurred, but the implied covenant of good faith and fair dealing did not operate to infer an audit right where the lease did not grant one.

Comment:

McClain creates a degree of uncertainty for commercial landlords with respect to lease representations regarding square footage. Based on this case, a commercial landlord may not be able to rely on contractual provisions whereby the parties stipulate to square footage amounts or on related disclaimers that shift the burden of confirming this information to tenants to protect the landlord from claims of fraud if the agreed upon figures are later determined to be materially inaccurate. Landlords should review their lease forms and measurement practices and procedures in light of this potential risk. However, *McClain* is also notable for holding a tenant cannot use the implied covenant of good faith and fair dealing to expand its rights to review operating expense information beyond what is granted in the lease, a more landlord-friendly result.

VI. WITT HOME RANCH, INC. V. COUNTY OF SONOMA[62]

This case addresses the question left unanswered in the California Supreme Court's decision in *Gardner v. County of Sonoma*, 29 Cal 4th 990 (2003), of whether a subdivision map approved and recorded prior to 1929 (when the state's first modern land use planning law was enacted) but after 1865 is valid under the Subdivision Map Act ("Map Act"). In *Gardner*, the supreme court affirmed Sonoma County's refusal to extend the grandfather clause of the Map Act to cover a subdivision map recorded in 1865. The court of appeal provided a partial answer to the question and determined that the Map Act's grandfather clause does not validate maps that were approved pursuant to laws prior to 1915.

Plaintiff Witt Home Ranch, Inc. (the "Ranch") was the owner of the "Houx Subdivision," a 120-acre parcel. In 1915, an earlier owner of the Houx Subdivision recorded a subdivision map of the property, dividing the property into 25 lots. Despite such subdivision, the Houx Subdivision was continuously owned as a single parcel by the Ranch and its predecessors-in-interest.[63] In 2005, the Ranch filed an application with the Sonoma County Permit and Resources Management Department ("PRMD") seeking certificates of compliance for the 25 lots shown on the recorded subdivision map.[64] The PRMD determined that the recorded subdivision map did not meet the criteria for allowing recognition of the parcels as separate legal parcels and refused to issue the requested certificates. The Ranch appealed the PRMD's decision to the county board of supervisors, and the board denied the appeal, reasoning that the legislation in place prior to 1919 primarily addressed surveying regulations, regulating the form rather than the substance of subdivision maps.[65] Such legislation failed to give any discretion to the local agency to review or regulate the design or improvements of the subdivision. Thus, the PRMD determined that only maps recorded pursuant to legislation enacted from 1929 on would be automatically recognized. The Ranch filed a complaint challenging the Board's decision, and the trial court entered judgment against the Ranch concluding that the Houx Subdivision map was not covered under the grandfather clause of the Subdivision Map Act.[66]

The court of appeal analyzed the Map Act's grandfather clause to determine which maps created under earlier versions of the Map Act were valid. Government Code Section 66499.30(a) – (c) prohibits transactions involving parcels where no final or parcel map has been recorded. Subdivision (d) excepts from such restrictions "any parcel or parcels of a subdivision offered for sale or lease, contracted for sale or lease, or sold or leased in compliance with or exempt from any law (including a local ordinance), *regulating the design and improvement of subdivisions* in effect at the time the subdivision was established."[67] Thus, if a subdivision map was recorded in compliance with statutes that regulated the design and improvement of subdivision in effect at the time the map was recorded, such map would be exempt from the prohibitions set forth in subdivisions (a) through (c).

Both the county and the Ranch acknowledged that the Houx map was recorded in compliance with the subdivision map laws in place in 1915. However, the county argued that the subdivision map laws in effect in 1915 did not regulate the

"design and improvement of subdivision" as required pursuant to Section 66499.30(d) because they imposed minimal or no constraints on subdivision and development.[68] The court of appeal agreed with the county and determined that the regulations existing in 1915 were primarily concerned with the accuracy of the depiction of the property on the map, rather than regulating the improvements on the property or the design of the subdivision as required by Section 66499.30(d).[69]

The court of appeal found support for its reasoning in the supreme court's decision in *Gardner*, where the supreme court reasoned that issuing a certificate of compliance based on the 1865 map in that case would frustrate the Map Act's objectives because it would permit the sale, lease, and financing of parcels without regard to regulations requiring consistency with applicable general and specific plans, without requiring dedications and impact mitigation fees, and without providing notice or opportunity to be heard to other interested persons that might suffer a deprivation of property rights.[70] Finding the Houx map to be a planning anachronism, merely a grid laid across a parcel of land, the court of appeal determined that the Houx map was inconsistent with the objectives of the modern Map Act.[71]

Finally, the court of appeal noted that its interpretation of Section 66499.30 would not be unfair to the Ranch because it had not detrimentally relied on the earlier state of law.[72] The Ranch had purchased the land after the Houx map was filed and made no attempt to take advantage of the map in its 70-year period of ownership. Based on all of the foregoing reasons, the court of appeal concluded that the Houx map could not be recognized as a valid subdivision map pursuant to the Map Act.[73]

Comment:

The *Witt Home Ranch* decision further limits the ability of landowners to obtain certificates of compliance from cities or counties based on old subdivision maps. Such certificates of compliance, when issued, can significantly increase the value of property because they allow individual parcels to be developed and/or sold separately. While highly desirable to landowners, such certificates of compliance are unpopular with government agencies that view such certificates as means of circumventing modern planning regulations. The court of appeal's decision in this case, if followed in other jurisdictions, may invalidate maps that were approved pursuant to laws enacted prior to 1915, but leaves unanswered the question of whether maps recorded after 1915 but before 1929 are valid pursuant to the grandfather clause of the Map Act.

VII. REAL ESTATE ANALYTICS V. VALLAS, LLC[74]

Real Estate Analytics v. Vallas, LLC reaffirms the unique nature of real property under the law by rejecting the trial court's assertion that damages are an adequate remedy at law. The court of appeal reversed the denial of a buyer's specific performance action where the buyer's intent in buying the property was to resell the property for profit. *Real Estate Analytics* fills a gap among existing appellate decisions by establishing the breaching party's burden to rebut the presumption that damages are inadequate in cases where the buyer sought to purchase the property for commercial or investment purposes.

Real Estate Analytics ("REA") brought a claim for breach of contract against Theodore Tee Vallas when Vallas cancelled a contract to sell REA 14.13 acres of land operated as a mobile home park. REA sought the remedy of specific performance. The trial court found Vallas breached but refused to grant REA specific performance, instead awarding it damages. The court of appeal reversed the trial court's holding with respect to damages and remanded the case with instructions to grant REA specific performance.

REA negotiated the purchase and sale agreement for the mobile home park with the plan of making a profit for its investors by subdividing the property and selling the lots to existing mobile home park residents. Two weeks before escrow was scheduled to close, Vallas cancelled the agreement and REA filed suit. At trial, the court held Vallas breached the contract but declined to award REA specific performance. Despite REA's assertions regarding the unique location and size of the property, the trial court reasoned that the remedy of damages was appropriate because the subject matter of the transaction was commercial property purchased "solely as a commodity" to earn money for investors and not because of the uniqueness of the property itself.[75] The court reasoned REA was concerned only with its profit, and therefore, the loss of the investment could adequately be offset by a monetary award. The court's damage award of $500,000 was the difference between the contract value and the value of the property on the date of the breach, plus interest on the deposit.

To obtain specific performance, a plaintiff must generally show (1) the inadequacy of a legal remedy; (2) an underlying contract that is reasonable and supported by adequate consideration; (3) the existence of mutuality of remedies; (4) contractual terms sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity to the performance promised in the contract.[76] The trial court's rationale was based on its finding that the inadequacy of legal remedy element was not satisfied by REA because it sought the property as an investment and not for some particular or specific use of the land.

Civil Code Section 3387 establishes a statutory presumption that a damages remedy is inadequate for a breach of a non-residential real property sales contract. The court explained that, except for a single-family home purchase, it is a rebuttable presumption that shifts the burden of proof to the breaching party to prove the adequacy of the damages. Accordingly, the legislature intended a damages remedy for a non-breaching party to a real estate contract should be the exception rather than the rule.[77] The court concluded Vallas failed to rebut the statutory presumption. REA produced strong evidence of the presumption of inadequacy of the remedy of money damages by showing the property was unique in size, location, and existing use. REA showed that the property was comprised of more than 14 acres located near the Pacific Ocean, with ocean views, and was located close to desirable beaches, resorts, neighborhoods, and transportation routes. The property also housed an established mobile home community whose long-term ground lease was scheduled to terminate in 2013. Moreover, existing residents had expressed interest in purchasing ownership interests in the property from REA.

In contrast, Vallas relied solely on an appraisal of recent mobile home park sales, not all in the immediate area, and none subject to a ground lease. The court found that Vallas failed to satisfy the burden of proof of adequacy of damages. Vallas'

evidence that other mobile home parks had sold within a recent time period did not establish damages that would compensate REA for the loss of the subject property and its intended investment opportunity. To rebut the presumption "a seller must show not only abstract replaceability but concrete availability of reasonably interchangeable property at terms within buyer's means."[78] The court concluded the trial court's reliance solely on REA's intent was flawed and that its profit motive did not overcome the strong statutory presumption that land is unique and damages are inadequate. The uniqueness of the property is based not only on its physical attributes and location but also the investment potential and reasonableness of the contract price. The court explained that the land was unique because of the manner in which it could be used to earn profits for the buyer upon resale and was not merely an interchangeable commodity. Moreover, the defendant had the burden to prove with particularity how damages would fully compensate the plaintiff for the breach. The judgment was reversed.

Comment:

Real Estate Analytics provides assurance to parties engaged in the purchase of real property for commercial or investment purposes that their motivation to earn a profit on a real property acquisition cannot be used to deprive them of the valuable remedy of specific performance. It reaffirms the recognition by California courts of the unique nature of real property and the presumption that monetary damages are inadequate to compensate a party denied its acquisition. *Real Estate Analytics* clarifies the scope of the breaching party's burden to rebut the presumption and prove damages are an adequate remedy. Thus, a defendant seeking to rebut the presumption that specific performance is the appropriate remedy in a breach of a real property contract must satisfy the criteria set forth in *Real Estate Analytics*, concretely establishing substantially similar property is immediately available for purchase upon comparable terms.

VIII. NEIGHBORS IN SUPPORT OF APPROPRIATE LAND USE V. COUNTY OF TUOLUMNE[79]

In this decision regarding the use of statutory development agreements, the court of appeal addressed the question of whether a county may use a development agreement to approve of the use of a parcel where the proposed use is prohibited by the applicable zoning ordinance. The court of appeal determined that, absent a rezoning of the property or an amendment to the zoning ordinance, the court may not do so.

Fresh from hosting a successful wedding for their daughter on their 37-acre property, Ronald and Lynda Peterson decided to open a business hosting weddings and other events on their land. The property was zoned exclusively for agricultural use; the commercial use of the property for weddings or other events was not permitted under the existing zoning ordinance with or without a conditional use permit.[80] The Petersons submitted an application to the Tuolumne County Community Development Department seeking permission to use the property for their new venture. The county staff and the county's planning commission recommended denial of the application, and the Petersons withdrew their application. Approximately one month later, relying on pending amendments before the board of supervisors that would have permitted weddings and similar outdoor activities as conditional uses, the Petersons submitted a revised application seeking a conditional use permit.[81]

The amendment was rejected by the board of supervisors, which acknowledged that the Petersons' desired use could not be permitted under the existing zoning designation. Instead, the board of supervisors passed an ordinance authorizing the adoption of a development agreement pursuant to Government Code Section 65864, *et seq*., which agreement granted the Petersons an exception to the zoning ordinance allowing them to use their property for their business.

The Petersons' neighbors brought an action against the county and its board of supervisors seeking reversal of the county's actions. The trial court agreed with neighbors and ruled that the county's actions violated the planning and zoning law because it authorized a use of the Petersons' land that was not permitted by the zoning ordinances. Thus, the county's ordinance, the development agreement and the conditional use permit were deemed void *ab initio*.[82]

The court of appeal focused its analysis on Government Code Section 65852, which provides: "All such [zoning] regulations shall be uniform for each class or kind of building or use of land throughout each zone, but the regulation in one type of zone may differ from those in other types of zones." In likening a zoning scheme to a contract, where each party foregoes certain rights to use the land in return for assurances that the neighboring property will be similarly restricted, the court of appeal determined that creating an *ad hoc* exception to benefit one parcel would allow such contract to be "broken."[83]

The county argued that Section 65864 *et seq*. exempts zoning actions from the uniformity requirement based on the following: (1) Section 65865.2 provides that a development agreement shall specify "the permitted uses of the property," implying that the uses may extend beyond those permitted by the zoning ordinance; (2) Section 65866 provides that the rules governing the permitted uses of land shall be those in effect when the development agreement is entered into unless "otherwise provided by the development agreement …," implying that the county has the power to provide for exceptions to existing rules in the development agreement; and (3) Section 65867.5 provides that a development agreement is only valid if consistent with applicable general and specific plans, but does not specify that such agreements must be consistent with applicable zoning ordinances. Such omission, the county argued, implies that a development agreement may be inconsistent with applicable zoning ordinances and still remain valid.[84]

In rejecting the county's arguments, the court of appeal stated such a "*mere arguable implication* of permissiveness" would not take precedence over the express command requiring uniformity in each zone set forth in Section 65852.[85] The appellate court determined that the legislature's failure to create an express exception to the uniformity requirement set forth in Section 65852 inferred an intent not to create such an exception. Thus, the court of appeal affirmed the trial court's ruling that the county's ordinance, the development agreement and the conditional use permit were void.

Comment:

The court of appeal's decision in *Neighbors* clarified and limited the power and reach of statutory development agree-

ments pursuant to Government Code Section 65864 *et seq*. Development agreements evolved to mitigate the risk of changing laws by assuring developers that the legal requirements in place at the time the agreement is entered into will continue to apply to their project. Here, the court of appeal clarified that development agreements may not be used to create exceptions to existing laws, and may only be used to *apply or further restrict* applicable zoning laws. Approval of a prohibited use may be acceptable but only if accompanied by a zoning amendment.

IX. SILICON VALLEY TAXPAYER'S ASSOCIATION, INC. V. SANTA CLARA COUNTY OPEN SPACE AUTHORITY[86]

In this case, the California Supreme Court clarified the standard of review for determining the validity of assessments pursuant to California Proposition 218, and struck down the special assessment in question. Proposition 218 was passed in 1996 by voter initiative and amended the California Constitution to restrict a local government's ability to impose assessments. Proposition 218 did so by narrowing certain requirements and definitions, imposing stricter procedures, and shifting certain presumptions that had traditionally favored the validity of assessments.[87] In particular, Proposition 218 determined that an assessment may only be imposed for a *special benefit* conferred on real property, and that an assessment must be *in proportion* to the special benefit conferred on such property.[88]

The assessment in question was imposed by the Santa Clara County Open Space Authority ("OSA"), which was created in 1992 for purposes of acquiring and preserving open space to counter the conversion of land to urban uses, to preserve quality of life, and to encourage agricultural activities.[89] In 2000, after the passage of Proposition 218, OSA determined that it needed additional funding to purchase open space and decided to form an assessment district. The proposed assessment district would include approximately 314,000 parcels and over 800 square miles containing over one million people.[90] Assessments for all single-family homes were set at $20 per year, and it was calculated that the assessment would increase OSA's budget by approximately eight million dollars. After a vote by the affected property owners, which resulted in a weighted vote of 50.9% in favor of the new assessment, OSA's board of directors approved the results and established the new assessment district.

Two taxpayer associations and several individual taxpayers sued OSA for, among other things, failure to satisfy the requirements of special benefit and proportionality under Proposition 218. In essence, they claimed, the assessment was a "special tax," which may be levied without benefiting particular individuals or property, rather than an assessment, which may only be levied against real property that directly benefits from the assessment. Special taxes require a mandatory two-thirds voter approval pursuant to Proposition 13. The trial court entered judgment in favor of OSA, and the court of appeal, granting substantial deference to the local agency's assessment, affirmed the trial court's judgment.[91]

As an initial matter, the supreme court addressed the standard of review that courts should apply in determining whether assessments are valid. The supreme court determined that the court of appeal erred in granting substantial deference to the local agency. Prior to the passage of Proposition 218, courts reviewed the quasi-legislative acts of local agencies under a deferential abuse of discretion standard. The drafters of Proposition 218 specifically addressed the standard of review by shifting the burden to the agency to demonstrate the legal validity of an assessment.[92] Accordingly, the supreme court concluded that courts should exercise their independent judgment in reviewing local agency decisions regarding whether benefits are special and proportional pursuant to Proposition 218.[93]

Next, the supreme court turned to the question of whether OSA's special assessment satisfied the "special benefits" portion of the test. Prior to the enactment of Proposition 218, a special benefit was referred to as a benefit over and above that received by the general public both inside and outside of the assessment district. Proposition 218 tightened the definition of a "special benefit" by defining it as "a particular and distinct benefit over and above general benefits conferred on real property *located in the district* …."[94] Thus, a special benefit must affect the assessed property in a way that is distinct from its general effect on all real property located in the district and in the public at large. The supreme court determined that OSA failed to meet its burden.

The engineer's report prepared by OSA listed several "special benefits" that the assessment would confer on *all* residents and property owners in the district (*e.g.*, enhanced recreational activities, protection of views and scenery, increased economic activity, and increased employment opportunity).[95] The report failed to measure the benefits that accrued to particular parcels. The supreme court also rejected OSA's view that special benefits are benefits conferred on residents of the assessment district, while general benefits are benefits conferred on non-residents of the assessment district. Rather, the supreme court determined that special benefits must be based on more than mere residence in an assessment district. They must also include additional factors such as, in this case, proximity to the open space, improved access to the open space, or views of the open space from particular parcels.[96]

Finally, the supreme court determined that OSA failed to show that the assessment satisfied the proportionality requirement of Proposition 218. The proportionate special benefit given to each parcel should be determined based on the entire capital cost of a public improvement, the maintenance and operational expenses of such improvement, or the cost of the property-related service provided.[97] OSA's engineer's report failed to identify with specificity the public improvements that the assessment would finance, failed to identify the calculation of the cost of the improvements, and failed to connect the proportionate cost of the benefits received from the improvements to the specific parcels.[98] Thus, the supreme court concluded that the assessment failed to satisfy the proportionality requirement and was invalid under Proposition 218.

Comment:

The supreme court's decision in this case will make it substantially more difficult for local agencies to demonstrate that special assessments are proper. First, the supreme court definitively shifted the burden to the local agencies to show that assessments are valid when such assessments are challenged in court. Second, the narrowed definition of "special benefits" and the specificity with which agencies must demonstrate proportionality forces agencies to prepare highly detailed reports

on how public improvements and services will benefit specific properties, and how the amounts assessed on specific properties were determined. An agency's failure to meet its burden creates a risk that an assessment will be deemed invalid under Proposition 218.

X. GRAY V. MCCORMICK[99]

Gray v. McCormick represents a departure from the general easement rule that the owners of a servient tenement may use the easement area in any manner not inconsistent with the use by the dominant tenement owner. In *Gray*, the court of appeal held a dominant tenement owner has the right to exclusive use of the entire surface of the land of the easement area, to the exclusion of all others, including the servient tenement owner, the fee title owner of the property.

The Grays and McCormicks were adjacent neighbors in an upscale residential subdivision. Both of their lots were subject to recorded covenants, conditions, restrictions, and reservation of easements (collectively, the "CC&Rs"). The subdivision tract map denoted various private streets over which all property owners in the project had "nonexclusive appurtenant easements for vehicular, pedestrian and equestrian traffic" and depicted an easement approximately 16-feet wide and 90-feet long for access, ingress, and egress across the McCormick lot in favor of the Gray lot, providing the only means of ingress and egress for the Gray lot. The CC&Rs provided that this easement was "exclusive." The easement area was unimproved but the McCormicks had been using it for passage of horses and for transport of rubbish, horse feed and manure to and from the stables in the McCormicks' backyard. The Grays planned to add a driveway, perimeter walls, and landscaping and objected to continued use of the area by the McCormicks. Though the McCormicks conceded an exclusive easement existed, they asserted it did not serve to exclude the property owner from making use of the easement area which does not interfere with the uses of the dominant tenement owner, in this case, ingress and egress. The trial court entered judgment in favor of the McCormicks, concurring that the McCormicks had the right to use the easement area in any way that did not interfere with its use by the Grays and expressly enjoining the McCormicks from using the easement area in any interfering manner.[100]

In determining the degree of exclusivity of the easement, the court's analysis focused on whom may be excluded from the easement area as well as establishing the uses and area from which they may be excluded. The court examined applicable statutes confirming that "[u]nder Civil Code Section 806, the extent of a servitude is determined by the terms of the grant."[101] It also found the rules of construction for deeds and contracts apply to easements so that the meaning of the easement agreement is a question of law, and the reviewing court is not bound by the trial court's conclusions. Thus, the instrument creating the easement is determinative, and the court shall interpret it independently.

The court reviewed applicable cases regarding the exclusivity of easements, finding an exclusive easement is an unusual interest in land that has been said to amount "almost to a conveyance of the fee" and noting the intent to convey such an interest cannot be imputed to the owner of the servient tenement in the absence of a clear indication of such an intent.[102] Accordingly, the court had to determine whether the easement instrument clearly expressed an intent to grant exclusive use of the easement area to the Grays. In this case, the easement language in the CC&Rs repeatedly emphasized exclusivity of the easement referring to an "exclusive easement of access, ingress and egress" and providing that "[u]se of the Easement by the Owner of Lot 6 and such Owner's family, guests, tenants and invitees shall be exclusive."[103] The language also obligated the Grays to construct, install, maintain, and repair access drive improvements within the easement area. The court considered these obligations inconsistent with continued use of the area by the McCormicks stating "it is inconceivable that the owners of a multi-million dollar property who build out 90 feet of access drive improvements would be expected to share that drive with a neighbor whose property abuts the street and to bear the costs of cleaning up the horse droppings and hay scatterings associated with that neighbor's use of the easement area."[104] Finally, the easement contains an indemnity that requires the Grays to indemnify, defend, and hold harmless the McCormicks from losses resulting from the Grays' use of the easement area. The indemnity carves out losses arising out of the misconduct or negligence of the McCormicks. The court concluded that this carve-out from the indemnification obligations was not inconsistent with exclusivity, as it is conceivable that misconduct or negligent acts occurring on the McCormick lot could impact the easement area. Finally, the court noted there is not any express reservation of any rights in favor of the McCormicks in the documents granting the easement.

In this case, the court confirmed exclusive easements are not prohibited provided the instrument creating it clearly states the intention of exclusivity. It suggests an exclusive easement may be created by other means, including by prescription. However, it does not address the issue raised by its holding of whether any conceivable use of the subsurface or air rights of the easement area remains that would not be inconsistent with the servient tenement's use. The judgment of the trial court was affirmed to the extent it enjoined the McCormicks from any interfering use but was reversed to the extent it permits any surface use of the easement area by the McCormicks.

Comment:

Gray adds some clarity to the array of existing easement case law by affirming that exclusive use easements may be lawfully granted provided the exclusivity of intent is clearly stated in the granting easement. Such an easement may be valid, even if, as in *Gray*, the terms of the grant effectively amount to a conveyance of a fee interest in the easement area. While the analysis is fairly fact-specific, property owners should nevertheless be cautious regarding how any easement is granted. If the servient tenement owner intends to retain any uses for itself with respect to the easement area, it should expressly reserve those rights. In addition, any party anticipating purchasing property subject to easements should be careful to ascertain a clear understanding of the nature and extent of any exclusive rights granted or held.

XI. NICOLL V. RUDNICK[105]

This case addresses the transfer of water rights upon foreclosure of a property with appurtenant appropriative water rights. *Nicoll v. Rudnick* established that water rights appurtenant to

land are included in a foreclosure sale, even though the deed of trust and the trustee's deed did not expressly reserve water rights. In *Nicoll*, a property owner sought review of a superior court judgment, which in a quiet title action, determined the apportionment of water rights between the owner's property and its neighbor's adjacent property.

In the 1860s, J.W. Nicoll constructed a three-mile long ditch (the "Nicoll Ditch") to convey water from the south fork of the Kern River to his 300.5 acre property. A 1902 judgment of the Kern County Superior Court confirmed his right to appropriate a defined quantity of water from the Kern River through the Nicoll Ditch for use on the property, then consisting of two contiguous parcels of land, an upslope parcel of 142.79 acres referred to as Nicoll Ranch, and a downslope parcel of 157.70 acres referred to as Nicoll Field. Nicoll Field was used to secure a loan J.W. Nicoll later failed to pay, and in 1933, the lending bank foreclosed upon Nicoll Field. Nicoll Field was later sold to the predecessor-in-interest of Oscar Rudnick, its current owner. A dispute arose between Rudnick and John W. Nicoll ("Nicoll"), successor to J.W. Nicoll and present owner of the Nicoll Ranch, concerning the Nicoll Ditch water, and in 2006, an action to quiet title to the parties' respective water rights was filed. Nicoll argued the water rights should be apportioned based on the water actually used on each parcel immediately preceding the foreclosure and that therefore, Nicoll Ranch should have 75% of the water and Nicoll Field the remaining 25%. Rudnick argued that the 1902 judgment established the water rights as appurtenant to the entire 300.5 acres. Thus, Rudnick argued that when he acquired Nicoll Field, which comprised 52% of the total original acreage, he acquired 52% of the appurtenant water rights. The trial court adopted Rudnick's argument, and the court of appeal affirmed.

The court affirmed that the 1902 judgment established J.W. Nicoll's claim to appropriate water from the river, granting a valid ditch right-of-way. Though the method of acquiring appropriative rights to water was changed to follow a statutory scheme in 1914, as they were established prior to 1914, the rights in this case were not subject to the statutory scheme and were determined by the 1902 judgment.[106] The 1902 judgment states the subject water rights were appurtenant to each party's real estate on which the appropriated water was used for beneficial purposes.[107] Thus, by its terms, the appropriative water rights run with the land, which at the time, included the entire 300.2 acres. The court reasoned that because the 1902 judgment preceded the foreclosure and separate ownership of the Nicoll lands, the water rights were appurtenant to the entire original acreage. The terms of an agreement regarding arbitration recorded concurrently with the 1902 judgment imply that J.W. Nicoll's allocation of water in the judgment was based on his ownership of more than 300 acres of land bolstering the court's conclusion that appropriative rights established in the 1902 judgment run with the entire original Nicoll acreage.

With respect to the impact of the foreclosure and subsequent conveyances on the water rights, the general rule is that rights and appurtenances that ordinarily pass with a conveyance of land pass to a purchaser in foreclosure, even if not mentioned in the foreclosure proceedings.[108] Furthermore, because water rights are appurtenant to land, they are presumed to be transferred with it, absent an express reservation.[109] In this case, Nicoll's predecessor-in-interest executed a deed of trust for Nicoll Field to secure the bank loan. Upon foreclosure, a trustee's deed was executed in favor of the bank, which then sold the parcel to Rudnick's predecessors. Neither the deed of trust, the trustee's deed nor the subsequent grant deed made reference to water rights. Accordingly, any rights appurtenant to Nicoll Field passed to its purchasers. As the 1902 judgment established the rights were appurtenant to the entire original acreage, the Court concluded the trial court properly allocated the amount of water rights based on the percentage of the original acreage conveyed. The court rejected Nicoll's arguments that the appropriative water rights should be determined based on the amount of water reasonably and beneficially used on the land at the time of foreclosure as inapplicable to the present facts.

Comment:

Water rights are a valuable and fiercely disputed issue with respect to real property in California. In the current economic climate in which foreclosure is increasingly common and water increasingly scarce, *Nicoll* provides some insight regarding how appurtenant appropriative water rights established prior to 1914 are established and how they may be allocated upon foreclosure of real property. This case should be of interest to lenders, parties seeking to acquire land though foreclosure, and parties with an interest in water rights law.

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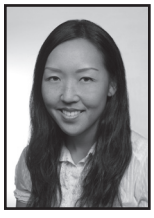

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ENDNOTES

1 We look at hundreds of cases each year that impact California real property. Narrowing them down to the top ten is a difficult task, but we do not do this ourselves. We ask numerous real property law practitioners to give us their invaluable input as to the top cases. The authors would like to thank the following people for their assistance identifying cases for consideration for this article: Julie Baird, Christopher Callegari, Paul Dubrasich, Julie Frambach, Karl Geier, George Harris, Ludlow Keeney Theodore Klaassen, Adam Lewis, Scott Rogers, Bill Shiber, Karen Turk, Gillian van Muyden, Ned Washburn, and Bryan Wenter.

2 Unless otherwise noted, code references are to California statutes, and court references are to California courts.

3 *Steiner v. Thexton*, 163 Cal.App.4th 359 (2008), review granted.

4 The California Supreme Court had not yet issued an opinion on this case as of the publication deadline of this article.

5 *Clear Channel Outdoor, Inc. v. Nancy Knupfer,* 391 B.R. 25 (9th Cir. B.A.P. 2008).

6 *Id.* at 29.

7 *Id.* at 29-30.

8 *Id.* at 31.

9 *Id.* at 32.

10 *Id.* at 33.

11 *Id.* at 34.

12 *Id.* at 34-35.

13 *Id.* at 37.

14 Bankruptcy Code Section 363, subd. (f).

15 *Clear Channel*, 391 B.R. at 40.

16 *Id.* 41.

17 *Id.* at 42.

18 *Id.* at 42-43.

19 *Id.* at 47.

20 *Save Tara v. City of West Hollywood*, 45 Cal.4th 116 (2008).

21 *Id.* at 123-124.

22 *Id.* at 123.

23 *Id.* at 124.

24 *Id.* at 124-125.

25 *Id.* at 130.

26 *Id.* at 132.

27 *Id.* at 136.

28 *Id.* at 124-125.

29 *Id.* at 141.

30 *Id.* at 142.

31 *Id.* at 144.

32 *Treo @ Kettner Homeowners Assn. v. Super. Ct.*, 166 Cal.App.4th 1055 (2008).

33 Code of Civil Procedure Section 638. All subsequent references are to Code of Civil Procedure unless otherwise specified.

34 *Treo @ Kettner Homeowners Assn. v. Super. Ct.,* 166 Cal.App.4th at 1061-62.

35 *Id.* at 1061-62.

36 *Id.* at 1062-63.

37 *Nahrstedt v. Lakeside Village Condominium Assn.,* 8 Cal.4th 361 (1994).

38 *Treo*, 166 Cal.App.4th at 1062-63.

39 *Id.* at 1062-63.

40 *Grafton Partners v. Super. Ct.*, 36 Cal.4th 944 (2005).

41 *Id.* at 956.

42 *Villa Milano Homeowners Assn. v. Il Davorage*, 84 Cal. App.4th 819 (2000).

43 *Treo*, 166 Cal.App.4th at 1065-66.

44 *Id.* at 1067.

45 *See also Thompson v. Toll Dublin*, 165 Cal.App.4th 1360 (2008) (holding that arbitration provisions contained in purchase agreement documentation were procedurally and substantively unconscionable) and *Bruni v. Didion*, 160 Cal.App.4th 1272 (2008) and *Baker v. Osborne Development*, 159 Cal.App.4th 884 (2008) (both holding that arbitration provisions contained in a new home warranty was substantively and procedurally unconscionable).

46 *McClain v. Octagon Plaza, LLC* 159 Cal.App.4th 784 (2008).

47 *Id.* at 790.

48 *Id.*

49 *Id.*

50 McClain also asserted claims of violation of the Consumer Credit Reporting Agencies Act and requesting declaratory relief. The Court upheld the trial court's demurrer with respect to these claims and we did not include analysis regarding these claims in the summary.

51 *McClain*, 159 Cal.App.4th at 792-93.

52 *Id.* at 794.

53 Civil Code Section 1668.

54 *McClain*, 159 Cal.App.4th at 794.

55 *Id.* at 794-95.

56 *E. H. Morrill Co. v. State of California*, 65 Cal.2d 787 (1967).

57 *McClain*, 159 Cal.App.4th at 796.

58 *E. H. Morrill Co. v. State of California*, 65 Cal.2d at 791-92.

59 *Furla v. Jon Douglas Co.*, 65 Cal.App.4th 1069 (1998).

60 *McClain*, 159 Cal.App.4th at 796-97. (italics added)

61 *Id.* at 805.

62 *Witt Home Ranch, Inc. v. County of Sonoma*, 165 Cal. App.4th 543 (2008).

63 *Id.* at 548-49.

64 *Id.* at 549.

65 *Id.* at 550.

66 *Id.*
67 Government Code Section 66499.30, subd. (d) (italics added).
68 *Witt Home Ranch*, 165 Cal.App.4th at 554-55.
69 *Id.* at 562-63.
70 *Id.* at 563.
71 *Id.*
72 *Id.* at 563-64.
73 *Id.* at 564.
74 *Real Estate Analytics, LLC v. Vallas,* 160 Cal.App.4th 463 (2008).
75 *Id.* at 470.
76 *Id.* at 472.
77 *Id.* at 474.
78 *Id.* at 475.
79 *Neighbors in Support of Appropriate Land Use et al., v. County of Tuolumne et al.*, 157 Cal.App.4th 997 (2007). This decision was issued too late in 2007 to make our list last year.
80 *Id.* at 1001.
81 *Id.* at 1002.
82 *Id.* 1003-04.
83 *Id.* at 1009.
84 *Id.* at 1013-14.
85 *Id.* at 1014 (emphasis in original).
86 *Silicon Valley Taxpayers' Ass'n, Inc. v. Santa Clara County Open Space Authority*, 44 Cal.4th 431 (2008).
87 *Id.* at 438.
88 *Id.* at 437.
89 *Id.* at 437.
90 *Id.* at 439.
91 *Id.* at 441.
92 Cal. Const. Art. XIII D, section 4, subd. (f).
93 *Silicon Valley,* 44 Cal.4th at 450.
94 Cal. Const. Art. XIII D, section 2, subd. (i) (emphasis added).
95 *Silicon Valley,* 44 Cal.4th at 453.
96 *Id.* at 455.
97 *Id.* at 456.
98 *Id.* at 457.
99 *Gray v. McCormick,* 167 Cal.App.4th 1019 (2008).
100 *Id.* at 1023.
101 *Id.* at 1024.
102 *Id.* at 1025.
103 *Id.* at 1026.
104 *Id.*
105 *Nicoll v. Rudnick,* 160 Cal.App.4th 550 (2008).
106 *Id.* at 557.
107 *Id.* at 555.
108 *Id.* at 560-61.
109 *Id.*

2008 Legislative Review

By Robert M. McCormick, Matthew W. Ellis, James P. Lucas, Danielle R. Moyer and Brandon M.G. Williams

I. INTRODUCTION

In 2008 the California Legislature remained undeterred by the looming prospect of an ever increasing, multi-billion dollar budget deficit and introduced a total of 4,690 proposals for new laws. Eventually the Legislature was able to labor through this mass of bills and pass and deliver 1,777 bills to Governor Schwarzenegger for his consideration. By the end of this session, however, the weight of the budget crisis had in the Governor's words become "a rock on the chest of California," that took priority over all other policy issues. In order to underscore his dissatisfaction with the "political dysfunction" over the State's budget, the Governor wielded his veto power with increased vigor and eliminated many bills solely on the basis that they were not of statewide importance. Clearly, without a budget it could not be business as usual, and the Governor set a record by vetoing more than a third of all the bills that reached his desk.

Despite this increasingly hostile environment for new legislation, several bills were enacted into law in 2008 that potentially have very significant implications for real property practitioners and deserve highlighting here. In particular, the area of land use received considerable attention in 2008 including, among the several new laws that were enacted, a sweeping "anti-sprawl" revision of land use policies in the form of AB 375. This new planning law enacting "preferred growth" is intended to accomplish the land use sector's contribution to achieving the green house gas emission reduction goals of the Global Warming Solutions Act of 2006 (AB 32). Because of its far-reaching implications, AB 375 has been characterized as the most significant land use bill passed in California in 30 years.

Another new law that could have a significant impact is SB 1608, which is intended to reform and discourage abuse of California's disability access laws. We will see if this legislation has its intended effect of reducing unwarranted, unnecessary litigation that does not advance the goals of disability access.

Finally, there are a variety of newly-enacted laws that address various aspects of the housing crisis, spanning such varied issues as an extension of the expiration date for tentative maps (AB 1185), the regulation of the activities of foreclosure consultants (AB 180), and the modification of foreclosure procedures for residential properties (AB 1137).

The following legislative review is intended to provide only shorthand references to selected bills that were enacted into law in the 2008 legislative session. Copies of the actual chaptered versions are available from the Legislative Counsel at http://www.leginfo.ca.gov under "Session 2007-2008," and should always be reviewed for details. Unless otherwise noted, all bills covered in this review became operative January 1, 2009.

II. ADA SB 1608, Corbett. Disabled persons: equal access rights: civil actions. Amends Section 5600 of the Business and Professions Code, adds Part 2.52 and Part 2.53 to Division 1 of the Civil Code, amends Sections 4450 and 4459.5 of, and adds Chapter 3.7 to Division 1 of Title 2 of the Government Code, and amends Section 18949.29 of the Health and Safety Code.

Existing law provides for the licensure and regulation of persons engaged in the practice of architecture by the California Architects Board. This act requires a person licensed to practice architecture, as a condition of license renewal: (a) to complete coursework regarding disability access requirements; (b) to certify that completion to the California Architects Board; and (c) to provide specified documentation from the course provider.

Existing law prohibits any person, firm, or corporation from denying or interfering with a disabled person's admittance to, or enjoyment of, public facilities, or from otherwise interfering with the rights of an individual with a disability, including the right to be accompanied by a guide dog, signal dog, or service dog. The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination against an individual with a disability on the basis of that disability in certain specified situations, which include, among other things, employment opportunities and access to public accommodations, services and transportation. Under this act, any attorney making a demand for money to, or complaint against, a building owner or tenant for any construction-related accessibility claim must also provide a written advisory, in a form which will be developed by the Judicial Council. The written advisory must be on a separate page clearly distinguishable from the demand for money. The specified text of the written advisory is included in the legislation.

Existing law authorizes the State Architect to establish a program for voluntary certification by the state of any person who meets specified criteria as a certified access specialist with respect to access to buildings for persons with disabilities. This act authorizes the State Architect to implement that program with startup funds derived, as a loan, from the reserve of the Public School Planning, Design, and Construction Review Revolving Fund, upon appropriation by the Legislature. This act also enacts the Construction-Related Accessibility Standards Compliance Act, which provides for the inspection of sites by certified access specialists and the provision of specified certificates and reports regarding those inspections. This act requires a local agency, commencing July 1, 2010, to employ or retain at least one building inspector who is a certified access specialist and, commencing January 1, 2014, to employ or retain a sufficient number of building inspectors who are certified access specialists to conduct permitting and plan check services to review for compliance with state construction-related accessibility standards by a place of public accommodation with respect

to new construction, all as specified in the act. This act also allows a local agency to charge a permit applicant or member of the public for these services, and it allows a local government to charge or increase inspection fees to the extent necessary to offset the costs of complying with these provisions.

This act also requires a court, with respect to an action involving a construction-related accessibility claim, to issue an order that, among other things, grants a 90-day stay of the proceedings with respect to that claim, schedules an early evaluation conference, and directs the defendant to file with the court under seal and serve on the plaintiff a copy of any relevant Certified Access Specialist inspection report, which shall be subject to a protective court order, as specified, if the defendant has satisfied certain requirements relating to inspection of the site at issue. In addition, this act requires that early evaluation conferences be conducted by a superior court judge or commissioner, or a court early evaluation conference officer. This act provides that damages may be recovered in a construction-related accessibility claim against a place of public accommodation only if a violation of construction-related accessibility standards denied the plaintiff full and equal access to the place of public accommodation on a particular occasion.

Existing law already requires all construction inspectors, plans examiners, and building officials to complete a minimum of 45 hours of continuing education for every three-year period, as specified. This act requires that at least eight of those hours of continuing education relate to disability access requirements and allows a local government to charge or increase inspection fees to the extent necessary to offset any added costs incurred in complying with these provisions.

III. BROKERS

A. AB 2454, Emmerson. Real estate: Recovery Account. Amends Section 10474 of the Business and Professions Code, relating to real estate.

Existing law, the Real Estate Law, provides for the licensure and regulation of real estate brokers and real estate salespersons by the Department of Real Estate (DRE). Existing law provides for creation of the Recovery Account in the Real Estate Fund, which is funded by fees imposed on licensees. Existing law provides that when an aggrieved person obtains a final judgment, as specified, against a defendant based upon the defendant's fraud, misrepresentation, or deceit, made with intent to defraud, or the defendant's conversion of trust funds, arising directly out of any transaction in which the defendant, while a real estate licensee, performed acts for which his or her license was required, the aggrieved person may file an application with the DRE for payment from the Recovery Account of the amount unpaid in the judgment that represents an actual and direct loss to the claimant in the transaction. Existing law prohibits the liability of the Recovery Account from exceeding $20,000 for any one transaction and $100,000 for any one licensee.

This act increases the liability limit from the Department of Real Estate Recovery Account for applications for payment filed on or after January 1, 2009, to $50,000 for any one transaction and $250,000 for any one licensee. This act also deletes certain obsolete language from that provision.

B. SB 1448, Scott. Real estate brokers and salespersons: fines. Amends Section 10139 of the Business and Professions Code, relating to real estate.

This act increases the maximum fine for any person acting as a real estate broker or real estate salesperson without a license or who advertises using words indicating that he or she is a real estate broker without being so licensed from $10,000 to $20,000, and if the violation is committed by a corporation, the maximum fine is now $60,000, instead of $50,000. This act requires, if a Real Estate Fraud Prosecution Trust Fund exists in the county where the person or corporation is convicted, that any fine collected from the person or corporation in excess of the above-referenced maximum fines be deposited in that fund.

C. SB 1461, Negrete McLeod. Real estate licensees. Amends Section 10140.6 of the Business and Professions Code, relating to real estate.

Existing law, the Real Estate Law, governs the licensing and regulation of real estate licensees, as defined, as administered by the Real Estate Commissioner. Under those provisions, a real estate licensee is prohibited from publishing, circulating, distributing, or causing to be published, circulated, or distributed in any newspaper or periodical, or by mail, any matter pertaining to any activity for which a real estate license is required that does not contain a designation disclosing that the licensee is performing acts for which a real estate license is required.

This act requires a licensee, as of July 1, 2009, to disclose his or her license identification number on specified solicitation materials and on real property purchase agreements when acting as an agent in those transactions. This act defines solicitation materials as including business cards, stationery, advertising fliers, and other materials designed to solicit the creation of a professional relationship between the licensee and a consumer.

D. SB 1737, Machado. Real estate: brokers and salespersons. Amends Section 10176 of, and adds Sections 10087 and 10177.6 to, the Business and Professions Code, relating to real estate.

Existing law provides for the licensure and regulation of real estate brokers and real estate salespersons by the Real Estate Commissioner and provides that a willful violation of that law is a crime. Existing law authorizes the commissioner to direct a person to desist and refrain from activities that are in violation of that law, as specified, and also authorizes the commissioner to suspend or revoke the license of a real estate licensee who performs or has been guilty of specified acts.

This act authorizes the commissioner to suspend or bar a person from a position of employment, management, or control for 36 months if the commissioner finds that the suspension or bar is in the public interest and that the person has committed or caused a violation of the Real Estate Law or a rule or order of the commissioner, as specified. This act also authorizes the commissioner to impose that discipline if the person has been convicted of, or pleaded *nolo contendere* to, a crime or been held liable in a civil action by final judgment, or any administrative judgment by any public agency, if the crime or civil or administrative judgment involves an offense involving dishonesty, fraud, or deceit, or any other offense reasonably related to the

qualifications, functions, or duties of a person engaged in the real estate business.

This act also authorizes the commissioner to suspend or revoke the license of a real estate licensee who is guilty of generating an inaccurate opinion of the value of residential real property requested in connection with a debt forgiveness sale, in order to manipulate the lienholder to reject the proposed debt forgiveness sale or to acquire a financial or business advantage, as specified, or both.

Existing law requires listing and selling agents, as defined, to provide sellers and buyers in a residential real property transaction with a disclosure form, as prescribed, containing general information on real estate agency relationships. Existing law also requires the listing or selling agent to disclose to the buyer and seller whether he or she is acting as the buyer's agent exclusively, the seller's agent exclusively, or as a dual agent representing both the buyer and the seller.

This act requires a person or entity that arranges financing in connection with a sale, lease, or exchange of real property and acts as an agent with respect to that property to make a written disclosure of those roles within 24 hours, to all parties to the sale, lease, or exchange and any related loan transaction. By imposing additional requirements under the Real Estate Law, the willful violation of which would be a crime, this act imposes a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement. This act provides that no reimbursement is required by this act for a specified reason.

IV. COMMON INTEREST DEVELOPMENTS

A. AB 1892, Smyth. Common interest developments: solar energy. Amends Section 714 of the Civil Code, relating to common interest developments.

Existing law provides that any covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property that effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable, except as specified. This act extends the application of this provision regarding the unenforceability of prohibitions or restrictions relating to solar energy systems to also include unrecorded governing documents of a common interest development such as bylaws and operating rules. It does not, however, prevent the inclusion of reasonable restrictions on the use of solar energy systems in any of the subject documents.

B. AB 2180, Lieu. Solar energy. Amends Section 714 of the Civil Code, relating to solar energy.

Existing law provides that a covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property that effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable, except as specified. Existing law also provides that whenever approval is required for the installation or use of a solar energy system, the application for approval shall be processed and approved by the appropriate approving entity in the same manner as an application for approval of an architectural modification to the property, and shall not be willfully avoided or delayed. This act requires that an approval or denial of an application for the approval of the installation or use of a solar energy system be in writing and that an application shall be deemed approved unless it has been denied in writing within 60 days from the date of receipt of the application, unless the delay is the result of a reasonable request for additional information. These provisions would apply only to an approving entity that is a homeowners' association and is not a public entity. They are intended to establish a time limit for such approvals that facilitate the ability of homeowners to qualify for federal and state solar rebate and incentive programs. This act is a companion act to AB 1892.

C. AB 2846, Feuer. Common interest developments: assessments. Amends Section 1365.1 of, and adds Section 1367.6 to, the Civil Code, relating to common interest developments.

Existing law, the Davis-Stirling Common Interest Development Act, defines and regulates common interest developments and provides that a homeowners' association may levy assessments that are a debt of the owners of separate interests in a common interest development and a lien upon such owners' separate interests. Existing law requires a homeowner's association to distribute a written notice regarding assessments and foreclosure to each member of the association during the 60-day period immediately preceding the beginning of the association's fiscal year, and specifies various requirements for the association to offer the owner the opportunity to participate in specified dispute resolution or alternative dispute resolution procedures prior to initiating a foreclosure on an owner's separate interest, and provides that an owner may dispute an assessment debt by submitting a written request for dispute resolution to the homeowner's association, as specified.

This act provides that, if a dispute exists regarding any charge or sum levied by the homeowner's association, and the amount in dispute does not exceed the jurisdictional limits of the small claims court, the owner of the separate interest may, in addition to pursing dispute resolution, pay under protest the disputed amount and all other amounts levied, including certain fees, costs, and other specified amounts, and commence an action in small claims court. This act also makes related changes to the notice described above.

D. SB 1511, Ducheny. Common interest developments: mortgages: successors in interest. Amends Section 2924b of the Civil Code, relating to common interest developments.

Existing law requires a trustee or mortgagee to record a notice of default and to post and publish a notice of sale prior to selling real property at a foreclosure sale. Existing law allows any person desiring a copy of any notice of default and notice of sale to record a request for a copy of those notices, as specified, and requires a mortgagee or trustee to provide those notices to a person who has caused that request to be recorded. This act allows an association, with respect to separate interests governed by the association, to record a request, as specified, that a mortgagee,

trustee, or other person authorized to record a notice of default regarding any of those separate interests mail to the association a copy of any trustee's deed upon sale concerning a separate interest. This act also requires the mortgagee or trustee to mail that information to the association within 15 business days following the date the trustee's deed is recorded, but specifies that failure to mail the request pursuant to that provision will not affect the title to real property.

V. CONSTRUCTION

A. AB 642, Wolk. Public Contracts. Amends Section 20175.2 of, and repeals and adds Article 5.5 (commencing with Section 20193) of Chapter 1 of Part 3 of Division 2 of the Public Contract Code, relating to public contracts.

The purpose of this act is to establish a pilot program by which local entities can utilize more cost-effective options for the bidding and construction of buildings and certain waste treatment projects. Under existing law, with respect to the construction of buildings, all counties and a handful of select cities are authorized to enter into design-build contracts, i.e., contracts in which the entity procures design and construction services from a single company before all plans and specifications are fully developed. This act authorizes all cities to enter into design-build contracts for construction of buildings, or improvements directly related to construction of buildings, where such projects are in excess of $1,000,000. The authority under this act does not extend to infrastructure projects.

Similarly, under existing law, all counties and two special districts are authorized to enter into design-build contracts for the construction of certain waste treatment projects. This act authorizes all local entities to use design-build contracting for the construction of wastewater facilities, solid waste management facilities or water recycling facilities in excess of $2,500,000. This act limits each entity to 20 such projects.

This act prescribes bidding procedures, and contains reporting requirements to the Legislative Analyst's Office, which office in turn is tasked with reporting to the Legislature on the usefulness of design-build contracting.

B. AB 2335, Nakanishi. Building Permits. Repeals Sections 19830, 19831, and 19832 of, and repeals and adds Section 19825 of, the Health and Safety Code, relating to building permits.

Currently scattered in several, separate statutes are a number of provisions dealing with requirements (1) for issuance of a permit prior to construction, demolition, alteration, or repair of any structure; (2) that the owner of a structure complete various forms identifying property and contractors performing construction on the property, as well as the lending agency; (3) for declaring compliance with various laws, including Workers' Compensation laws; and (4) for the local government to provide notice to the owner of the legal implications of the contemplated construction. This act repeals those scattered sections and consolidates them in one provision combining, modifying and expanding existing forms, declarations and notice to property owners.

C. AB 3024, Duvall. Payment Bonds. Amends Section 7103 of the Public Contract Code, relating to payment bonds.

Existing law requires contractors on public works projects in excess of $5,000 to provide a payment bond of at least 100% of the total amount payable under the project. This act increases the threshold at which such bonds are required from $5,000 to $25,000.

D. SB 1258, Lowenthal. Building Standards. Adds Sections 17922.12 and 18941.7 to the Health and Safety Code, and amends Section 14877.1 of the Water Code, relating to building standards.

Under existing law, the Department of Housing and Community Development (HCD) makes proposals to the California Building Standards Commission for the adoption, amendment or repeal of building standards relating to dwellings, apartments, hotels, and motels. This act also tasks the HCD with studying and proposing ways to safely utilize certain kinds of untreated wastewater known as "graywater." This act defines "graywater" to include untreated wastewater not contaminated by any toilet discharge or infectious bodily wastes, as well as wastewater from bathtubs, showers, bathroom sinks, and washing machines, but excluding wastewater from kitchen sinks or dishwashers. Included among the areas to be studied by the HCD are environmental consequences of graywater use for irrigation, maintenance of statutory water quality standards, impacts on human health and circumstances under which in-home graywater treatment systems might be recommended. This act provides that once the Building Standards Commission approves the recommended standards for publication in the California Building Standards Code, the authority of the current body in charge of monitoring graywater systems, the Department of Water Resources, will be terminated. This act further authorizes local governments to adopt graywater standards that are stricter than those adopted by the HCD.

E. SB 1334, Calderon. Drinking Water. Amends Section 116875 of the Health and Safety Code, relating to drinking water.

Existing federal law prohibits the use of any pipes, plumbing fixtures, or solders in any public water system or facility that provides water for human consumption, unless such pipes, fixtures, or solders are "lead free," as that term is defined. Under existing state law, the definition of "lead free" will automatically become more stringent effective January 1, 2010, than is currently the case. This act makes the definition of "lead free" even stricter with respect to pipes, fixtures or solders intended to convey or dispense drinking water. This act further requires all plumbing products to be certified as compliant by an independent third-party entity accredited by the American National Standards Institute (ANSI).

F. SB 1432, Margett. Contractors. Amends Section 7071.5, 7071.10, and 7071.11 of the Business and Professions Code, and Section 116.220 of the Code of Civil Procedure, relating to contractors.

This act seeks to provide better protections for consumers who have been injured by the actions of a contractor. Under

existing law, a property owner bringing an action in small claims court against a guarantor of a contractor license bond is limited to $4,000, and any such action must be brought within two years after expiration of the license period during which this act occurred, or two years after the cancellation or revocation of the license by the bond, whichever occurs first. This act increases the small claims amount from $4,000 to $6,500 for actions against a guarantor who charges a fee for its guarantor services, and also increases the period during which an action can be filed.

Existing law also provides that a property owner who contracts for construction of a single-family dwelling not intended for sale, and who is damaged as a result of violation of the Contractors State License Law, can only state a claim on the contractor's bond if the property owner proves that the contractor's violation was willful and deliberate. No such requirement exists with respect to a claim brought by an injured property owner whose contract was for construction of improvements to an existing home. The legislation removes that distinction, so that a property owner who enters into a contract for construction of a single-family dwelling will no longer have to prove that an injury is the result of a willful and deliberate act.

G. SB 1473, Calderon. Building Standards. Adds Sections 18930.5, 18931.6, 18931.7, and 18938.3 to the Health and Safety Code, relating to building standards.

Under existing law, the Department of Housing and Community Development (HCD) makes proposals to the California Building Standards Commission for the adoption, amendment, or repeal of building standards relating to dwellings, apartments, hotels, and motels. In addition, the State Energy Resources Conservation and Development Commission prescribes building design and construction standards and energy conservation design standards in order to increase energy efficiency for new construction, and state agencies may propose building standards to the Building Standards Commission for review and adoption. Overlaid with the above are two executive orders that establish a State commitment to aggressive action to reduce electricity usage in state buildings, and reduce greenhouse gasses statewide.

This act attempts to clarify who has authority over certain areas, particularly involving green building standards. This act makes clear that the Building Standards Commission ultimately has authority to set green building standards with respect to buildings for which there is not already a state agency having particular authority or expertise. In addition, this act directs local agencies to collect a fee from anyone applying for a building permit, at the rate of $4 per $100,000. The local entity will retain 10% for administrative costs and code enforcement education, and the remainder of which is transmitted to the Building Standards Commission for carrying out statutory provisions related to building standards, including development and education regarding green building standards.

VI. LANDLORD/TENANT

A. AB 2025, Silva. Commercial real property: termination of tenancy: disposition of personal property.

Existing law provides for the disposition of personal property remaining on the premises at the termination of tenancy. Existing law provides that if the landlord reasonably believes that the total resale value of the personal property is less than $300, the landlord may retain the property for his or her own use or dispose of it in any manner.

This act provides for the disposition of personal property remaining on the premises of commercial real property, as defined (which definition specifically excludes residential property and self storage units), at the termination of a tenancy. This act also generally provides that, in the case of a tenancy of commercial real property, if the landlord reasonably believes that the total resale value of the personal property is the lesser of $750 or $1 per square foot of the premises occupied by the tenant, the landlord may retain the property for his or her own use or dispose of it in any manner, provided that landlord has delivered the requisite written notice to tenant in the form provided for in Section 1993.05 and provided tenant with a minimum of 15 days after said notice is personally delivered or, if mailed, not less than 18 days after notice is deposited in the mail, for tenant to claim its property.

B. AB 2052, Lieu. Residential tenancies: domestic violence. Adds Section 1946.7 to the Civil Code, and amends, repeals, and adds Section 1161 of the Code of Civil Procedure, relating to tenancies, and declares the urgency thereof, to take effect immediately.

This act authorizes a tenant to notify the landlord in writing that he or she or a household member, as defined, was a victim of an act of domestic violence, sexual assault, or stalking, as defined, and intends to terminate the tenancy. This act requires the tenant to attach a copy of a temporary restraining order or emergency protective order, or a copy of a specified written report by a peace officer, to the notice. This act authorizes the tenant to quit the premises and the tenant would be discharged from payment of rent for any period following 30 days from the date of the notice, or as specified. This act provides that the notice to terminate the tenancy shall be given within 60 days of the date the order was issued or the report was made, or as specified. This act provides that other tenants and members of the effected person's family are not released from their obligations under the rental agreement.

Existing law establishes the criteria for determining when a tenant is guilty of unlawful detainer of a premises, and includes committing nuisance in this regard. Existing law, until January 1, 2010, in specified courts, deems certain conduct involving illegal sales of controlled substances and unlawful use of illegal weapons as committing a nuisance on the premises. This act provides, only until January 1, 2012, for the purposes of the law of unlawful detainer, that if a person commits specified acts of domestic violence, sexual assault, or stalking against another tenant or subtenant on the premises, there is a rebuttable presumption that that person has committed a nuisance on the premises; provided, however this shall not apply if the victim or a member of the victim's household, other than the perpetrator, has not vacated the premises. This act declares that it is to take effect immediately as an urgency statute.

VII. LAND USE

A. AB 242, Blakeslee. Land use: annexation: housing. Amends Section 65584.07 of the Government Code, relating to land use.

The Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 authorizes local governments to annex portions of territory to other local governments, as specified. The existing Planning and Zoning Law requires local governments to adopt comprehensive general plans that address a number of elements, including the housing element. The HCD is required to assist local governments in the allocation of the regional housing needs. Existing law also authorizes a city or county to transfer a percentage of its share of the regional housing needs to another city or county, as specified.

Existing law requires each city, county, and city and county to revise its housing element on specified dates, in accordance with a specified schedule, and not less often than once every fifth year after that revision.

Existing law requires, during the period between adoption of a final regional housing needs allocation until the due date of the housing element update, that the council of governments or the department, whichever assigned the county's share, reduce the share of regional housing needs of a county if certain conditions are met. If an annexation of unincorporated land to a city occurs after the council of governments, or the department for areas with no council of governments, has made its final allocation under these provisions, the city and county are authorized to reach a mutually-acceptable agreement on a revised determination of regional housing needs, to reallocate a portion of the affected county's share of regional housing needs to the annexing city, and report the revision to the council of governments and the department, or to the department for areas with no council of governments.

This act revises provisions governing the process for making the transfer of the county's regional housing needs allocation to the city.

B. AB 1263, Caballero. Local agency formation commissions: statement. Amends Sections 56375, 56375.4, and 56383 of the Government Code, relating to local government.

This act clarifies the process by which Local Agency Formation Commissions (LAFCOs) may impose fees or service charges to recover their costs, and allows LAFCOs and cities to use the existing expedited annexation procedures on county islands created after January 1, 2000, if they were created as a result of boundary adjustments between two counties.

C. AB 1358, Leno. Planning: circulation element: transportation. Amends Sections 65040.2 and 65302 of the Government Code, relating to planning.

Existing law requires each county and city to adopt a comprehensive, long-term general plan for the physical development of the county or city with specified elements, including a circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, any military airports and ports, and other local public utilities and facilities, all correlated with the land use element of the plan. Commencing January 1, 2011, this act requires that the legislative body of a city or county, upon any substantive revision of the circulation element of the general plan, also modify the circulation element to plan for a balanced, multimodal transportation network that meets the needs of all users of streets, roads, and highways, defined to include motorists, pedestrians, bicyclists, children, persons with disabilities, seniors, movers of commercial goods, and users of public transportation, in a manner that is suitable to the rural, suburban, or urban context of the general plan.

Existing law establishes in the Office of the Governor the Office of Planning and Research (OPR) with duties that include developing and adopting guidelines for the preparation of, and content of mandatory elements required in, city and county general plans. This act requires the OPR, commencing January 1, 2009, and no later than January 1, 2014, upon the next revision of these guidelines, to prepare or amend (in consultation with authorized experts) guidelines for a legislative body to accommodate the safe and convenient travel of users of streets, roads, and highways in a manner that is suitable to the rural, suburban or urban context of the general plan, and in doing so to consider how appropriate accommodation varies depending on its transportation and land use context.

D. AB 1764, Blakeslee. Land use: agricultural use. Amends Section 51201 of the Government Code, relating to land use.

Existing law, for purposes of the Williamson Act, defines agricultural commodity to mean any and all plant and animal products produced in this state for commercial purposes. This act includes in the definition of agricultural commodity plant products used for producing biofuels. Existing law, for purposes of the Williamson Act, also defines open-space use to mean the use of land in a manner that preserves its natural characteristics, beauty, or openness for the benefit and enjoyment of the public, to provide essential habitat for wildlife, or for the solar evaporation of seawater within the course of salt production for commercial purposes, if the land is within, among other things, a wildlife habitat area or a managed wetland area, as defined. This act includes land that is within an area enrolled in the United States Department of Agriculture's Conservation Reserve Program or Conservation Reserve Enhancement Program.

E. AB 2069, Jones. Local planning: residential development. Amends Section 65863 of the Government Code, relating to local planning.

Existing law governing local planning and zoning prohibits a city, county, or city and county from reducing, or requiring or permitting the reduction of, the residential density for any parcel to, or allow development of any parcel at, a lower residential density, as defined, unless the city, county, or city and county makes certain written findings regarding the consistency of the reduction with the applicable adopted general plan and the adequacy of the remaining housing sites to accommodate the jurisdiction's share of regional housing needs. This act redefines lower residential density, as specified, for purposes of the above prohibition to address properties on which both residential and non-residential are permitted.

F. AB 2280, Saldana. Density bonus. Amends Section 65915 of the Government Code, relating to housing.

The existing density bonus law requires a city or county grant to a developer of housing a density bonus and other

incentives or concessions for the production of lower income housing units or the donation of land within the development if the developer, among other things, agrees to construct a specified percentage of units for low, very low, or moderate income households or qualifying residents.

This act implements a number of revisions intended to resolve conflicts and clarify requirements under the existing density bonus law that, among other things:

(1) impose certain specified procedures on the application for a density bonus and other incentives or concessions;

(2) require a city, county, or city and county to grant a concession or incentive requested by the applicant under existing law unless the city, county, or city and county makes a written finding, based upon substantial evidence, that, among other things, the concession or incentive would be contrary to state or federal law;

(3) delete a requirement that an applicant for a waiver or reduction of development standards show that the waiver or modification is necessary to make proposed housing units economically feasible; and

(4) require, as a condition for the granting of a density bonus to a developer in exchange for donating land to a city, county, or city and county for very low income housing, that the local agency identify a source of funding for the very low income units.

G. AB 2484, Caballero. Local government: special districts. Amends Sections 56021, 56654, 56824.10, 56824.12, 56824.14, 57075, and 57076 of the Government Code, relating to local government.

Existing law, the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 contains provisions for the exercise of new or different services by special districts. This act provides specific procedures for the modification of a special district's authority to increase, decrease or eliminate the provision of services or service functions of special districts. In particular, this act expands the definition of "change of organization" to include a proposal for the exercise of new or different functions or classes of services, or the divestiture of the power to provide particular functions or classes of services, within all or part of the jurisdictional boundaries of a special district.

In addition, this act among other things:

(1) requires a change of organization proposal be initiated only by the legislative body of the affected special district if the proposal involves the exercise of new or different functions or classes of services, or the divestiture of the power to provide particular functions or classes of services, within all or part of the jurisdictional boundaries of that particular special district.

(2) requires the legislative body of a special district include in the plan for services required in connection with a proposal for a change of organization or reorganization, a written summary of whether the new or different function or class of services, or divestiture of the power to provide particular functions or classes of services within all or part of the jurisdictional boundaries of a special district, will involve the activation or divestiture of the power to provide a particular service or services, service function or functions, or class of service or services.

(3) requires the applicable local agency formation commission review and approve or disapprove proposals for the divestiture of the power to provide particular functions or class of services, within all or part of the jurisdictional boundaries of a special district, and prohibits the approval of proposals where the commission has determined that the special district will not have sufficient revenues to carry out the proposed new or different functions or class of services, except as specified.

(4) requires the applicable local agency formation commission to take specified actions with regard to written protests against a proposal for the exercise of new or different functions or class of services, or the divestiture of the power to provide particular functions or class of services, within all or part of the jurisdictional boundaries of a special district, in both a registered voter district or city, or a landowner-voter district.

This act is a companion bill to AB 3047 and SB 1458.

H. AB 2604, Torrico. Developer fees. Amends Section 66007 of the Government Code, relating to land use.

Existing law prohibits a local agency that imposes any fees or charges on a residential development for the construction of public improvements or facilities from requiring the payment of those fees or charges until the date of the final inspection or the date the certificate of occupancy is issued, whichever occurs first, with specified exceptions. If the fee or charge is not fully paid prior to issuance of a building permit, existing law authorizes the local agency issuing the building permit to require the property owner, as a condition of issuance of the building permit, to execute a contract to pay the fee or charge within the specified time. This act authorizes a local agency to defer the collection of one or more fees up to the close of escrow, with exception of school impact fees.

I. AB 2921, Laird. Local government: agricultural land. Amends Sections 51201, 51250, 51256, 51257, 51282, 51283, and 51297 of, and adds Section 51223 to, the Government Code, relating to local government.

Under the existing Williamson Act, which authorizes a city or county to contract with a landowner to limit the use of agricultural land located in an agricultural preserve designated by the city or county, the Department of Conservation (DOC) is required to notify the city or county if it discovers a possible material breach, as defined, of the contract, and the city or county is required to take certain actions to resolve the breach within designated timeframes. This act provides for reimbursement, as specified, for the costs incurred by the city or county in taking those actions and authorizes the department to discharge the responsibilities of a city or county that fails to take specified

actions to resolve the breach. This act exempts, subject to certain exceptions, a contract that has been terminated or canceled from a material breach proceeding under these provisions. This act authorizes the DOC to discharge certain actions if the finding of no material breach by a city or county was not supported by the evidence, as specified, or was not made on the record at a public hearing. This act further authorizes the DOC and the city or county to agree to extend any deadline within these provisions, and would provide a process by which a landowner may request a meeting between the landowner, the department, and the city or county. This act also deletes the exemption provided for a canceled contract and defines and revises the definition of "agricultural use," "development," and "open-space use" for purposes of the act.

This act also makes adjustments to provisions of the Williamson Act applicable to contract rescissions and open space and agricultural easements. Under the existing Williamson Act a landowner is allowed to rescind a contract made under its provisions and to simultaneously place other land under an agricultural conservation easement, subject to specified conditions. This act revises the conditions under which a landowner may cancel a Williamson Act contract to place other land under an agricultural conservation preserve and authorizes the rescission of a contract for the purpose of restricting the same land by an open-space contract or an open-space easement agreement under specified circumstances.

The existing Williams Act law authorizes the board or council to grant tentative approval for a cancellation by petition of a landowner as to all or any part of land subject to a contract, if the board or council makes specified findings. This act prohibits a board or council from accepting or approving a petition for cancellation if the board or council discovers, or is notified of, a likely material breach on the land, except as specified.

The existing Williamson Act authorizes a landowner to enter into a farmland security zone contract and also to petition the city or county where the land subject to the contract is located for cancellation of the contract. Under this act, the city or county is required to take certain actions in determining whether to approve the petition. This act additionally requires the city or county to determine the amount of the cancellation fee required of the landowner and to report that amount to the county auditor before tentatively approving the cancellation petition.

The Williamson Act, until January 1, 2009, authorized parties to a contract subject to the act's provisions to rescind the contract and simultaneously enter into a new contract in order to facilitate a lot line adjustment, if certain findings were made by the governing body of the city or county where the land is located. This act extends the above authorization until January 1, 2010.

Existing law establishes the Soil Conservation Fund to support, among other things, the cost of the farmlands mapping and monitoring program of the DOC, and program support costs incurred by the DOC in administering the open-space subvention program. This act authorizes the use of funds in the Soil Conservation Fund to cover the costs to the department in administering the provisions of the Williamson Act regarding discovering material breaches of a Williamson Act contract.

J. AB 3047, Committee on Local Government. Local agency formation commissions: notice requirements. Amends Sections 56106, 56157, 56332, 56375.3, 56425.5, 56654, 56706, and 57080 of, to amend the heading of Chapter 7 (commencing with Section 57176) of Part 4 of Division 3 of Title 5 of, and repeals Sections 56650.5 and 56758 of, the Government Code, relating to local agencies.

This act addresses a specified number of minor, non-controversial but necessary changes to the existing Cortese-Knox-Hertzberg Act of 2000 that requires the local agency formation commission in each county to review and approve or disapprove proposals for changes of organization or reorganization of cities and districts within the county. Among other things, this act makes corrective or clarifying changes regarding required notices and annexation procedures.

K. SB 375, Steinberg. Transportation planning: travel demand models: sustainable communities strategy: environmental review. Amends Sections 65080, 65400, 65583, 65584.01, 65584.02, 65584.04, 65587, and 65588 of, and adds Sections 14522.1, 14522.2, and 65080.01 to, the Government Code, and amends Section 21061.3 of, adds Section 21159.28 to, and adds Chapter 4.2 (commencing with Section 21155) to Division 13 of, the Public Resources Code, relating to environmental quality.

Existing law requires various transportation planning activities by the Department of Transportation and by designated regional transportation planning agencies, including development of a regional transportation plan. Existing law authorizes the California Transportation Commission (CTC), in cooperation with the regional agencies, to prescribe study areas for analysis and evaluation.

This act requires the CTC to maintain guidelines, as specified, similar to the "travel demand models" used in the development of regional transportation plans by those certain regional agencies designated under federal law as "metropolitan planning organizations" and to consult with various agencies in this regard, and to form an advisory committee and to hold workshops before amending the guidelines.

This act also requires the regional transportation plan for regions of the state with a metropolitan planning organization to adopt a "sustainable communities strategy," as defined, as part of its regional transportation plan, designed to achieve certain goals for the reduction of greenhouse gas emissions from automobiles and light trucks in a region. This act requires the California Air Resources Board (CARB), working in consultation with the metropolitan planning organizations, to provide each affected region with greenhouse gas emission reduction targets for the automobile and light truck sector for 2020 and 2035 by September 30, 2010, to appoint a Regional Targets Advisory Committee to recommend factors and methodologies for setting those targets, and to update those targets every 8 years. This act requires certain transportation planning and programming activities by the metropolitan planning organizations to be consistent with the sustainable communities strategy contained in the regional transportation plan. In the

event the sustainable communities strategy is unable to achieve the greenhouse gas emission reduction targets, the affected metropolitan planning organizations are required under this act to prepare an alternative planning strategy showing how the targets would be achieved through alternative development patterns, infrastructure, or additional transportation measures or policies. The CARB is required under this act to review each metropolitan planning organization's sustainable communities strategy and alternative planning strategy to determine whether the strategy, if implemented, would achieve the greenhouse gas emission reduction targets. In the event the CARB finds a strategy to be insufficient, this act requires the strategy to be revised by the metropolitan planning organization, with a minimum requirement that the metropolitan planning organization must obtain CARB acceptance that an alternative planning strategy, if implemented, would achieve the targets. This act states that the adopted strategies do not regulate the use of land and are not subject to state approval, and that city or county land use policies, including the general plan, are not required to be consistent with the regional transportation plan. This act also requires the metropolitan planning organization to hold specified informational meetings in this regard with local elected officials and requires a public participation program with workshops and public hearings for the public, among other things.

Existing law requires each city, county, or city and county to prepare and adopt a general plan for its jurisdiction that contains certain mandatory elements, including a housing element. Existing law requires the housing element to identify the existing and projected housing needs of all economic segments of the community and, among other things, to contain a program that sets forth a five-year schedule of actions of the local government to implement the goals and objectives of the housing element.

This act instead requires the program to set forth a schedule of actions during the planning period, as defined, and requires each action to have a timetable for implementation. This act requires rezoning of certain sites to accommodate certain housing needs within specified times, with an opportunity for an extension of time in certain cases, and requires the local government to hold a noticed public hearing within 30 days after the deadline for compliance expires. This act prohibits, under certain conditions, a local government that fails to complete a required rezoning within the timeframe required from disapproving a housing development project, as defined, or from taking various other actions that would render the project infeasible, and allows the project applicant or any interested person to bring an action to enforce these provisions. This act also allows a court to compel a local government to complete the rezoning within specified times and to impose sanctions on the local government if the court order or judgment is not carried out, and provides that in certain cases the local government shall bear the burden of proof relative to actions brought to compel compliance with specified deadlines and requirements.

Existing law requires each local government to review and revise its housing element as frequently as appropriate, but not less than every five years. This act extends the review period to eight years for those local governments that are located within a region covered by a metropolitan planning organization in a nonattainment region or by a metropolitan planning organization or regional transportation planning agency that meets certain requirements. This act also provides that, in certain cases, the time period would be reduced to four years or other periods, as specified.

This act exempts a transit priority project, as defined, that meets certain requirements and that is declared by the legislative body of a local jurisdiction to be a "sustainable communities project" from review under the California Environmental Quality Act (CEQA). The transit priority project needs to be consistent with a metropolitan planning organization's sustainable communities strategy or an alternative planning strategy that has been determined by the CARB to achieve the greenhouse gas emission reductions targets. This act provides for limited CEQA review of various other transit priority projects and exempts the environmental documents for those residential or mixed-use residential projects meeting certain requirements from being required to include certain information regarding growth-inducing impacts or impacts from certain vehicle trips.

This act also authorizes the legislative body of a local jurisdiction to adopt traffic mitigation measures for transit priority projects and exempts a transit priority project seeking a land use approval from compliance with additional measures for traffic impacts, if the local jurisdiction has adopted those traffic mitigation measures.

L. SB 732, Steinberg. Environment. Amends Sections 75076 and 75077 of, and adds Chapter 12 (commencing with Section 75100) and Chapter 13 (commencing with Section 75120) to Division 43 of, the Public Resources Code, relating to the environment, and makes an appropriation therefor.

Existing law, the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006, an initiative statute approved by the voters at the November 7, 2006 statewide general election, makes about $5.4 billion in bond funds available for safe drinking water, water quality and supply, flood control, natural resource protection, and park improvements.

This act provides guidelines and details for the implementation of the initiative which, among other things:

(1) requires the State Department of Public Health, the Department of Fish and Game, and the San Francisco Bay Area Conservancy, when implementing the provisions of the initiative to develop and adopt guidelines and regulations, consult with other entities, conduct studies, and follow certain procedures for establishing a project, grant, loan, or other financial assistance program implementing the initiative;

(2) establishes the Strategic Growth Council and appropriates $500,000 from the funding provided by the initiative to the Resources Agency to support the council and its activities; and

(3) requires the council to take certain actions with regard to coordinating programs of member state agencies to improve air and water quality, improve natural resource protection, increase the availability of affordable housing, improve transportation, meet the goals of the California Global Warming Solutions Act of 2006, encourage sustainable land use planning, and revitalize urban and community centers in a sustainable manner. The council is required to manage and award grants and loans to support the planning and development of sustain-

able communities, for preparing, adopting, and implementing general plans, general plan elements, regional plans, or other planning instruments, and for preparing, planning, and implementing urban greening plans. The council is also required to, not later than July 1, 2010, and every year thereafter, provide a report to the Legislature with specified information regarding the management of the grants and loans.

M. SB 1124, Committee on Local Government. Local Government Omnibus Act of 2008. Repeals Article 8 (commencing with Section 17375) of Chapter 3 of Part 10.5 of the Education Code, and amends Sections 6509.7, 8855, 15975, 25558, 25904, 26020, 26100, 26101, 26802.5, 37617, 50022.6, 53601, 53635, 53635.8, 53646, 53839, 56425.5, 65863 and 66412 of the Government Code, amends Sections 4730.11, 5474, 33492.42, and 116183 of the Health and Safety Code, and amends Section 36623 of the Streets and Highways Code, relating to local government.

This act enacts the Local Government Omnibus Act of 2009 that proposes 15 relatively minor, noncontroversial changes to the law affecting local agencies' powers and duties. Among other things, this act:

(1) designates an entity formed by the regional transportation planning authority as a nonprofit public benefit corporation, designated as a consolidated transportation services agency, under the Social Service Transportation Improvement Act, as a public agency, within the meaning of "public entity," for the purposes of liability for certain actions, as specified;

(2) exempts from the requirements of the Subdivision Map Act, the leasing of, or the granting of an easement to, a parcel of land, or any portion thereof, in conjunction with the financing, erection, and sale or lease of a solar electrical generation device on the land, if the project is subject to review under other local agency ordinances regulating design and improvement or if the project is subject to discretionary action by the advisory agency or legislative body; and

(3) incorporates additional changes to Section 65863 of the Government Code that confirm the changes proposed by AB 2069.

N. SB 1185, Lowenthal. Land use: subdivision maps. Amends Sections 66452.6 and 66463.5 of, to add Section 66452.21 to, and amends and renumbers Sections 66452.11 and 66452.12 of, the Government Code, relating to land use, and declaring the urgency thereof, to take effect immediately.

Under the existing Subdivision Map Act, which establishes a statewide regulatory framework for controlling the subdividing of land, a subdivider is generally required to submit, and have approved by, the city, county, or city and county in which the land is situated a tentative or vesting tentative map, which confers a vested right to proceed with development in substantial compliance with specified ordinances, policies, and standards. The existing law provides for the expiration of tentative or vesting tentative maps, after specified periods of time, and specifically contains an outdated provision that extends by 12 months the expiration date of any tentative or vesting tentative map or parcel map for which a tentative or vesting tentative map has been approved that had not expired on May 15, 1996. This act extends the applicable expiration date to 12 months, as specified, for any vesting tentative map, in addition to a tentative map, generally, that has not expired as of the effective date of the newly enacted provisions and that will expire, as specified, before January 1, 2011. This extension is in addition to any other extension of the expiration date provided for in specified provisions of the act. Any legislative, administrative, or other approval by any local agency, state agency, or other political subdivision of the state that pertains to a development project included in a map that is extended is also extended by 12 months under specified conditions.

Under the existing Subdivision Map Act when a tentative map is required, an approved or conditionally approved tentative map must expire 24 months after its approval or conditional approval, or after any additional time period as prescribed by local ordinance, not to exceed an additional 12 months. A subdivider under existing law may file with the appropriate legislative body, prior to the expiration of the approved or conditionally approved tentative map, an application to extend the time at which the map will expire for a period or periods not to exceed a total of five years. This act allows the subdivider to file an application to extend the time at which the map will expire for a period or periods not to exceed a total of six years.

This act took effect immediately as an urgency statute.

O. SB 1399, Simitian. Public resources: solar shading. Amends Sections 25981, 25982, 25984, and 25985 of, adds Section 25982.1 to, and repeals and adds Section 25983 of, the Public Resources Code, relating to public resources.

Existing law, known as the Solar Shade Control Act, prohibits the placement or growth of a tree or shrub on property adjacent to the installation of a solar collector on the property of another, if the tree or shrub casts a shadow of a specified size on the collector absorption area during specified times. A person who violates this prohibition and who fails to remove or alter the tree or shrub after receiving reasonable notice is guilty of an infraction for maintaining a public nuisance and subject to a criminal fine not to exceed $1,000 for each violation. Existing law exempts trees and shrubs under specified conditions. Existing law allows for a city, county, or city and county to adopt an ordinance exempting its jurisdiction from the above prohibition.

This act authorizes the owner of property where the solar collector is to be installed to provide, prior to its installation, a written notice by certified mail containing specified information to owners of affected property.

This act exempts from prohibition trees and shrubs planted prior to the time of the installation of a solar collector, trees and shrubs that are subject to a local ordinance, or the replacement of trees or shrubs that have been growing before the installation of a solar collector and that are subsequently removed for the protection of public health, safety or the environment. This act also provides for specified pre-installation written notices and limits the applicable "solar collector" to be a device or structure on the roof of a building, except for devices or structures installed on the ground if they cannot be installed on the roof

of the building due to specified conditions. This act further excludes a device or structure that is designed and intended to offset more than the building's electricity demand. This act repeals the public nuisance violation of the above requirement prohibition and provides that a tree or shrub maintained in violation of the above requirement is instead a private nuisance if the person who maintains or permits the maintenance of the tree or shrub receives a written notice from the owner of the affected solar collector requesting compliance. This act provides that a local ordinance specifying the requirements for tree preservation or solar shade control governs within the jurisdiction that adopted the ordinance. This act also makes certain technical nonsubstantive changes.

P. SB 1431, Wiggins: Parks and recreation; easements. Adds Section 5011.7 to the Public Resources Code, relating to parks and recreation.

Existing law authorizes the Department of Parks and Recreation (DPR) to acquire fee title or any interest in real property, including conservation easements for the extension, improvement or development of the state park system. This act clarifies the authority of the DPR to acquire conservation easements, as the act defines that term, on real property if the DPR determines that the conservation easement is necessary to protect a unit of the state park system from an incompatible use or to preserve and enhance the natural resource, cultural, or historic value of the unit of the state park system. This act also authorizes the DPR to make grants to state or local government agencies or nonprofit land trust organizations to purchase and hold such conservation easements, if specified requirements are met. This act requires the DPR to adopt, on or before July 1, 2009, written policies regarding conservation easement purchases and make those policies available on the DPR's Internet website.

Q. SB 1458, Committee on Local Government. Local government: the County Service Area Law. Amends Sections 25643, 50078.1, 54251, 56036, 56375, and 57075 of, amends and renumbers Section 25210 of, adds Chapter 2.5 (commencing with Section 25210) to, and repeals Chapter 2.2 (commencing with Section 25210.1) of, Part 2 of Division 2 of Title 3 of, the Government Code, amends Section 5470 of the Health and Safety Code, to repeal Section 20394.3 of the Public Contract Code, amends Sections 5621, 13031, and 13215 of, and repeals Section 13030 of, the Public Resources Code, amends Section 97.41 of the Revenue and Taxation Code, amends Section 1179.5 of the Streets and Highways Code, and amends Sections 22976, 22981, and 22982 of the Water Code, relating to local government.

The existing County Service Area Law authorizes the formation of county service areas to provide authorized services, as specified. This act repeals the existing County Services Area Law and enacts a New County Service Area Law that fundamentally revises and recasts its provisions and makes conforming changes that modernizes, streamlines and updates the prior act. This act is coordinated with AB 1263 and AB 2848.

R. SB 1473, Calderon. Building standards. ***[See Section V.G.]***

VIII. MOBILE HOMES

A. AB 2016, Committee on Housing and Community Development. Housing omnibus act. Amends Sections 65400, 65583, 65583.2, 65584.04, 65584.05, 65588, 66427.1, and 66452.21 of, amends and renumbers Sections 66452.8 and 66452.9 of, adds Sections 66452.19 and 66452.20 to, and repeals Sections 66452.14 and 66452.15 of, the Government Code, and amends Sections 18029, 18031.7, 18897, 18897.2, 18897.4, 18897.6, 18897.7, 50675.14, and 50802 of, and amends and renumbers the heading of Part 2.3 (commencing with Section 18897) of Division 13 of, the Health and Safety Code, relating to housing.

The Planning and Zoning Law requires each city, county, or city and county to prepare and adopt a general plan for its jurisdiction that contains certain mandatory elements, including a housing element. Existing law requires that the housing element identify the existing and projected housing needs of all economic segments of the community. In the proposed final allocation plan of regional housing needs, the council of governments or delegate subregion, as applicable, is required to adjust allocations to local governments based upon the results of a specified appeals process. This act additionally requires the council of governments or delegate subregion, as applicable, to adjust allocations of regional housing needs in the proposed final allocation plan based upon the results of a specified revision request process.

Existing law, the Budget Act of 2007, provides for the appropriation of moneys, as specified, from the Emergency Housing and Assistance Fund to the HCD for, among other things, operating facilities and capital development programs. This act includes those provisions in the Emergency Housing and Assistance Program, as specified.

The Mobilehomes-Manufactured Housing Act of 1980 requires the HCD to enforce various laws pertaining to the structural, fire safety, plumbing, heat-producing, or electrical systems and installations or equipment of a manufactured home, mobilehome, special purpose commercial coach, or commercial coach. Any person who knowingly violates any provision of this act is guilty of a misdemeanor.

This act includes multifamily manufactured homes within these provisions. This act also provides that any person who is required to file an application for an alteration or conversion of the structural, fire safety, plumbing, heat-producing or electrical systems, and installations or equipment of a manufactured home, mobilehome, multifamily manufactured home, special purpose commercial modular, or commercial modular, and who fails to do so, is required to pay double the application fees, as specified, or, for subsequent failures to file within a five-year period, pay 10 times the application fee, as specified. By creating a new crime or expanding an existing crime, this act imposes a state-mandated local program.

This act allows the replacement of appliances for comfort heating in manufactured homes, mobilehomes or multifamily manu-

factured homes with fuel-gas appliances for comfort heating not specifically listed for use in a manufactured home or mobilehome.

This act deletes obsolete provisions, corrects erroneous cross-references, and makes various other technical changes in existing law relating to housing and local land use planning.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement. This act provides that no reimbursement is required by this act for a specified reason.

B. AB 2050, Garcia. Mobilehomes and manufactured homes. Amends Section 18031.7 of, and repeals and adds Section 18029.6 of, the Health and Safety Code, relating to manufactured housing.

This act requires all fuel-gas-burning water heater appliances installed in new manufactured homes, mobilehomes or new multifamily manufactured homes, or installed as replacement fuel-gas-burning water heater appliances in existing mobilehomes, existing manufactured homes or existing multifamily manufactured homes that are offered for sale, rent or lease, to be seismically braced, anchored or strapped. The above-referenced requirement shall be satisfied if the transferor, within 45 days prior to the date of transfer of title, signs a declaration stating that each water heater appliance in the used manufactured home, used mobilehome or used multifamily manufactured home is secured on the date the declaration is signed.

Under the existing act, all used mobilehomes and manufactured homes sold in this state on and after January 1, 1986, are required to be equipped with an operable smoke detector. This act instead requires, commencing on or after January 1, 2009, all used manufactured homes, used mobilehomes, and used multifamily manufactured homes that are sold to have a smoke alarm installed in each room designed for sleeping that is operable on the date of transfer of title. The above-referenced requirement shall be satisfied if the transferor, within 45 days prior to the date of transfer of title, signs a declaration stating that each smoke alarm in the manufactured home, mobilehome or multifamily manufactured home is installed pursuant to Section 18029.6 and is operable on the date the declaration is signed.

By creating a new crime or expanding an existing crime, this act imposes a state-mandated local program. The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement. This act provides that the Legislature finds there is no mandate contained in this act that will result in costs incurred by a local agency or school district for a new program or higher level of service that require reimbursement pursuant to these constitutional and statutory provisions.

This act applies the real estate licensee duty provisions of Section 8897.5 of the Government Code to Sections 18029.6 and 18031.7 of the Health and Safety Code.

C. AB 2554, Mullin. Housing: local enforcement: relinquishment. Amends Sections 17050, 18300, 18400.1, and 18865 of the Health and Safety Code, relating to housing.

The Employee Housing Act, the Mobilehome Parks Act and the Special Occupancy Parks Act authorize enforcement by a city, county, or city and county upon compliance with certain procedural requirements, and authorize relinquishment of local enforcement authority upon provision of written notice to the HCD. Existing law provides that the HCD is required to assume responsibility for local enforcement within 30 days after receipt of the written notice relinquishing the local enforcement authority. This act requires the HCD to assume responsibility for local enforcement within 90 days after receipt of the written notice (instead of 30 days), and provides for the relinquishment of fees collected by the local authorities under the relinquished authority to the HCD.

D. SB 1107, Correa. Mobilehome parks: disabled accommodations and caregivers. Amends Sections 798.34 and 799.9 of, and adds Sections 798.29.6 and 799.11 to, the Civil Code, relating to mobilehome parks.

This act requires the management of a mobilehome park to permit a homeowner or resident to install accommodations for the disabled on the home or the site, lot, or space on which the mobilehome is located, under specified conditions. This act authorizes the management to require that the accommodations installed be removed by the current homeowner at the time the home is removed from the park or pursuant to a written agreement prior to the completion of the resale of the home, as specified. This act specifies that these provisions are not exclusive.

Existing law authorizes a homeowner who is 55 years of age or older and has a tenancy in a mobilehome park under a rental agreement to share his or her mobilehome with any person over 18 years of age if that person is providing live-in health care or live-in supportive care to the homeowner, pursuant to a written treatment plan prepared by the homeowner's physician, and prohibits the management of the mobilehome park from charging a fee for that person. A similar provision applies if the homeowner has an ownership interest in a subdivision, cooperative or condominium for mobilehomes, or a resident-owned mobilehome park in which the homeowner's mobilehome is located and a person provides live-in health care, live-in supportive care or supervision to the homeowner. The person providing care or supervision does not have rights of tenancy in the mobile home park.

This act expands those provisions to apply to any homeowner without regard to age.

E. SB 1234, Correa. Mobilehomes: privacy. Amends Section 798.26 of the Civil Code, relating to mobilehomes.

Existing law provides that the ownership or management of a mobilehome park shall have no right of entry to a mobilehome, except in an emergency or when the resident has abandoned the mobilehome, without the prior written consent of the resident. This act expands that prohibition to include an enclosed accessory structure.

IX. MORTGAGE LOAN SERVICES

A. AB 69, Lieu. Mortgage lending: reporting. Adds Sections 22159.5 and 50307.1 to the Financial Code, relating to mortgage lending.

Existing law provides for the licensure and regulation of finance lenders and brokers and residential mortgage lenders

and loan servicers by the Commissioner of Corporations. This act authorizes the Commissioner to require such licensees to provide reports concerning residential mortgage loan servicing activities. This act also authorizes the Commissioner to seek and receive information from residential mortgage loan servicers not subject to the Commissioner's jurisdiction.

B. SB 1065, Correa. Home financing programs. Amends, repeals, and adds Sections 52013 and 52020 of the Health and Safety Code, relating to housing.

Existing law, for purposes of a home financing program, provides that a city or county has specified powers and duties and may administer a home financing program to acquire, contract, and enter into advance commitments to acquire home mortgages, as defined, made, or owned by lending institutions at the purchase prices and upon other terms and conditions as determined by the city or county. However, under existing law cities and counties are prohibited from acquiring loans for the purpose of refinancing except when the loan is for the substantial rehabilitation of a home. This act, among other things, allows cities and counties to purchase loans for the purpose of refinancing if the home is owner-occupied, regardless of whether the loan is for the substantial rehabilitation of a home. The provisions of this act will be repealed January 1, 2012.

X. MORTGAGES

A. AB 180, Bass. Mortgages: foreclosure consultants. Amends Sections 1632, 2945.2, 2945.3, and 2945.4 of, and adds Section 2945.45 to, the Civil Code, relating to mortgages.

Existing law defines a foreclosure consultant as a person who offers, for compensation, to perform specified services for a homeowner relating to a foreclosure sale. Existing law prohibits a foreclosure consultant from entering into an agreement to assist the owner in arranging, or arrange for the owner, the release of surplus funds prior to 65 days after the trustee's sale is conducted. This act prohibits a foreclosure consultant from entering into such agreement at any time.

Existing law allows a homeowner to cancel a contract with a foreclosure consultant within three days after signing the contract by providing written notice of the cancellation at the address provided by the foreclosure consultant. Existing law requires that the contract be written in the same language as principally used by the foreclosure consultant to describe his or her services or to negotiate the contract. Existing law further prohibits a foreclosure consultant from taking any power of attorney from an owner, except to inspect documents as provided by law.

This act allows a homeowner to cancel a contract with a foreclosure consultant within five days after signing the contract, and to do so by mail, e-mail, or facsimile. It also requires that the foreclosure consultant, in specified circumstances, to provide the owner before the owner signs the contract with one or more copies of a completed contract written in the language specified by the homeowner. This act further prohibits a foreclosure consultant from taking any power of attorney from an owner for any purpose.

This act also requires a foreclosure consultant to register with the Department of Justice (DOJ) in accordance with certain requirements, and to obtain and maintain, a surety bond of $100,000. A violation of these provisions would be a crime. This act permits the DOJ to refuse to issue, or to revoke, a foreclosure consultant's registration for any violation of the law regulating foreclosure consultants.

B. SB 1137, Perata. Residential mortgage loans: foreclosure procedures. Adds and repeals Sections 2923.5, 2923.6, 2924.8, and 2929.3 of the Civil Code, and adds and repeals Section 1161b of the Code of Civil Procedure, relating to mortgages.

Upon a breach of the obligation of a mortgage or transfer of an interest in property, existing law requires the trustee, mortgagee, or beneficiary to record in the office of the county recorder wherein the mortgaged or trust property is situated, a notice of default and to mail the notice of default to the mortgagor or trustor. Existing law requires the notice to contain specified statements, including, but not limited to, those related to the mortgagor's or trustor's legal rights, as specified. Existing law also requires that the notice of sale in the case of default be posted on the property, as specified.

Until January 1, 2013, and as applied to residential mortgage loans made from January 1, 2003, to December 31, 2007, inclusive, that are for owner-occupied residences, this act, among other things, requires a mortgagee, trustee, beneficiary or authorized agent to wait 30 days after contact is made with the borrower, or 30 days after satisfying due diligence requirements to contact the borrower, as specified, before filing a notice of default. This act also requires contact with the borrower, as defined, in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. This act further requires the mortgagee, beneficiary or authorized agent to advise the borrower that he or she has the right to request a subsequent meeting within 14 days, and to provide the borrower the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. This act requires the notice of default to include a specified declaration from the mortgagee, beneficiary or authorized agent regarding its contact with the borrower or that the borrower has surrendered the property. If a notice of default had already been filed prior to the enactment of this act, this act requires the mortgagee, trustee, beneficiary, or authorized agent, as part of the notice of sale, to include a specified declaration regarding contact with the borrower. This act authorizes a borrower to designate a HUD-certified housing counseling agency, attorney, or other advisor to discuss with the mortgagee, beneficiary or authorized agent, on the borrower's behalf, options for the borrower to avoid foreclosure. The contact and meeting requirements of these provisions would not apply if a borrower has surrendered the property or the borrower has contracted with an organization, as specified. This act also requires specified mailings to the resident of a property that is the subject of a notice of sale, as specified.

Until January 1, 2013, this act requires a legal owner to maintain vacant residential property purchased at a foreclosure sale, or acquired by that owner through foreclosure under a mortgage or deed of trust. This act authorizes a governmental entity to impose civil fines and penalties for failure to maintain

that property of up to $1,000 per day for a violation. This act requires a governmental entity that seeks to impose those fines and penalties to give notice of the claimed violation and an opportunity to correct the violation at least 14 days prior to imposing the fines and penalties, and to allow a hearing for contesting those fines and penalties.

Existing law governs the termination of tenancies and generally requires 30 days' notice of the termination thereof, except under specified circumstances. Until January 1, 2013, this act gives a tenant or subtenant in possession of a rental housing unit at the time the property is sold in foreclosure, 60 days to remove himself or herself from the property, as specified.

XI. PROPERTY TAXES

A. AB 1451, Leno. Property tax: exclusion for newly constructed active solar energy system. Amends Section 73 of the Revenue and Taxation Code.

The California Constitution generally limits ad valorem taxes on real property to 1% of the full cash value of that property. For purposes of this limitation, "full cash value" is defined as the assessor's valuation of real property as shown on the 1975-76 tax act under "full cash value" or, thereafter, the appraised value of that real property when purchased, newly constructed, or a change in ownership has occurred. The California Constitution authorizes the Legislature to provide that "newly constructed" does not include, among other things, the construction or addition of an active solar energy system. Existing property tax law excludes from the definition of "newly constructed," through the 2008-09 fiscal year, the construction or addition of an active solar energy system, as defined.

This act modifies this exclusion to include the construction of an active solar energy system in a new building in which the owner-builder incorporated an active solar energy system in the initial construction of the new building and the owner-builder does not intend to occupy or use the new building. This act provides this exclusion to the initial purchaser of the new building, but only if the owner-builder did not receive the exclusion for the same system and the initial purchaser purchased the new building prior to that building becoming subject to reassessment to the owner-builder, as provided. This act requires the county assessor to reduce the base year value of these residences by the value of the active solar energy system, less the total amount of any rebates for the active solar energy system received by either the owner-builder or the initial purchaser of the new building, as specified.

This act provides that the changes made by the act apply beginning with the lien date or the 2008-09 fiscal year. This act also extends the active solar energy system exclusion from the definition of "newly constructed" through the 2015-16 fiscal year.

B. AB 2411, Caballero. Property tax: refunds. Amends Sections 4836, 5097, and 5151 of the Revenue and Taxation Code, relating to taxation.

Existing property tax law requires property taxes to be refunded upon the filing of a claim filed within four years after making the payment sought to be refunded, within one year after the mailing of a specified notice, or within a specified period agreed to by the assessee or county assessor, whichever is later. Existing property tax law also provides for the payment of interest on those refunds at the greater of, three percent per annum or the county pool apportioned rate. This act requires property taxes to be refunded, if a specified application for a reduction in an assessment or an application for equalization of an assessment has been filed, upon the filing of a claim within specified time periods. This act also makes clarifying changes to the method used to calculate interest on the refunds.

C. SB 1007, Machado. Exchange facilitators. Adds and repeals Division 20.5 (commencing with Section 51000) of the Financial Code, relating to exchange facilitators.

Existing law provides for licensure and regulation of various financial institutions by the Commissioner of Financial Institutions or the Commissioner of Corporations, but does not specifically regulate persons engaged in the facilitation of like-kind exchanges of property pursuant to federal tax law. This act requires a person engaging in business as an exchange facilitator, as defined, to comply with certain bonding and insurance requirements, as specified, and to notify existing exchange clients whose relinquished or replacement property is located in the State of California of any change in control, as defined, of the exchange facilitator. This act also requires a person engaging in business as an exchange facilitator to, among other things, act as a custodian for all exchange funds and to invest those funds in investments that meet a prudent investor standard, as specified. This act prohibits these persons from performing specified acts, including, but not limited to, making material misrepresentations and engaging in conduct constituting fraudulent or dishonest dealings. This act makes any person who violates these provisions subject to civil suit in a court of competent jurisdiction and would provide that a person claiming to have sustained damage because of a failure to comply with these provisions may file a claim on specified bonds, deposits, or letters of credit to recover the damages. These provisions will remain in effect until January 1, 2014, at which point they would be repealed.

D. AB 3035, Huffman. Property taxation: exemptions. Adds Section 75.24 to the Revenue and Taxation Code, relating to taxation.

Existing law exempts from property taxation specified types of property or property owned by specified taxpayers. Existing law specifies that a property tax exemption applies to a supplemental assessment if the person claiming the exemption meets the qualifications for the exemption, as specified, no later than 90 days after the date the new construction or change in ownership occurred. This act extends the time that a qualified organization, as defined, is required to meet the qualifications for the exemption from 90 days to 180 days.

E. SB 1233, Harman. Property tax: change in ownership. Amends Section 63.1 of the Revenue and Taxation Code, relating to taxation.

The California Constitution generally limits ad valorem taxes on real property to 1% of the full cash value of that property. For purposes of this limitation, "full cash value" is defined as the assessor's valuation of real property as shown on the 1975-76

tax act under "full cash value" or, thereafter, the appraised value of that real property when purchased, newly constructed or a change in ownership has occurred. The California Constitution excludes from a "change in ownership" specified property transfers of a principal residence and the first $1,000,000 of the value of other real property between parents and their children, as defined by the Legislature. Existing law requires those seeking an exclusion under the parent-child exception to file a claim within specified times.

This act requires, upon written notification by the county assessor of potential eligibility for exclusion, a transferee eligible for exclusion to file a certified claim for exclusion within the time specified in the notice. This act authorizes the assessor, if a certified claim for exclusion is not filed within the time specified in the notice, to send a second notice of potential eligibility for exclusion, notifying the transferee that a certified claim has not been received and that reassessment of the property will commence, as specified. This act provides that if the eligible transferee fails to timely file the claim and subsequently qualifies for exclusion, the assessor may require the eligible transferee to be subject to a one-time processing fee, as specified, not to exceed $175.

F. SB 1495, Kehoe. Taxation. Amends Section 279 of the Revenue and Taxation Code, relating to taxation.

Existing law provides that a disabled veteran's property tax exemption, once granted, remains in continuous effect unless the title to the property changes, the property is altered so that the property no longer qualifies as a dwelling, the owner is no longer considered disabled, or the owner does not occupy the property as his or her principal place of residence on the property tax lien date.

This act, for purposes of the disabled veteran's property tax exemption, specifies that a dwelling not occupied because of a misfortune or calamity continues to be the principal residence for purposes of the exemption, on the property tax lien date, provided that the person's absence is temporary and the person intends to return to the dwelling when able to do so. This act also provides that, except under specified circumstances where a dwelling is destroyed in a disaster for which the Governor has proclaimed a state of emergency, when a dwelling has been totally destroyed, and thus no dwelling exists on the lien date, the disabled veterans' exemption is not applicable until the structure has been replaced and is occupied as a dwelling.

XII. PURCHASE AND SALE

A. AB 2020, Fuentes. Residential property contracts: liquidated damages. Amends, repeals, and adds to Section 1675 of the Civil Code, relating to residential property.

Existing law provides that a liquidated damages provision in a contract to purchase and sell residential property that provides for a payment that does not exceed 3% of the purchase price made by the buyer to the seller upon the buyer's failure to complete the purchase of the property is valid unless the buyer establishes that the amount is unreasonable. Existing law also provides that a liquidated damages provision in a contract to purchase and sell residential property that provides for a payment that exceeds 3% of the purchase price made by the buyer to the seller upon the buyer's failure to complete the purchase of the property is invalid unless the seller establishes that the amount is reasonable. The standards of reasonableness are set forth in Section 1675 of the Civil Code. In certain circumstances involving the sale of an attached residential condominium unit located within a structure of 10 or more residential condominium units, as specified, and the liquidated damages payment exceeds 3% of the purchase price, the seller is required to perform an accounting of its costs and revenues related to the construction and sale of the residential property and any delay caused by the buyer's default. The seller shall refund to the buyer any amounts previously retained as liquidated damages in excess of the greater of either 3% of the originally agreed-upon purchase price of the residential property or the amount of the seller's losses resulting from the buyer's default, as calculated by the accounting.

This act increases the presumptively valid amount of the liquidated damages to 6% for default by buyers of an attached residential condominium located within a structure of 20 or more residential condominium units, standing over eight stories high, that is high-density infill development, when the purchase price is greater than $1,000,000.00. This act provides for the annual adjustment of that minimum $1,000,000.00 purchase price in order to account for increases in the median price of a single family home in California. This act also requires the seller to perform an accounting, and for the seller to provide a specified notice in the purchase and sale contract.

This Act shall sunset on July 1, 2014.

B. AB 2881, Wolk. Nuisance: agricultural activity: recovery of defendant's costs: right to farm. Amends Section 11010 of the Business and Professions Code, amends Section 1103.4 of the Civil Code, and amends the heading of Article 1.7 (commencing with Section 1103) of Chapter 2 of Title 4 of Part 4 of Division 2 of, the Civil Code, relating to nuisance.

Existing law requires any person who intends to offer subdivided lands within California for sale or lease to file with the Department of Real Estate an application for a public report, consisting of a completed questionnaire and a notice of intention that includes, among other things, a statement that there is an airport in the vicinity and that this may affect the use of the property. Existing law makes a violation of these provisions a crime.

This act requires the notice of intention provided as part of an application for a public report, as described above, to contain a specified Notice of Right to Farm regarding any property that is presently located within one mile of farm or ranch land designated on the most current "Important Farmland Map" issued by the California Department of Conservation, Division of Land Resource Protection. The content of the Notice of Right to Farm is contained in Section 11010(b)(17). By changing the definition of a crime, this act imposes a state-mandated local program.

Existing law limits the liability of a transferor for failing to disclose natural hazards in specified property transactions if the transferor obtains a report or opinion prepared by a licensed engineer, land surveyor, geologist, or expert in natural hazard discovery

dealing with matters within the scope of the professional's license or expertise. Existing law conditions this limitation in specified ways, including the requirement that when an expert responds to a request regarding natural hazards, that the expert also determine whether the property is within an airport influence zone and, if so, provide a specified notice with his or her report.

This act conditions the limitation on liability described above by requiring an expert, when responding to a request regarding natural hazards, to also determine whether the property is presently located within one mile of farm or ranch land designated on the most current "Important Farmland Map" issued by the California Department of Conservation, Division of Land Resource Protection, and to provide a specified notice in this regard. This act also makes conforming changes.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement. This act provides that no reimbursement is required by this act for a specified reason.

C. AB 3078, Committee on Revenue and Taxation. Taxation: tax administration: group returns: real estate withholding requirements: penalties: income apportionment. Amends Sections 18535, 18536, 18662, 18668, 19136, 21006, and 25106 of, amends, repeals, and adds Section 21004 of, and adds Section 19311.5 to, the Revenue and Taxation Code, relating to taxation.

The Personal Income Tax Law provides various credits against "net taxes" to taxpayers for income taxes paid to another state on income that is taxable by that law. That law generally provides that no credit or refund is allowed after a specified period of time unless, before the expiration of that period, a claim for refund or credit is filed by the taxpayer or the Franchise Tax Board allows a credit, makes a refund, or mails a notice of proposed assessment.

This act permits a claim for credit or refund of an overpayment of income tax attributable to a credit allowable under the above provisions to be filed within one year from the date tax is paid to the other state or within the period provided in the franchise and income tax laws, whichever period expires later. This act also declares that this act is not to be construed to change the requirements of Section 18007 of the Revenue and Taxation Code.

The Katz-Harris Taxpayers' Act of Rights Act establishes the position of Taxpayers' Rights Advocate and provides specified protections for taxpayers for purposes of, among other things, determining their correct tax liability. This act authorizes, until January 1, 2012, the Taxpayers' Rights Advocate to abate penalties, fees, additions to tax, or interest attributable to error of the Franchise Tax Board, as specified.

The Katz-Harris Taxpayers' Act of Rights Act requires the Franchise Tax Board to annually identify areas of recurrent taxpayer noncompliance and report its findings to the Legislature. This act requires the Franchise Tax Board to include in its report a summary of cases where relief was granted and to keep a public record regarding the relief granted.

Existing income tax laws authorize the Franchise Tax Board to provide for the filing of a group return for electing nonresident partners, as specified. Existing law authorizes the board to provide for the filing of a group return for electing nonresident directors of a corporation, as specified, and to adjust the income of those taxpayers to properly reflect income, as provided. This act allows the board to include entities with less than twp electing nonresident individuals, and electing individuals with more than a specified amount of California taxable income, in a group nonresident return, as provided.

Existing law requires the transferee of California real property, in specified circumstances, to withhold, for income tax purposes, 3 1/3% of the sales price of the property when the property is acquired from either an individual or a corporation without a permanent place of business in California, as specified. This act imposes withholding requirements on a sale of California real property by a partnership without a permanent place of business in California.

Existing law provides that, in the case of a sale of California real property by an "S" corporation without a permanent place of business in California, the "S" corporation may elect the alternative withholding rate of 1.5% based on the gain recognized by the "S" corporation on the sale, instead of the default withholding rate of 3 1/3% based on the "S" corporation's sales proceeds. This act increases the alternative withholding rate for a sale of California real property by an "S" corporation without a permanent place of business in California to 10.8% or 12.8%, as applicable, of the gain recognized by the "S" corporation on the sale.

Existing law provides that a nonresident seller of California real property pursuant to an installment agreement is not subject to withholding when payments are received by the seller in later years, unless the buyer makes an election to withhold on a payment-by-payment basis, rather than on the entire sale in the year of sale. This act instead requires the buyer to withhold on each installment sale payment if the sale of California real property is structured as an installment sale, as provided. This act also deletes redundant provisions and would make clarifying changes relating to the assessment and collection of unremitted withholding.

Existing law allows a seller of California real estate to make an election, pursuant to a certification made under penalty of perjury, as specified, for an alternative withholding rate based on the amount certified by the transferor, provided that the certified amount is not less than the gain required to be recognized by the seller under the Corporation Tax Law or the Personal Income Tax Law, as applicable. By modifying existing withholding requirements to include sellers that are non-California partnerships and by requiring a certification under penalty of perjury for alternative withholding from those partnerships, this act expands the scope of the existing crime of perjury, and would thereby impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement. This act provides that no reimbursement is required by this act for a specified reason.

The Personal Income Tax Law and the Corporation Tax Law impose a penalty for underpayment of an estimated income tax. Those laws also specify that a penalty shall not be imposed

if either specified taxes imposed for the preceding taxable year, minus the sum of any credits against the tax, or the tax computed under specified provisions upon the estimated income for the taxable year, minus the sum of any credits against the tax, is less than $200. In the case of a separate return filed by a married person, the threshold is less than $100. This act increases the amounts excluded from that penalty from $200 to $500, and in the case of a separate return filed by a married person, from $100 to $250.

The Corporation Tax Law imposes taxes measured by income, and in the case of a corporation that conducts a unitary business generally requires, or in some cases permits, the members of the group to compute their tax by utilizing the "combined report" approach. Existing law provides that dividends paid by one member of a unitary group to another member of that group may be eliminated from the recipient corporation's taxable income, provided that the dividends are paid out of earnings and profits accumulated by the payer when the payer and recipient were members of the same combined unitary group, as specified. This act clarifies that the dividend elimination, as provided, is allowed regardless of whether the payer and payee are taxpayer members of the California combined unitary group return, or whether the payer or payee had previously filed California tax returns, as long as the payer and payee filed as members of a comparable unitary business outside of this state when the earnings and profits from which the dividends were paid arose. This act declares that these changes are declaratory of existing law. This act also specifies that the dividend elimination provisions apply to dividends paid out of the specified income by a member of a combined unitary group to a newly formed member, as defined.

XIII. TITLE/ESCROW

A. AB 2323, Huff. Escrow Agents. Amends Section 17209 of the Financial Code.

The Escrow Law provides for licensing and regulation by the Commissioner of Corporations of persons engaged in business as escrow agents, unless specifically exempted. It also requires persons licensed as escrow agents to be members of the Escrow Agents' Fidelity Corporation (the "Fidelity Corporation"), which is a nonprofit corporation established for the purpose of indemnifying its members against loss. The Fidelity Corporation is funded by fees and assessments on its members. Existing law requires an applicant for a license as an escrow agent or for a Fidelity Corporation Certificate to submit fingerprints for a Department of Justice criminal background check. Existing law also requires an escrow agent to submit to the commissioner, by certified mail, the fingerprints of persons seeking employment with the agent.

This act expands these provisions to also include federal summary criminal history information from the Federal Bureau of Investigation (FBI) and other related information, and allows the submission of fingerprint images and related information by escrow agents to be transmitted electronically. This act requires the DOJ to forward the commissioner's or Fidelity Corporation's request to the FBI and to compile and disseminate a response to the requesting party. This act further requires the DOJ to charge a fee for these services sufficient to cover its related costs.

B. SB 133, Aanestad. Title insurance: title solicitors. Amends Section 12404 of the Insurance Code and adds Article 8 to the Insurance Code (commencing with Section 12418).

This act prohibits a person from being employed as a title marketing representative unless he or she holds a valid certificate of registration as a title marketing representative issued by the commissioner for a 3-year period. This act exempts specified activities from its scope. Violation of these provisions is a misdemeanor, pursuant to provisions of existing law. This act defines "title marketing representative" and specifically provides that this definition does not include a person whose primary duties directly involve the creation, production, or issuance of the title policy or the performance of escrow services. If a person markets title insurance without a valid certificate as a title marketing representative, all as defined in the statute, then the commissioner may issue a cease and desist order prohibiting that person from further marketing.

This act also requires title companies to notify the California State Insurance Commissioner when a title marketing representative is terminated or employed, as further detailed in the act.

To obtain a certificate, this act requires the submission of certain specific information to the Insurance Commissioner, all under penalty of perjury. This act also specifies the application process for the certificate of registration and provides that the commissioner must set a fee to obtain or renew a certificate. The fee must be in an amount sufficient to defray the actual costs of processing the application.

Under this act, the Department of Insurance may revoke, suspend, restrict, or decline to issue a certificate of registration if it determines, after a hearing, that the title marketing representative has committed certain acts specified in the act. This act also specifies other remedies available to the Insurance Commissioner for misconduct.

Finally, existing law already prohibits title companies from offering per se inducements for the placement or referral of title insurance business. This act amends existing law to newly deem the following, among other things, as per se inducements: (i) expenditures for food; beverages, and entertainment; (ii) advertising or paying for the advertising in any newspaper, newsletter, magazine, or publication that is produced by, or on behalf of, a person (as defined in the act) or that results in a direct or indirect subsidy to a person. This act also includes some new express carveouts from the "per se inducement" category, including, among others, promotional items with a value of less than $10 which include a permanently affixed title company logo and educational materials exclusively related to the business of title insurance (if continuing education credits are not provided).

C. SB 1396, Cox. Local government: recording fees. Amends Section 27388 of the Government Code.

Existing law authorizes a county board of supervisors to impose a fee of up to $2 to be paid at the time of recording of every real estate instrument, paper, or notice required or permitted by law to be recorded within that county, and defines "real estate instrument" to mean a deed of trust, an assignment of deed of trust, a reconveyance, a request for notice and a notice of default. This act authorizes a county board of supervisors to

impose a fee of up to $3 to be paid at the time of recording of every real estate instrument, paper or notice required or permitted by law to be recorded within that county, except as specified, and defines "real estate instrument" to mean a deed of trust, an assignment of deed of trust, a reconveyance, a request for notice, a notice of default, a substitution of trustee, a notice of trustee sale, and a notice of rescission of declaration of default.

D. SB 1604, Machado. Escrow Agents' Fidelity Corporation. Amends Sections 17312, 17331.2, 17406, and 17409 of the Financial Code, relating to escrow agents.

The existing Escrow Law provides for licensure and regulation by the Commissioner of Corporations of persons engaged in business as escrow agents, unless specifically exempted by law. Existing law also requires persons licensed as escrow agents to be members of the Fidelity Corporation which is a nonprofit corporation established for the purpose of indemnifying its members against loss. The coverage provided by Fidelity Corporation under existing law is limited to certain types of transactions and provides that indemnity coverage for other transactions be provided by escrow agents through bonding requirements. This act amends existing law to provide that any private insurance coverage of a member be applied as primary coverage when such private insurance also covers a loss that would be covered by Fidelity Corporation.

Existing law requires employees of escrow agents and various other persons to obtain a certificate from Fidelity Corporation as a condition of employment or compensation. Existing law also requires Fidelity Corporation to deny an application for a certificate or to revoke the certificate under certain circumstances specified in existing law. This act allows a person whose certificate application has been denied or whose certificate has been revoked to file a reapplication for a certificate after a specified time, provided that the person has satisfied all obligations to Fidelity Corporation under any prior arbitration award or judgment.

Existing law requires a licensee under the Escrow Law to submit an annual audit report to the commissioner as well as various other financial reports that the commissioner may require. Existing law also requires an independent accountant who prepares certain reports in that regard to provide copies directly to the commissioner. This act requires a licensee who engages an independent accountant or third-party contractor to reconcile trust account records to request that such accountant or third-party contractor immediately notify the commissioner and Fidelity Corporation upon the occurrence of various events or discoveries specified in this act.

Existing law specifies the types of financial institution accounts that are allowable depositories for moneys deposited in escrow with a licensee. This act requires that an agreement by a licensee with a financial institution to establish a trust account be accompanied by a letter from the licensee authorizing and requesting the financial institution to immediately notify the commissioner and Fidelity Corporation of account closure or the occurrence of an overdraft balance under circumstances specified in this act.

XIV. CONCLUSION

A more comprehensive list of all of the legislation tracked each year by the Legislation Committee of the State Bar Real Property Law Section may be found at the Section's web site at http://calbar.ca.gov/rpsection. From there, you can link to some additional sites for keeping up with legislation, including the California Legislative Counsel's Official California Legislative Information at http://www.leginfo.ca.gov.

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Enforcement Issues for a Creditor Holding Multiple Deeds of Trust on the Same Property

*By Michael T. Andrew**

I. INTRODUCTION

In a variety of circumstances, one creditor may hold multiple deeds of trust encumbering the same real property. This might occur because a single loan transaction is segmented into senior and junior portions, or because a lender has made separate senior and junior loans, at the same or different times, perhaps under different loan programs. Alternatively, a creditor holding one deed of trust on a property might purchase, typically from a senior creditor, another debt secured by the same property.

In these situations, for any one of the multiple secured debts it holds, the creditor has the normal enforcement alternatives of California law, with fairly clear consequences for that one debt. The creditor can foreclose nonjudicially and, because of the antideficiency rule of Code of Civil Procedure § 580d, will lose any right to a deficiency judgment against the trustor.[1] Or, if the creditor wishes to obtain a deficiency judgment, it can foreclose judicially under Code of Civil Procedure § 726.[2] Section 726(b)'s fair-value rule will apply, however, limiting the deficiency to the difference between the debt and the court-determined fair value of the property.[3] In addition, unless a deficiency is waived or prohibited, after a judicial foreclosure sale the trustor will have a right of post-sale redemption for as long as a year.[4]

While those consequences of foreclosure are clear with respect to the particular debt being enforced, much less clear is how the foreclosure affects other debts held by the same creditor and secured by the same property. Can those other debts still give rise to personal liability? Does the answer depend on which deed of trust the creditor chooses to foreclose? Does it depend on whether foreclosure is judicial or nonjudicial?

This article discusses those questions, primarily in the following factual context: One creditor holds two deeds of trust encumbering the same real property, senior and junior. The deeds of trust secure distinct, non-overlapping debts. The debts may have arisen at the same time or at different times. There is no cross-collateralization as between the two deeds of trust; that is, the deeds of trust do not include "dragnet" or other provisions that would cause either of the separate debts to be secured by both deeds of trust.[5]

Part II below examines the effect upon the junior debt of first foreclosing under the senior deed of trust, and Part III discusses the effect upon the senior debt of first foreclosing under the junior deed of trust. Each Part begins by summarizing the consequences of foreclosure if the deeds of trust had been held by unrelated creditors, then turns to multiple deeds of trust held by the same creditor.

II. EFFECT OF FORECLOSING UNDER THE SENIOR DEED OF TRUST

A. When Senior and Junior Creditors Are Unrelated

When a property is encumbered by senior and junior deeds of trust and the holder of the senior deed of trust forecloses, the purchaser at the foreclosure sale takes title to the property free of the junior deed of trust.[6] Although the junior deed of trust is thereby extinguished, this does not terminate the debt it secured, and, when the senior and junior creditors are unrelated, enforcement of the junior debt is not precluded by California's one-action or antideficiency laws. As a general rule the junior creditor — referred to as a "sold-out junior" — can enforce its now-unsecured debt in the same manner as any other unsecured debt, by obtaining and enforcing a money judgment against the trustor. This was the California Supreme Court's holding in *Roseleaf Corp. v. Chierighino*.[7]

Other courts, beginning with the Ninth Circuit in *Bank of Hemet v. United States*,[8] imposed a caveat on the *Roseleaf* rule when the holder of the junior deed of trust buys the property at the senior creditor's foreclosure sale, i.e., by overbidding in cash the senior creditor's likely credit bid. This caveat is based on Code of Civil Procedure § 580a, which provides that if a creditor seeks a deficiency judgment after nonjudicially foreclosing upon real property, the deficiency is subject to a fair-value limitation similar to that applicable under § 726(b) in a judicial foreclosure action.[9] *Bank of Hemet* held that if the junior secured creditor buys the property at the senior's foreclosure sale, the fair-value rule of § 580a applies to an action by the junior creditor to collect its debt.[10] As a result, the junior creditor can recover a deficiency judgment only to the extent that it has not already been made whole by the fair value of the property. This rule prevents the junior creditor from acquiring the property at a below-fair-value price and still collecting the full amount of its debt, a double recovery.

This application of § 580a is not found in the statute's literal language. By its terms, § 580a only limits a money judgment following nonjudicial foreclosure of the deed of trust that secured the obligation for which the judgment is sought.[11] Here, the junior deed of trust was never foreclosed, it was extinguished by foreclosure of the senior deed of trust. But the junior creditor's acquisition of the property at the senior's sale is viewed as triggering the *policy* of § 580a, namely, to prevent a windfall by means of a nonconsensual acquisition of the property followed by a personal judgment. In fact, it is only this "penumbra"-type approach to § 580a — a beyond-the-language application of the statute's policy — that gives § 580a much scope of application. Seven years after § 580a's enactment in 1933 the antideficiency rule of § 580d was enacted, precluding *any* deficiency after nonjudicial foreclosure in most cases, rendering § 580a largely moot.[12]

B. When Senior and Junior Creditors Are The Same

1. Simon v. Superior Court

To date, the California Supreme Court has not considered how or whether the rules described above should apply when the

senior and junior deeds of trust are held by the same creditor. The most prominent California case addressing this question is *Simon v. Superior Court*, decided in 1992 by the First District Court of Appeal.[13] There, Bank of America had made two loans to a borrower, secured by separate deeds of trust on the same property, both recorded on the same day. After a default, the bank nonjudicially foreclosed under the senior deed of trust, then sought to recover a money judgment on the junior debt. The court denied recovery, holding:

> [W]here a creditor makes two successive loans secured by separate deeds of trust on the same real property and forecloses under its senior deed of trust's power of sale, thereby eliminating the security for its junior deed of trust, section 580d of the Code of Civil Procedure bars recovery of any "deficiency" balance due on the obligation the junior deed of trust secured.[14]

Thus, *Simon* rejected application of both the *Roseleaf* rule described above — that a sold-out junior can recover on its now-unsecured claim in the normal manner for unsecured claims — and the *Bank of Hemet* caveat — that a junior who purchases at the senior's sale can recover on its claim but is subject to § 580a's fair-value rule. Instead, in *Simon* the court took a penumbra approach to § 580d, applying it to bar any judgment on the junior debt even though the statute's literal language does not apply, as there was no foreclosure under the junior deed of trust.[15] The court reasoned:

> We will not sanction the creation of multiple trust deeds on the same property, securing loans represented by successive promissory notes from the same debtor, as a means of circumventing the provisions of section 580d. The elevation of the form of such a contrived procedure over its easily perceived substance would deal a mortal blow to the antideficiency legislation of this state. Assuming, arguendo, legitimate reasons do exist to divide a loan to a debtor into multiple notes thus secured, section 580d must nonetheless be viewed as controlling where, as here, the senior and junior lenders and lienors are identical and those liens are placed on the same real property. Otherwise, creditors would be free to structure their loans to a single debtor, and the security therefor, so as to obtain on default the secured property on a trustee's sale under a senior deed of trust; thereby eliminate the debtor's right of redemption thereto; and thereafter effect an excessive recovery by obtaining a deficiency judgment against that debtor on an obligation secured by a junior lien the creditor chose to eliminate.[16]

The court thus premised its rule on the need to prevent evasion of § 580d through form-over-substance structuring of transactions. As the foregoing passage indicates, however, the court concluded that the rule would apply even when there are "legitimate reasons" for two separate obligations, separately secured. *Simon* is sometimes characterized as treating the two secured obligations "as one" for purposes of § 580d,[17] although *Simon* itself did not use that terminology.

It remains to be seen how the California Supreme Court might approach a *Simon* situation. *Simon* relied on the supreme court's decision in *Freedland v. Greco*,[18] but *Freedland* in fact provides little support. In *Freedland* the creditor had obtained two $7000 promissory notes for the very same $7000 debt, together with a deed of trust purporting to secure only one of the two notes. The supreme court readily concluded that § 580d barred a deficiency recovery on both notes after foreclosure of the deed of trust.[19] Redundant notes for the same debt have no economic substance; unsurprisingly, the supreme court found them to be a "manifestly evasive device."[20] In other antideficiency and one-action contexts, the supreme court has approved the separate treatment of truly separate, non-overlapping notes.[21]

The *Simon* court's indifference to legitimate reasons for separate notes evidencing separate amounts seems hard to justify. For example, lenders often make a purchase-money first-priority loan on real property, followed, then or later, by a junior-priority line-of-credit loan. If the identical junior loan were borrowed from another lender, the *Simon* rule would not apply. Thus, *Simon* imposes a very costly penalty on a lender for making a legitimate junior loan on market-based terms to its own existing customer, by forcing the lender to pursue judicial foreclosure to obtain a recovery that another lender could have obtained without. It is certainly not self-evident, as it was in *Freedland*, that this type of transaction risks the mortal blow to California's antideficiency laws that the court in *Simon* feared. In these and most ordinary lending circumstances, there is considerable weight to the view that *Roseleaf*'s "sold-out junior" rule, subject to the *Bank of Hemet* § 580a fair-value caveat, should apply regardless of whether there is one lender or two, leaving situations involving contrivance and evasion to be dealt with separately as in *Freedland*.

2. Applying Simon

Apart from the question whether *Simon* was correctly decided, there are many questions about how it should be interpreted. They include the following:

> (a) Does *Simon* apply even if the transactions giving rise to the deeds of trust occurred at different times? Does *Simon* apply even if the secured loans were originated by different lenders, but later came into the same hands (e.g., where a junior lender purchases the senior's loan)?

Simon involved two deeds of trust recorded in favor of the same lender on the same day. The court held that its rule applies even when there are "legitimate reasons . . . to *divide a loan* to a debtor into multiple notes," because of the perceived risk of contrived, evasive transaction structuring.[22] But when unrelated loans are made at separate times, or by separate lenders, that risk is likely to be all but nonexistent.[23]

There is a dichotomy, of uncertain significance, between *Simon* and a concurring opinion in an earlier First District case, *Union Bank v. Wendland*,[24] discussed approvingly at length in *Simon*. In *Wendland* the two loans had been made some eighteen months apart. In his concurrence, Justice Elkington opined that § 580d should bar recovery on the junior debt after the lender acquired the property at its foreclosure under the senior deed

of trust. In his view, this bar had nothing at all to do with the lender's intent or any presumptive bad faith, and the timing of the loans was irrelevant.[25] To him, it was simply a matter of applying § 580d to prevent a lender from "obtaining the real property security at a private foreclosure sale thus denying the borrower any right of redemption, and also obtaining a judgment for the remaining deficiency."[26] His primary focus, in other words, was on the foreclosure itself, not on the antecedent transaction structuring, as in *Simon*.

Arguably *Simon*'s loan-structuring focus excludes from its rule loans that originated at different times and, even more so, loans originated by different lenders that later come into the same hands. In light of the *Wendland* concurrence, though, it certainly should not be assumed that a court would decline to apply *Simon* in these circumstances.

(b) Does *Simon* apply if one creditor made two loans, senior and junior, but because of later transfers the loans are held by different parties at the time of foreclosure?

Similarly here, the answer may depend upon whether the focus of the *Simon* rule is thought to be upon the time of loan origination or the time of foreclosure. If the former, then it might be argued that the loans, originally "contrived" as two, remain forever one for *Simon* purposes, a permanent taint that survives transfer to separate parties.

Essentially that argument was made, but was rejected, in *National Enterprises, Inc. v. Woods*.[27] There the Third District Court of Appeal held that where two loans made by the same lender were later sold to different parties and the holder of the senior *judicially* foreclosed, the holder of the junior was not barred from recovering on its note. The court distinguished *Simon* on grounds that the foreclosure was judicial, but also found *Simon* inapposite because by the time of the foreclosure the loans were held by separate parties[28] — parties the *Woods* court repeatedly referred to as "independent."[29]

The borrower in *Woods* urged an application of the one-action rule of § 726(a) akin to *Simon*'s application of § 580d, to bar recovery on the junior debt because the loans had been originated by the same creditor. The court's reasons for rejecting that argument, "at least in the absence of evidence of a scheme to circumvent the rule," included the adverse impact it would have on the secondary market and the illogic of considering § 726(a) triggered at the time of loan origination, before the one action was ever commenced.[30] That same reasoning can be applied in the § 580d context to argue that the *Simon* rule should not be triggered if the two loans are held by separate parties when the senior deed of trust is nonjudicially foreclosed, if there is no purpose of evasion and the parties are independent.

(c) Does *Simon* apply if the creditor, holding both senior and junior deeds of trust, forecloses judicially under the senior, thereby extinguishing its junior, then seeks a money judgment on the debt previously secured by the junior?

To the court in *Woods*, the answer was clearly no because *Simon* was an application of § 580d, which is triggered only by a nonjudicial foreclosure, and *Simon* itself involved a nonjudicial foreclosure.[31] In fact, the answer may not be so clear. The same result that the *Simon* court sought to preclude could also be achieved by judicially foreclosing the senior deed of trust, which extinguishes the junior deed of trust, and waiving a deficiency on the senior debt, which terminates the right of redemption, then seeking a money judgment on the junior debt.[32] Only a *combined* judicial foreclosure of senior and junior deeds of trust together would preclude that result, something that the one-action rule does not appear to require.[33] Thus, if one accepts *Simon*'s premise, arguably § 580d's policy is triggered not because of the *type* of senior foreclosure, but because the holder of the junior debt, who also holds the senior debt, acquires the property nonconsensually without judicially foreclosing the *junior* deed of trust.[34]

(d) Does *Simon* apply if a third party, rather than the creditor, purchases at the foreclosure sale?

This is another issue on which there was a shift between Justice Elkington's concurrence in *Wendland* and the court's opinion in *Simon*, of uncertain import. The creditor's acquisition of title was an explicit and central element of Justice Elkington's conception of the rule precluding recovery on the junior debt.[35] In *Simon*, on the other hand, the rule is stated without reference to acquisition by the creditor, which is mentioned only in passing in the discussion; the emphasis is instead on the creditor's decision to extinguish its own junior deed of trust by foreclosing the senior deed of trust.[36]

(e) If *Simon* applies to bar a recovery on the junior note, what is its effect on a tort recovery by the creditor?

In *Evans v. California Trailer Court, Inc.*,[37] the Fifth District Court of Appeal followed *Simon* to bar a recovery on the debt secured by the junior deed of trust, but held that *Simon* did not bar a tort recovery. *Simon* is an application of the antideficiency rule of § 580d, and as discussed in Part III(B)(2)(b) below, the California Supreme Court has held that § 580d does not preclude recovery for certain torts, although a full credit bid by the creditor at the foreclosure sale can do so. In *Evans* the creditor had made a full credit bid of its *senior* debt to acquire the property at foreclosure. The defendant argued that this should be considered a full credit bid of *both* debts, senior and junior. *Evans* rejected that argument.[38]

As the foregoing discussion reflects, considerable uncertainty surrounds the *Simon* rule. None of the issues discussed has a clear resolution, and none is the subject of supreme court precedent that would insure consistent treatment.

III. EFFECT OF FORECLOSING UNDER THE JUNIOR DEED OF TRUST

The discussion so far has focused on foreclosure under the senior deed of trust, and the resulting impact on the junior debt. The focus turns now to the reverse situation, foreclosure under the junior deed of trust and the impact on the senior debt.

A. When Senior and Junior Creditors Are Unrelated

When a junior deed of trust is foreclosed and senior and junior deeds of trust are held by different creditors, the foreclosure normally has no direct impact upon either the senior deed of trust or the debt it secures. The senior debt continues to

encumber the property, and the purchaser at the junior sale takes subject to it, but is not personally liable for it.[39] The original trustor remains liable (although the nature of that liability may change, as will be discussed below).

B. When Senior and Junior Creditors Are The Same

1. Three Analytical Approaches

California law is not well-developed on the question of what happens when senior and junior deeds of trust are held by the same creditor, foreclosure occurs under the junior deed of trust and the creditor acquires the property at the sale, then seeks to recover on the senior debt — i.e., the reverse of *Simon*, where the creditor foreclosed under the senior deed of trust, then sought recovery on the junior debt. Before examining what little California authority there is, it is useful to consider three different analytical approaches to this issue that courts elsewhere have applied: a merger-of-title approach, a merger-of-rights or extinguishment approach, and a valuation-based approach.

(a) Merger of Title or Estates

If the holder of both a senior and junior deed of trust forecloses under the junior and acquires the property at the sale, it will then hold fee title to the same property on which it also holds the remaining, formerly senior, deed of trust. This suggests, of course, merger of title (or estates): "Whenever a greater estate and a lesser estate in the same parcel of real property are held by the same person, without an intermediate interest or estate, the lesser estate generally merges into the greater estate and is extinguished."[40] But not always: "[t]he doctrine of merger is applied only where it prevents an injustice and serves the interests of the person holding the two estates, in the absence of evidence of a contrary intent."[41] "[T]he merger of the ownership of the property and the lien in one person extinguishes the lien unless it is necessary for the protection of the lienholder's rights that the lien remain."[42]

Merger-of-title doctrine has been criticized as altogether unsuited and unnecessary for handling mortgage-related issues.[43] In the present context it is enough to observe that the status of title is simply not the relevant question. At issue is whether the senior *debt* survives, not the senior *lien*.[44] While "[a] security interest cannot exist without an underlying obligation,"[45] the reverse is not also true: a debt need not be secured in the first place, and if it is, termination of the encumbrance does not equate to termination of the debt. Nonetheless, some cases have used merger-of-title doctrine as the basis for deciding whether a senior debt survives after the creditor acquires title upon foreclosure under its junior deed of trust.[46]

(b) Merger of Rights; Extinguishment

While merger-of-title doctrine does not adequately address whether the senior debt survives the creditor's acquisition of the property at a foreclosure sale under its junior deed of trust, some authorities have addressed that issue with a different merger doctrine, referred to as merger of rights, or extinguishment.

The underpinning of the merger-of-rights doctrine is as follows. When property is contractually sold subject to a deed of trust, the buyer is not personally liable for the debt, not having assumed it.[47] However, the buyer takes the property encumbered by the debt, and thus presumably receives credit for it in the purchase price. That is, the price will not be equal to the total value of the property, but only to the equity above the encumbrance. As a consequence, even though the buyer is not liable for the debt, the burden appropriately falls on the buyer to pay the debt to keep the property from foreclosure. To implement that result, long-standing law considers the property itself to have become primarily liable for the debt, the "primary fund" for its satisfaction, and the seller/trustor, though still liable, to have become a surety.[48]

Because a foreclosure sale under a junior deed of trust is, of course, a sale subject to the senior, those same principles can be applied. The foreclosure-sale purchaser is buying only the equity in the property above the senior debt, and presumably bids accordingly. The property becomes the primary fund for satisfaction of the senior debt. If that approach is taken, and the purchaser at the junior sale is also the holder of the senior debt, this is the result: The primary fund for *satisfaction* of the senior debt has come into the same hands as the right to *payment* of that debt. When that occurs, the merger-of-rights doctrine extinguishes the original trustor's personal liability on the senior debt.[49]

An often-cited example of merger of rights, or extinguishment, is a 1934 South Dakota Supreme Court case, *Wright v. Anderson*.[50] The court explained merger of rights, and distinguished it from merger of title, as follows:

> We are not dealing with any question of the persistence of a lien or charge upon real estate or with a question of whether such lien or charge would or would not merge in the fee. The question here involved has nothing to do with any estate in the land, but is a question of whether the personal liability of the maker of a mortgage has been extinguished. The applicable doctrine, though sometimes discussed in the phraseology of merger, is more properly spoken of as "extinguishment" or "confusion of rights." . . . The fundamental principle is that a man cannot be both debtor and creditor with respect to the same debt at the same time and when a situation arises where the hand that is obligated to pay the debt is the same hand that is entitled to receive it, the debt is extinguished and forever gone.
>
> . . . .
>
> . . . [T]he debt is extinguished, notwithstanding the fact that there may be no merger and notwithstanding the fact that the purchaser may maintain the validity of the lien upon the land as between himself and an intervening subsequent encumbrancer who was a stranger to his purchase.[51]

In its most stringent form, merger-of-rights/extinguishment doctrine is all-or-nothing. The actual value of the property is irrelevant, as is the amount bid at the junior foreclosure sale by the holder of the senior debt.[52] Even if the property's value is insufficient to cover the senior debt, the obligor's liability for that debt is completely extinguished.

That result is said to be justified because, as discussed above, its underpinning is a presumption that the purchaser at a junior foreclosure sale, knowing that what is being sold is only the equity above the senior encumbrance, determines its bid accordingly, and would not make the purchase unless it believed that the property's value exceeds the amount of the senior debt.[53] For two reasons, however, that presumption may be faulty when the secured creditor is itself the foreclosure-sale purchaser. First, "[u]nlike third-party purchasers, a lienor sometimes has valid reasons for buying at a foreclosure sale even if the property is worth less than the outstanding debts encumbering it."[54] Second, when the holder of the senior encumbrance purchases at the sale under its own junior encumbrance, it will effectively acquire title free of *both* encumbrances; thus, in practical effect, such a creditor is not bidding merely on the equity in excess of the senior encumbrance.[55]

(c) Valuation; Preventing Unjust Enrichment

A third approach to determining whether the trustor has continuing liability on the senior debt rejects the all-or-nothing aspect of strict merger-of-rights/extinguishment doctrine. Instead, this approach focuses on the actual value of the property relative to the debt and on preventing unjust enrichment of either party. As a treatise explains:

> The [merger-of-rights/extinguishment] result and analysis are logical and fair only if one assumes that the land was worth at least an amount equal to the sum of the two mortgage debts. . . . In such a case, the mortgagee would be unjustly enriched if it were permitted to become the owner of land worth at least an amount equal to the sum of the two mortgage debts and also allowed to collect on the senior debt. But where the land is not worth at least the sum of the two debts, to apply the merger doctrine to destroy completely the senior debt shortchanges the mortgagee. . . . To allow the mortgagee to recover the [amount not covered by the value of the property] from the mortgagor personally would not result in unjust enrichment and should not be barred by the merger doctrine.[56]

Endorsing that approach, the Arizona Supreme Court in 1991 treated merger of rights as a doctrine of rebuttably presumed intent, like merger of title, and concluded that if merger of rights would be inequitable to the creditor because the property's value is insufficient to cover the debts, to that extent the doctrine should not apply and the senior debt should not be extinguished.[57] A more straightforward valuation-based approach would eliminate discussion of merger of rights and presumed intent altogether and simply focus directly on valuation and preventing unjust enrichment of either party. The Restatement (Third) of Property suggests that approach.[58]

What, then, of California?

2. California Law

(a) Overview

It does not appear that any reported California case has directly ruled on whether a creditor who forecloses under its junior deed of trust and acquires the property at the sale can thereafter recover against the trustor on the senior debt. In dicta a California Supreme Court case in 1900 raised the possibility that purchase at the junior sale might "hazard the extinguishment of [the creditor's] remaining lien therein and with it the secured debt," but "intimate[d] no opinion whether such result would follow."[59] Two present-day California Court of Appeal cases, discussed in Part III(B)(2)(c) below, dealt with a tort claim based upon the senior debt, reaching conflicting conclusions, but neither case involved an action on the debt itself.

None of the three analytical approaches described above appears compelled or precluded by the actual language of any of California's one-action, fair-value or antideficiency statutes. Those statutes all address the obligation secured by the deed of trust being enforced (here, the junior deed of trust), not other obligations (e.g., the debt secured by the senior deed of trust).[60]

Statutory penumbra approaches obviously suggest themselves, however. For example, using a *Bank of Hemet* approach to Code of Civil Procedure § 580a's fair-value rule, or an approach based upon the fair-value rule of § 726(b), a court might arrive at a valuation-based result. If the creditor purchased at a foreclosure sale under its junior deed of trust, with a credit bid of any amount, recovery on its senior debt would not be precluded but would be limited to take account of the fair value of the property that the creditor thus acquired. On the other hand, a court that views *Simon* as correctly decided might use a penumbra reading of § 580d's antideficiency rule to bar a recovery on the senior debt altogether (at least in circumstances where the *Simon* bar would apply to the reverse situation), regardless of the property's value or the bid amount. This approach would yield the same result as the strict version of merger-of-rights/extinguishment doctrine. To date, though, these issues have not been addressed in reported California cases.

(b) The "Full Credit Bid Rule"

Where, as here, valuation and credit bidding are at issue, the potential relevance of the California Supreme Court's decision in *Cornelison v. Kornbluth*[61] must be considered, although the case did not involve multiple deeds of trust.

After nonjudicial foreclosure, Code of Civil Procedure § 580d bars recovery of any deficiency judgment on the debt secured by the deed of trust, regardless of the amount bid at the sale. *Cornelison* held that § 580d does not bar the creditor from recovering in tort for conduct constituting bad-faith waste of the real property, but if the creditor made a full credit bid at the foreclosure sale — i.e., it bid the full amount of the debt — that *does* preclude such a recovery.[62] The reason is straightforward: The essence of a secured creditor's waste claim is that the security for the debt has been impaired, so if that debt has been fully *satisfied*, which is the precisely the effect of a full credit bid, there can be no claim of impairment.[63] Having bid that full amount to purchase the property, with no duty to do so, the creditor cannot also claim that the property's value as security for repayment of that debt was less than the debt thereby satisfied. However, if the creditor makes a lower bid, recovery is permissible, not to exceed the amount of the remaining debt.[64] Simply put: a credit bid satisfies the debt to the extent of the bid.

Cornelison has spawned an array of court of appeal cases focused on what torts, beyond bad-faith waste, may permit

recovery, how that recovery is to be measured, and to what extent each recovery is affected by the creditor's bid at the foreclosure sale.[65] In *Alliance Mortgage Co. v. Rothwell*, the supreme court expanded its *Cornelison* ruling by holding that the "full credit bid rule," as it has confusingly come to be known, will not preclude a fraud recovery against a third party where the bid was itself proximately caused by the fraud. [66]

A discussion of how and when the "full credit bid rule" applies to various potential tort recoveries is beyond the scope of this article. For present purposes the question is the rule's relevance, if any, when a creditor forecloses its junior deed of trust and then seeks recovery against the trustor on the senior debt.

Specifically: In the waste context described above, the court in *Cornelison* stated that "purchase of the property securing the debt by entering a full credit bid establishes the value of the security as being equal to the outstanding indebtedness."[67] Where the creditor holds senior and junior deeds of trust and forecloses under its junior, should the court's reference to the "outstanding indebtedness" be read to include not only the creditor's junior debt but also its senior debt? If so, then *Cornelison* might be read to implicitly adopt the strict version of merger-of-rights doctrine, precluding any consideration of the property's actual value and extinguishing the senior debt, at least where there was a full credit bid of the junior debt.

Cornelison did not involve, nor did the supreme court discuss, multiple deeds of trust. The court's statement about value was made in reference only to the single debt there at issue. Thus, to treat *Cornelison* as implicitly resolving the question of enforceability of the senior debt would be appropriate only if the resolution necessarily follows from the court's actual holding. As discussed below, one court of appeal case appears to have assumed, without analysis, that *Cornelison* does resolve the issue.

In fact, though, *Cornelison* stands for a proposition that simply does not speak to the multiple-deed-of-trust situation, namely: To the extent that a creditor *satisfies* its own debt by a credit bid, it cannot then make a recovery on the basis that the very same debt was *not* so satisfied. But the effect on the creditor's senior debt is a distinctly different question, and either answer to that question — that the senior debt survives, or that it does not — would leave *Cornelison*'s holding intact. Thus, *Cornelison* should be considered relevant only as to the junior debt, which is satisfied to the extent of the credit bid, and not relevant as to the status of the senior debt.

(c) *Romo* and *Kolodge*

Two First District Court of Appeal cases, *Romo v. Stewart Title*[68] and *Kolodge v. Boyd*,[69] have addressed the impact of foreclosure under a junior deed of trust when the creditor also holds a senior deed of trust. In each case the plaintiff creditor purchased the property by credit bid at the foreclosure sale, then sought a tort recovery against a third party — an escrow company in *Romo*, an appraiser in *Kolodge* — claiming damages that arose in part from nonpayment of the junior and senior debts. Neither case involved a claim on the debts against the trustor, but the opinions in both cases suggest how the court might have approached such a claim.

In *Romo*, the plaintiff had made a full credit bid at the foreclosure sale under her junior deed of trust. Then, in the tort action, she sought damages including amounts equal to the debts that had been secured by both her foreclosed junior deed of trust and her senior deed of trust. Applying *Cornelison*, the court first held, appropriately, that the plaintiff's full credit bid of her junior debt caused that debt to be satisfied in full. Thus, it could not be a basis for tort damages.[70] (As the court recognized, in an action against a trustor on the debt, the anti-deficiency rule of § 580d would bar recovery on the junior debt altogether, regardless of the bid amount.[71])

The court then turned to the plaintiff's senior debt, and held that under *Cornelison* her full credit bid of the junior debt also barred any recovery based on the senior debt:

> Plaintiff's full credit bid conclusively established the value of the property as being equal to the indebtedness secured by the property. (*Cornelison v. Kornbluth* . . . .) Within the context of foreclosure of a junior lien, plaintiff's full credit bid is presumed to establish the value of the total indebtedness, since plaintiff took the property subject to the first and second deeds of trust. Had plaintiff believed the value of the property was insufficient to support both senior liens, plaintiff was not obligated to make a full credit bid. . . . By her full credit bid, however, plaintiff accepted the property as being equal to the indebtedness.[72]

Thus, in the context of a full credit bid, the court in *Romo* effectively treated *Cornelison* as mandating the strict version of merger-of-rights/extinguishment doctrine. That approach renders the senior debt unrecoverable regardless of the actual value of the property, because it precludes the creditor from establishing that the actual value was anything less than the combined junior and senior debt.

The court in *Romo* went on, however, to comment in dicta about the effect of a less-than-full credit bid. The plaintiff's junior note was for $18,470 and her senior note was for $12,300. The court commented: "Had plaintiff entered a bid for $12,300 less than the amount owing to her on the $18,470 note, then plaintiff would not be precluded from recovering the $12,300 remaining due."[73] That is, reducing the credit bid at the foreclosure under the junior deed of trust by the amount of the senior debt would have allowed the plaintiff to recover that amount.

It is certainly true that if the plaintiff had reduced her credit bid by $12,300 as the court suggested, she could have recovered $12,300 by virtue of her *junior* note in the tort action, having left that portion of it unsatisfied by the lower bid. In context, though, that does not appear to have been the court's meaning. The comment came in the midst of the court's discussion of the impact of the "full credit bid rule" upon the *senior* note, not the junior note. Thus, the court seems to have meant — for reasons unclear — that $12,300 would be recoverable under the *senior* note had the bid been lowered by that amount at the junior foreclosure sale.[74]

There is a significant difference between these two interpretations of the court's dicta. Only if the amount is recoverable under the senior note could it be asserted against the *trustor* in an action on the debt, as distinguished from a tort action. Nonjudicial foreclosure under the junior deed of trust precludes

any further recovery against the trustor on the junior note, regardless of the bid amount, because of the antideficiency rule of Code of Civil Procedure § 580d.[75]

What to make of *Romo*? Regardless of how the court's dicta is interpreted, the case very clearly treats *Cornelison* as precluding any recovery on the senior debt where a *full* credit bid has been made on the junior debt — essentially the merger-of-rights approach. Beyond that, *Romo*'s significance is not clear. The strict version of merger-of-rights doctrine does not take account of the amount of the bid; all that matters is that the property is acquired subject to the creditor's own senior debt, whether by a full credit bid or a one-dollar bid. But the court in *Romo* seems to have been uncomfortable with that possibility, as suggested by its puzzling dicta. In any event, the bidding approach suggested in *Romo* — reducing the credit bid at the junior foreclosure sale by the amount of the senior debt — is of limited use to a creditor whose senior debt exceeds its junior debt, as is often the case.

In *Kolodge*,[76] also a First District Court of Appeal case, the court took a very different approach. It criticized *Romo*'s result and characterized *Romo* as having been based implicitly upon a merger of title, of the senior lien into the fee acquired at the junior sale.[77] The court in *Kolodge* thought merger-of-title doctrine *capable* of extinguishing the senior debt, not merely the senior lien,[78] but considered the doctrine properly applicable only where it "prevents an injustice and serves the interests of the person holding the two estates, in the absence of evidence of a contrary intent."[79] Applying this principle to the context of the junior foreclosure sale, the court concluded that no merger intent should be implied, and thus merger of title should not occur unless there was evidence of actual intent.[80] The court remanded the case for a determination whether any merger intent had been expressly evidenced in the loan documents, which the court considered "unlikely."[81]

In a perplexing *Cornelison* twist, the court then instructed the trial court that on remand it would need to reach this merger question only if it found that the plaintiff had made a full credit bid of the junior note at the foreclosure sale. If the bid were *any* amount less, wrote the court, "the question of merger will, of course, be moot,"[82] apparently meaning that the senior debt would simply survive. The court did not explain how that conclusion follows from the "full credit bid rule." In fact, the court went on to seemingly moot the merger and full-credit-bid issue altogether by holding that the "full credit bid rule" should not be applied to bar a tort claim.[83]

It is difficult to decipher *Romo* and *Kolodge*, individually or collectively. They provide little by way of enlightenment, and are in direct conflict on how the senior debt is affected by the junior foreclosure. At present, California law offers no clear answer to whether the senior debt is recoverable against the trustor after the junior deed of trust is foreclosed.

IV. CONCLUSION

Parts II and III above address the alternative enforcement paths a creditor holding multiple deeds of trust can take after default, first foreclosing under the senior deed of trust, and first foreclosing under the junior. As the discussion reflects, in each case California law is replete with unanswered questions about how foreclosure under one deed of trust affects the creditor's ability to recover on the debt secured by the other. Each path involves its own doctrinal tangle.

Until California law evolves further, it may be that the only certain way to obtain a money judgment on *either* debt, senior or junior, is to judicially foreclose under *both* deeds of trust together.[84] Situations in which only one debt is in default obviously raise complications. Also to be considered in a creditor's decision-making, but beyond the scope of this article, is the potential effect of each foreclosure alternative on recoveries from guarantors or other collateral.

It is not uncommon for one creditor to hold multiple deeds of trust on the same property. For the benefit of borrowers and lenders alike, the resulting enforcement issues merit clear and consistent treatment in the law, by statutory amendment or by appellate decision-making that is mindful of the broader context.

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ENDNOTES

* The views expressed in this article are those of the author only.

1 Cal. Civ. Proc. Code § 580d provides in part: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust."

2 *Id*. § 726(a). This section provides for a foreclosure judgment directing the sale of the encumbered property and application of the proceeds to the debt and costs. Section 726(b) provides that the foreclosure decree shall determine the defendant's personal liability for a deficiency unless a deficiency is waived by the creditor or prohibited by § 580b (which bars a deficiency judgment on vendor purchase-money obligations and certain third-party purchase-money loans). Section 726(a) also sets forth California's "one-action" rule, precluding multiple actions on a real-property-secured debt, and is interpreted to embody a "security-first" rule, requiring that the creditor proceed against the security before otherwise enforcing the debt. *See Security Pacific National Bank v. Wozab*, 51 Cal. 3d 991, 997-1000 (1990).

3 Under Cal. Civ. Proc. Code § 726(b), the plaintiff must apply for a fair-value hearing within three months after sale. A money judgment is rendered for the difference between the debt and the greater of the foreclosure sale price or the property's fair value.

4 *Id*. §§ 726(e), 729.010-729.090. If a deficiency is waived or prohibited (e.g., for purchase-money debt within the antideficiency rule of § 580b), there is no right to post-sale redemption. *Id*. § 726(e). Otherwise, the redemption period is three months if the sale proceeds were sufficient to satisfy the debt, and one year if not. *Id*. § 729.030.

5 When such provisions do exist, the two deeds of trust might be found to have merged. *See, e.g, Union Bank v. Wendland*, 54 Cal. App. 3d 393, 405-06 (1976); *but see National Enterprises, Inc. v. Woods*, 94 Cal. App. 4th 1217, 1228-30 (2001) (discussing the limited precedential value of *Wendland*'s merger analysis, in which two of the three justices did not join, and questioning the analysis itself). The concurring opinion of Justice Elkington in *Wendland* is discussed further below. S*ee infra* notes 24-26 and 35-36 and accompanying text.

6 *See., e.g., Streiff v. Darlington*, 9 Cal. 2d 42, 45 (1937); *see also* Cal. Civ. Proc. Code § 701.630 (judicial foreclosure).

7 59 Cal. 2d 35, 39-40, 43-44 (1963). However, if the junior debt is a purchase-money obligation within Cal. Civ. Proc. Code § 580b, which prohibits any deficiency recovery at all, the sold-out junior can make no recovery. *Brown v. Jensen*, 41 Cal. 2d 193 (1953). An exception is made in some non-"standard" circumstances where the junior deed of trust was subordinated to a construction loan used to develop the property for a different use. *Spangler v. Memel*, 7 Cal. 3d 603 (1972).

8 643 F.2d 661 (9th Cir. 1981).

9 Cal. Civ. Proc. Code § 580a limits a deficiency judgment to the difference between the debt and the greater of the foreclosure sale price or the property's fair market value. The action must be brought within three months after the sale.

10 643 F.2d at 668-69; *accord, Walter E. Heller Western, Inc. v. Bloxham*, 176 Cal. App. 3d 266, 273-74 (1985). See *Dreyfuss v. Union Bank*, 24 Cal. 4th 400, 407 n.2 (2000) (citing *Bank of Hemet* and *Walter E. Heller Western* without apparent disapproval). The three-month time limitation in § 580a for bringing a deficiency action has also been held to apply. *Citrus State Bank v. McKendrick*, 215 Cal. App. 3d 941 (1989).

11 Cal. Civ. Proc. Code § 580a applies "[w]henever a money judgment is sought for the balance due upon an obligation for the payment of which a deed of trust or mortgage . . . was given as security, following the exercise of the power of sale in *such* deed of trust or mortgage . . . ." (emphasis added). The court's application of § 580a in *Bank of Hemet* also necessitated a "gloss" on the computation specified in the statute such that "the entire amount of the indebtedness due at the time of sale" is read to include both senior and junior debt. 643 F.2d at 669.

12 *See Dreyfuss*, 24 Cal. 4th at 407 n.2. Section 580a may retain some literal application because § 580d applies only to a "note," suggesting that other obligations might be outside its reach. *See, e.g., Willys of Marin Co. v. Pierce*, 140 Cal. App. 2d 826 (1956) (lease); *see also Freedland v. Greco*, 45 Cal. 2d 462, 468 (1955) ("other sections of the Code of Civil Procedure which deal with deficiency judgments . . . refer to 'debts,' 'obligations,' or 'contracts' secured by a trust deed may be broader than the word 'note' used in section 580d") (dicta).

13 4 Cal. App. 4th 63 (1992).

14 *Id*. at 66 (footnote omitted).

15 *See* Cal. Civ. Proc. Code § 580d, quoted *supra* note 1.

16 4 Cal. App. 4th at 77-78 (footnote omitted).

17 *See, e.g., Evans v. California Trailer Court, Inc.*, 28 Cal. App. 4th 540, 551, 555 (1994).

18 45 Cal. 2d 462 (1955), discussed in *Simon*, 4 Cal. App. 4th at 78.

19 45 Cal. 2d at 466-67.

20 *Id*. at 467.

21 *See Walker v. Community Bank*, 10 Cal. 3d 729, 740 n.5 (1974) ("if there were separate debts with separate security, even though arising from one transaction, then section 726 has no application"); *Roseleaf*, 59 Cal. 2d 35 at 41-42; *see also Stockton Sav. & Loan Soc'y v. Harrold*, 127 Cal. 612, 620-21 (1900), discussed *infra* note 59.

22 4 Cal. App. 4th at 78 (emphasis added).

23 *See National Enterprises, Inc. v. Woods*, 94 Cal. App. 4th 1217, 1235 (2001), quoted *infra* note 30.

24 54 Cal. App. 3d 393, 407 (1976) (Elkington, J., concurring). *Wendland* held that the creditor could not recover on the junior debt after foreclosing the senior deed of trust, but the two justices who concurred in that holding disagreed on the reasoning. The lead opinion was based upon a conclusion that, because of a dragnet clause in the first deed of trust, "the second deed of trust merged into the first deed of trust." *Id*. at 405 (opinion of Molinari, J.).

25 *Id*. at 408-09.

26 *Id*. at 409.

27 94 Cal. App. 4th 1217 (2001).

28 *Id*. at 1230-31, 1238.

29 *Id*. at 1221, 1233, 1234, 1235 (seven references to "independent").

30 *Id*. at 1231-38. The court considered the loans "legitmately separate," observing: "[w]e recognize that a single lender might structure a single debt into several promissory notes in order to preserve the right to bring multiple actions. [¶] But that was not the case here because the two debts originated years apart . . . ." *Id*. at 1235.

31 *Id*. at 1230-31.

32 The court's concern in *Simon* was that the lender could "utilize its power of sale to foreclose the senior lien, thereby eliminating the Simons' right to redeem; and having so terminated that right of redemption, obtain a deficiency judgment against the Simons on the junior obligation whose security Bank, thus, made the choice to eliminate." 4 Cal. App. 4th at 77. Similarly, in a judicial foreclosure action under the senior deed of trust, there would be no right of redemption if the creditor waives a deficiency on the senior debt. Cal. Civ. Proc. Code § 726(e). *See supra* note 4.

33 Cal. Civ. Proc. Code § 726(a) requires a creditor to include in the same action all of its real property security for the obligation being sued upon; the statute does not, conversely, require a creditor to include in the action all of

its separate obligations that are secured by the same real property. *See Woods*, 94 Cal. App. 4th at 1221 ("the plain language of the statutory rule only speaks in terms of an action on 'any debt' and does not bar separate actions on separate debts"); *see also id*. at 1235 (discussing serial foreclosures); *and see Roseleaf*, 59 Cal. 2d at 39-40 ("Section 726 provides that the decree of foreclosure 'shall determine the personal liability of any defendant for the payment of the debt secured by *such* mortgage or deed of trust,' . . . referring to the mortgage or deed of trust foreclosed by the same decree."); *Stockton Sav. & Loan Soc'y v. Harrold*, 127 Cal. 612, 620-21 (1900), discussed *infra* note 59.

34 This same analysis is equally relevant to *Bank of Hemet*'s application of the fair-value rule of § 580a to an unrelated third party who holds a junior deed of trust and acquires the property at the senior's foreclosure sale, whether judicial or nonjudicial. *See, e.g.,* 1 R. BERNHARDT, CALIFORNIA MORTGAGE & DEED OF TRUST PRACTICE § 5.23 (3d ed. 2008) ("This [§ 580a] fair value limitation on high-bidding sold-out junior creditors is true whether the senior sale is judicial or nonjudicial.").

35 *Wendland*, 54 Cal.App.3d at 409-10 (Elkington, J., concurring). "Having taken title to the subject real property in that manner, [the creditor] was precluded by section 580d from also taking a deficiency judgment." *Id*. at 410.

36 *Simon*, 4 Cal. App. 4th at 66, quoted in text accompanying note 14 *supra*; *and see id*. at 77-78.

37 28 Cal. App. 4th 540 (1994).

38 *Id*. at 554-55.

39 *See Cornelison v. Kornbluth*, 15 Cal. 3d 590, 596-597 (1975).

40 4 H. MILLER & M. STARR, CALIFORNIA REAL ESTATE § 10:41 (3d ed. 2008) (footnote omitted).

41 *Id*.

42 *Id*. (footnote omitted). For example, when the beneficiary of a deed of trust receives a deed in lieu of foreclosure, merger does not necessarily occur, so the deed of trust may remain alive to be foreclosed if necessary to cut off junior liens. The presumed intent of the beneficiary, absent contrary evidence, is to keep the deed of trust alive, unmerged, for that purpose. *See, e.g., Anglo-Californian Bank, Ltd. v. Field*, 146 Cal. 644, 652-55 (1905).

43 For an extensive analysis and criticism of merger doctrine in the context of real property encumbrances, *see* Burkhart, *Freeing Mortgages of Merger*, 40 VAND. L. REV. 283 (1987). The RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 8.5 (1997) rejects the application of merger doctrine to mortgages and deeds of trust: "The doctrine of merger does not apply to mortgages or affect the enforceability of a mortgage obligation." *See id*. comment a ("In every mortgage context a court will be able to reach a just and equitable result without resort to the vagaries of the merger doctrine.").

44 *See* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 8.5 comment c (1997) ("Merger should be inapplicable to issues of personal liability for an obligation because merger is designed solely to serve the nonsubstantive purpose of simplifying property titles."); Burkhart, *supra* note 43, at 379 (courts commit a "serious analytic error when they apply merger to determine the enforceability of a debt after the lender acquires the collateral for it subject to the lender's lien").

45 *Alliance Mortgage Co. v. Rothwell,* 10 Cal. 4th 1226, 1235 (1995).

46 *See* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 8.5 comment c (1997) ("As self-evident as this proposition seems, some courts have applied merger to determine the enforceability of an obligation. For example, courts have held that an obligation is unenforceable if the mortgage securing it has merged into the fee."); Burkhart, *supra* note 43, at 378-81; *Kolodge v. Boyd*, 88 Cal. App. 4th 349 (2001), discussed *infra* in Part III(B)(2)(c).

47 *See Braun v. Crew*, 183 Cal. 728, 731 (1920).

48 *See, e.g., id*. ("[T]he land thereupon becomes, so far as the mortgagor is concerned, and as between him, the creditor, and the vendee, primarily liable for the payment of the debt. . . . [T]he relation of principal and surety springs up between the land and the mortgagor, he being the surety and the land the principal debtor. . . . He becomes at once entitled to all the protection which the law gives to sureties.") (holding that where creditor and vendee later agreed to modify the debt, the mortgagor, as surety, was exonerated). Because of the seller's status as surety, the buyer cannot compel the seller to pay, nor can the buyer recover from the seller if the creditor forecloses. Indeed, if after selling the property the seller does pay the debt, as surety it is subrogated to the creditor's rights against the collateral, *see* Cal. Civ. Code §§ 2848-49, and thus can foreclose to reimburse itself. *See, e.g., Vincent v. Garland*, 14 Cal. App. 2d 725, 727-728 (1936). But the seller, like the creditor, has no right to a money judgment against the buyer, who did not assume the debt. *See, e.g., Braun*, 183 Cal. at 731; *Vincent*, 14 Cal. App. 2d at 728; *Gursky v. Rosenberg*, 105 Cal. App. 410, 413 (1930).

49 *See, e.g., Wright v. Anderson*, 62 S.D. 444, 448-49, 253 N.W. 484, 486 (S. Dak. 1934) ("Such purchaser (whether it be the holder of the junior incumbrance or a stranger) takes the property subject to prior liens of record and in the hands of such purchaser the land itself has become the primary fund for the payment of the prior liens, and, if such purchaser is already or subsequently becomes the owner and holder of such prior liens, they are deemed (as between such purchaser and the original makers) discharged out of the land and he cannot resort to the makers' personal liability thereon."); *see* 1 G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 6.16 (5th ed. 2007).

50 62 S.D. 444, 253 N.W. 484 (S. Dak. 1934).

51 *Id*. at 449-50, 253 N.W. at 487. *See also Mid Kansas Federal Sav. & Loan Ass'n v. Dynamic Devel. Corp.*, 167 Ariz. 122, 129-30, 804 P.2d 1310, 1317-18 (Ariz. 1991), distinguishing the merger-of-title and merger-of-rights doctrines. The court in *Wright* cited the California case of *Strout v. Natoma Water & Mining Co.*, 9 Cal. 78 (1858), as recognizing the distinction between extinguishment and merger, 62 S.D. at 449, 253 N.W. at 487, but that does not seem clear.

52 *See, e.g., Wright*, 62 S.D. at 453, 253 N.W. at 489 ("[A]s between respondents [trustors] and appellant [creditor], personal liability on the first mortgage indebtedness was

extinguished when appellant, owning said indebtedness, purchased the land subject to the first mortgage upon foreclosure of the second mortgage, thereby becoming at the same time the owner of the primary fund for the payment of the prior debt.").

53 *See, e.g., id*. at 452, 253 N.W. at 488 (the purchaser is "charged with knowing, as a matter of law, that the only thing that could be offered for sale in foreclosure of the second mortgage was the equity of redemption from the first mortgage"); *compare id.* at 454-455, 253 N.W. at 489 (Polley, J., dissenting) ("this presumption is rebuttable and where the full amount of the property is paid on the second mortgage, the above rule does not apply").

54 Burkhart, *supra* note 43, at 381 n.310 ("For example, the lender may foreclose and buy at the sale if the owner is mismanaging the property. The lender justifiably may believe that, if properly managed, the property will sufficiently increase in value or will generate sufficient income to repay the debt. The lender also might acquire the property if it believes the borrower to be judgment proof, indicating that the property is the only asset available for the lender's recovery. Therefore, the rule preventing a purchaser who buys land subject to a lien from enforcing the related debt should be a presumptive, rather than a per se, rule.").

55 *See In re Richardso*n, 48 Bankr. 141, 142 (Bankr. E.D. Tenn. 1985) ("[I]f the same creditor holds both the first and second mortgages . . . [a]s to the amount the creditor can bid, foreclosing only on the second mortgage may have the same effect as foreclosing on both mortgages. The creditor can bid according to the value of the property free of both mortgages.").

56 1 G. NELSON & D. WHITMAN, *supra* note 49, § 6.16 (footnotes omitted) (discussing post-foreclosure recovery on *both* debts). In California, after nonjudicial foreclosure under the junior deed of trust, further recovery on the junior debt is barred by Cal Civ. Proc. Code § 580d regardless of the value of the property.

57 *Mid Kansas Federal Sav. & Loan Ass'n v. Dynamic Devel. Corp.*, 167 Ariz. 122, 130-131, 804 P.2d 1310, 1318-19 (Ariz. 1991). "The primary issue in the doctrine of merger of rights is whether the lender would be unjustly enriched if he were permitted to enforce the debt." *Id*. at 1318. The property's value exceeded the debts, and the court thus held that merger of rights would occur and the senior debt would be extinguished. *Id*. at 1319-20. *See also Board of Trustees v. Ren-Cen Indoor Tennis & Racquet Club*, 145 Mich. App. 318, 377 N.W.2d 432 (1985), *appeal denied*, 425 Mich. 875, 388 N.W.2d 680 (1986).

58 RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 8.5 comment c(2) and Reporter's Note to comment c(2) (1997); *see, e.g., In re Richardso*n, 48 Bankr. 141 (Bankr. E.D. Tenn. 1985).

59 *Stockton Sav. & Loan Soc'y v. Harrold*, 127 Cal. 612, 621 (1900). *Stockton* involved one mortgage securing two separate obligations. The court concluded that it was permissible to judicially foreclose the mortgage to enforce one of the obligations yet still keep the mortgage alive to foreclose later with respect to the other. In effect, this treated the one mortgage as if it were two, with the junior being foreclosed first. The court opined that the one-action rule did not preclude this approach "when required by the circumstances." *Id*. at 621. The court then offered this caution: "We may suggest that the [creditor] have advice of counsel before becoming himself the purchaser of this tract at the sale under the first foreclosure, lest by such purchase he hazard the extinguishment of his remaining lien therein and with it the secured debt. We intimate no opinion whether such result would follow." *Id*.

60 *See* Cal. Civ. Proc. Code §§ 580a, 580b, 580d, 726(a), 726(b).

61 15 Cal. 3d 590 (1975).

62 *Id*. at 606-07.

63 *Id. See also Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1238-39 (1995) ("If the full credit bid is successful, i.e., results in the acquisition of the property, the lender pays the full outstanding balance of the debt and costs of foreclosure to itself and takes title to the security property, releasing the borrower from further obligations under the defaulted note. . . . [¶] Under the 'full credit bid rule,' when a lender makes such a bid, it is precluded *for purposes of collecting its debt* from later claiming that the property was actually worth less than the bid. . . . Thus, the lender is not entitled to insurance proceeds payable for prepurchase damage to the property, prepurchase net rent proceeds, or damages for waste, because the lender's only interest in the property, *the repayment of its debt*, has been satisfied, and any further payment would result in a double recovery.") (emphasis added).

64 *Cornelison*, 15 Cal.3d at 607 (recovery is "an amount not exceeding the difference between the amount of his bid and the full amount of the outstanding indebtedness immediately prior to the foreclosure sale"); *Alliance Mortgage*, 10 Cal. 4th at 1242-43. For that reason, what is often called the "full credit bid rule" is more easily understood as simply the "credit bid rule." *See, e.g., Track Mortgage Group, Inc. v. Crusader Insurance Co.*, 98 Cal. App. 4th 857, 861 (2002) ("The lender's contract damages are limited to the difference between the amount secured by the deed of trust and the amount of the lender's credit bid at the foreclosure sale (the credit bid rule)."); 1 R. BERNHARDT, *supra* note 34, § 2.69 ("the 'rule' is just an artifact of the principle that a lender who successfully bids at a foreclosure sale is paid off to the extent of the successful bid").

65 *See Alliance Mortgage*, 10 Cal. 4th at 1241-45; 1 BERNHARDT, *supra* note 34, §§ 2.91-2.99.

66 10 Cal. 4th at 1246-47.

67 *Cornelison*, 15 Cal. 3d at 606; *Alliance Mortgage*, 10 Cal. 4th at 1242.

68 35 Cal. App. 4th 1609 (1995).

69 88 Cal. App. 4th 349 (2001).

70 35 Cal. App. 4th at 1616-17.

71 *Id*. at 1615 n.4.

72 *Id*. at 1617.

73 *Id*.

74 The logic supporting that conclusion is not apparent, and the court did not explain it. The court supported its dicta only by citation to *Cornelison*, 15 Cal. 3d at 607, for the proposition that "in action for bad faith waste, lender could

recover difference between unpaid balance on the debt and amount of credit bid," and to *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, 66 Cal. App. 3d 101, 140 (1977), for the proposition that "in fraud action, lender could recover deficiency remaining after lender repurchased property at nonjudicial foreclosure sale." *Romo*, 35 Cal. App. 4th at 1616-17. *Romo* seems to have transposed these holdings, which dealt with the debt actually involved in the foreclosure sale, to the senior debt.

75 In *Romo* itself, recovery against the trustor would have been precluded in any event because both of the debts were purchase-money obligations, and thus were within the anti-deficiency protection of Cal. Civ. Proc. Code § 580b.

76 88 Cal. App. 4th 349 (2001).

77 *Id*. at 360-61. In fact, this characterization of *Romo* is not accurate. A footnote in *Romo* explicitly observed that merger of title had occurred, extinguishing the *lien* of the senior deed of trust. 35 Cal. App. 4th at 1617 n.8 ("When plaintiff acquired the property at the trustee's sale, she took the property subject to the senior liens. Because plaintiff was herself the lienholder on the second deed of trust, that lien was merged with her title and thereby extinguished."). But in *Romo* the court proceeded to decide the status of the senior *debt* along the lines described above, *see supra* notes 72-75 and accompanying text, not based upon merger of title.

Kolodge also criticized *Romo* as being in conflict with *Evans v. California Trailer Court, Inc.*, 28 Cal. App. 4th 540 (1994), discussed in text accompanying notes 37-38 *supra*. This criticism too is inaccurate. *Evans* dealt with a full credit bid of the senior debt at the senior deed-of-trust foreclosure sale, holding that this bid should not also be considered a full credit bid of the junior debt. *Romo*, on the other hand, dealt with a full credit bid of the junior debt at the junior deed-of-trust foreclosure sale, holding that it rendered the senior debt unrecoverable. The two situations are plainly distinguishable: the purchaser at a senior sale takes title free of a junior encumbrance, but the purchaser at a junior sale takes title subject to a senior encumbrance. The latter fact was the basis for *Romo*'s holding. *See* 35 Cal. App. 4th at 1617, quoted in text accompanying note 72 *supra*.

78 88 Cal. App. 4th at 362 (referring to merger of "the liens *and obligations*" of plaintiff's senior loans) (emphasis added).

79 *Id*. at 362 (citation and internal quotation marks omitted).

80 *Id*. ("The record provides no reason the liens and obligations relating to appellant's [senior] loans should be deemed to have merged in the title appellant acquired at the trustee's sale [under its junior deed of trust], because that would shield a third party from liability for tortious conduct, which would defeat the rights of the buyer and be inequitable. For this reason, an intent of the parties to the [promissory] notes that merger would not occur should be implied.").

81 *Id*. at 362-63.

82 *Id*. at 363.

83 *Id*. at 370 ("Use of the full credit bid rule to conclusively establish that the debt has been fully satisfied makes sense only when applied for the benefit of the borrower in connection with obligations arising under the note. Application of the rule to bar claims against tortfeasors not party to the note goes far beyond the purpose of the rule and is simply irrational."); *see also id*. at 372 (our analysis "considers the full credit bid rule inapplicable to *all* tort claims against third parties, even those for simple negligence"); *compare Track Mortgage Group, Inc. v. Crusader Ins. Co.*, 98 Cal. App. 4th 857, 866 (2002) (*Kolodge* "stand[s] for nothing more than that the full credit bid rule is inapplicable where the lender is fraudulently or negligently induced to make the bid").

84 *See* 1 G. NELSON & D. WHITMAN, *supra* note 49, § 6.16 ("[I]f judicial foreclosure is utilized, the court could order both mortgages foreclosed simultaneously. If the mortgagee purchased at that sale and the sale price was for less than the combined mortgage debt, there is no reason why the mortgagee should not be able to obtain a deficiency decree for that difference. The merger concept would simply be inapplicable. This approach will probably not work, however, with power of sale foreclosure. Although a court clearly can approve such a procedure, it is doubtful that the person holding a power of sale would have similar authority, if for no other reason than that power of sale legislation does not ordinarily provide for the foreclosure of more than one mortgage at a time.").

Unlawful Detainer Actions: The Technical "Nuts and Bolts"

By Jaime C. Uziel and Robert J. Sheppard

I. INTRODUCTION

In its ideal form, an unlawful detainer action (also known as an eviction lawsuit) is a rapidly moving process which, when utilized flawlessly by the landlord, results in the expedited removal of the tenant from the rented premises.

As landlord practitioners well know, however, unlawful detainer actions are fraught with potential traps and pitfalls, which tenant practitioners can use to their clients' advantage in order to defeat the eviction action or to cause extensive delays. Such tenant-caused delays often position the parties to facilitate a settlement, primarily because the evicting landlord wants to minimize additional attorneys' fees and is aware that it could lose the case at trial, in which event the tenant would remain in possession of the premises and the landlord would pay the tenant's attorneys' fees, if there is an attorney fee clause in the written rental agreement.

To avoid such consequences, landlords (and landlord practitioners) must take great care to ensure that their eviction notices and legal pleadings are defect-free and fully comply with all laws applicable to the unlawful detainer process.

Tenants and tenant practitioners should closely scrutinize landlord notices and legal pleadings to find defects, and should determine whether the landlord has complied with all applicable eviction-related legal requirements and prerequisites.

Like all litigation, unlawful detainer actions resemble chess games, requiring strategic moves at every juncture. What makes unlawful detainer actions unique is their accelerated nature (because they are entitled to preference in the court system, and must be set for trial, upon request, within 20 days of the case being "at-issue"—i.e., after all defendants have filed Answers in the action).

This primer provides only the basics of unlawful detainer litigation. To avoid (or exploit) the pitfalls associated with unlawful detainer litigation, both landlord and tenant practitioners must educate themselves, as comprehensively as possible, on all applicable local, state, and federal laws.

In particular, local rent ordinances (such as those which exist in San Francisco, Berkeley, Oakland, Los Angeles, West Los Angeles, and Santa Monica) include strict rules that govern the unlawful detainer process, often setting forth very specific grounds on which landlords may evict residential tenants. Attorneys practicing in areas where local ordinances apply must familiarize themselves with (and be sure to follow) the rules and procedures set forth in those ordinances.

This primer does not draw a distinction between residential and commercial evictions. For the most part, the same rules apply. However, there are some differences, which should be reviewed on a case-by-case basis.

II. AN OVERVIEW OF THE UNLAWFUL DETAINER ACTION

A. Summary of Unlawful Detainer Proceedings

An unlawful detainer action is an expedited, summary procedure that is generally limited to the issues of possession of the rented premises and related damages. As such, a landlord who wishes to evict a tenant will normally proceed by means of the unlawful detainer process (although there are other procedures potentially available to the landlord).

Typically, service of an eviction notice on the tenant is a prerequisite for filing an unlawful detainer action. Generally, a three-day notice is used for a "fault eviction," i.e., when the tenant has breached the lease or violated a statutory obligation.

A three-day notice for non-payment of rent or for breach of the rental agreement must be stated "in the alternative", i.e., the notice must require that the tenant either vacate the premises or pay the unpaid rent/cure the breach within the three-day period. If the tenant fails to comply within the three-day period, then the landlord may file an unlawful detainer action against the tenant.[1]

Subject to local rental ordinances, a three-day notice for commission of waste or nuisance, use of the premises for an illegal purpose, or unlawful subleasing or assignment, need not be stated in the alternative. In these situations, the three-day notice will require that the tenant vacate the premises within the three-day period. If the tenant fails to vacate the premises within the three-day period, then the landlord may file an unlawful detainer action against the tenant.[2]

Generally, 30-day or 60-day notices are required for "no fault" evictions. That is, a landlord generally may evict a month-to-month tenant without cause (subject to local rent ordinances or housing regulations) by serving the tenant with a 30-day notice (if the tenant has been in possession for less than one year) or a 60-day notice (if the tenant has been in possession for one year or more).[3]

An eviction notice is not needed—and a landlord may proceed immediately to an unlawful detainer action—if the tenant remains in possession after the expiration of a fixed-term lease, and the tenancy is not under the jurisdiction of a rent ordinance containing "just cause" eviction provisions.

The initial pleadings of the landlord's unlawful detainer action must include the Summons and Complaint. The landlord files the Complaint in court, and the court issues a Summons related to the Complaint. The landlord then must properly serve the Summons and Complaint on the tenant (usually by means of a process server).

The landlord should also prepare and properly serve a Judicial Council-approved pleading document entitled "Prejudgment Claim of Right of Possession," which is designed to ensure that occupants of the premises other than the known tenant are also evicted.[4]

The unlawful detainer action normally seeks possession of the premises, rent through the date on which the tenancy is terminated, and "holdover rental damages" through the date on which judgment is entered. The Complaint may include a request for attorneys' fees, but only if there is an attorneys' fee provision in the rental agreement, and the rental agreement is attached as an exhibit to the Complaint.

Because unlawful detainers are "summary proceedings," additional causes of action by the landlord and a Cross-Complaint by the tenant are precluded.

If the tenant surrenders possession of the premises before the action is filed, the landlord may not viably allege an unlawful detainer action and must pursue a damages action instead.[5]

If the tenant surrenders possession of the premises after the action is filed, the court will convert the action to a normal civil action, after which the landlord may amend to assert other causes of action, and the tenant may cross-complain against the landlord.

Once the case is "at-issue" (i.e., all defendants have filed Answers to the Complaint), either party may file a Memorandum to Set the case for trial, at which time the court is required to set the case for trial within 20 days after the date the Memorandum to Set was filed[6].

The parties to an unlawful detainer action are entitled to conduct discovery, subject to shortened time deadlines and other nuances unique to the unlawful detainer process.

In many jurisdictions, the court will require that the parties participate in a settlement conference prior to trial.

If the tenant prevails at trial, the tenant will be allowed to remain in possession of the premises and may be entitled to an award of attorneys' fees (depending on whether there is an attorney fee clause in the rental agreement). If the landlord prevails at trial, the court will issue a judgment (for possession, and possibly for damages and/or attorneys' fees) and a Writ of Possession (and Execution), which the landlord can use to effect an actual eviction by the sheriff.

A tenant may bring post-trial motions, may appeal the judgment, and may ask the court to stay the execution until the tenant's motions or appeal are decided. If the stay is denied, the tenant may seek an Extraordinary Writ to obtain relief from the Appellate Division of the Superior Court or from the Court of Appeal.

B. Shortened Time Frame of Unlawful Detainer Actions

Typical litigation procedures are simplified and deadlines are shortened in unlawful detainer actions in order to expedite the action. Examples of these modifications include:

- defendants (i.e., tenants) must appear in the action by filing a responsive pleading in court within five days (rather than 30 days) after service of the Summons and Complaint.[7]
- there generally is no right to file or assert a Cross-Complaint.
- unlawful detainer actions have trial precedence over most other civil actions.[8]
- the deadline to respond to most discovery requests is five days (rather than 30 days).
- trial must be set within 20 days after the "At-Issue Memorandum" (or Memorandum to Set) is filed in court.[9]
- a stay on appeal is discretionary with the trial court judge.[10]

C. Strict Compliance With Statutory Requirements

Unlawful detainers are summary proceedings in which a tenant's procedural rights are limited, but a forfeiture of the tenant's right to possession is at stake. For these reasons, courts strictly construe unlawful detainer statutory procedures and require that landlords strictly comply with all statutory requirements related to the unlawful detainer process.[11]

Moreover, the landlord's strict compliance with the statutory notice requirements is a prerequisite to invoking the summary procedures of unlawful detainer.[12]

Landlords frequently fail to comply with statutes (or local rules) regarding eviction notices. Often, the notice is defective on its face or the notice is improperly served on the tenant. In addition, landlords often prepare defective Summonses, which tenants may attack by way of a Motion to Quash. Another common area of landlord error is the Complaint, which may be attacked by Motion to Strike or by Demurrer.

To avoid costly delays and possible dismissal of the action, landlords and landlord practitioners must take care to make sure their notices and pleadings are defect-free.

III. TYPICAL PROCEDURES AND RESPONSES WITHIN THE UNLAWFUL DETAINER ACTION

A. Service of an Eviction Notice

In most circumstances, an eviction notice (i.e., a three-day notice, a 30-day notice, or a 60-day notice) must be served on the tenant to support an unlawful detainer action. This can be a three-day notice for cause, a three-day Notice to Pay or Quit, a three-day Notice to Cure a Breached Covenant or Quit, a 30-day notice for cause, a 30-day notice without cause, a 60-day notice for cause, or a 60-day notice without cause, depending on the circumstances. In some situations (e.g., expiration of a fixed-term tenancy, death of the tenant, eviction of a resident-employee), no notice is required before the filing of an unlawful detainer action. Different laws often apply in jurisdictions with rent ordinances or if the property is government-owned or -subsidized.

Cal. Code Civ. Proc. Section 1l61 sets forth the situations in which a three-day notice must be served on the tenant prior to filing a Complaint in an unlawful detainer action. Requirements regarding the contents, timing, and method of service of the three-day notice are set forth in Cal. Code Civ. Proc. Sections 1l61-1162. Because the landlord must strictly comply with the summary procedures of unlawful detainer, if the tenant can show that any part of the notice is defective, the court must dismiss the action. The landlord must then "start over" by serving a new notice and filing a new Complaint in order to evict the tenant.

Landlords may not file an unlawful detainer Complaint until after the notice period has expired. The notice period may be extended, depending on the type of notice and the manner in which it was served.

In appropriate situations, a landlord can bring an action in ejectment or to quiet title without service of a written notice on

the tenant. However, such actions do not have priority on the court's calendar.[13]

When the premises are subsidized or owned by the government, Federal law (and sometimes local law) imposes different notice requirements, affecting the contents, timing, and method of the service of notices.

When the premises are located in a rent-controlled or eviction-controlled city or county, whether the landlord may evict, how much notice is required, and the contents and other details related to the written notice are likely subject to special rules (which usually favor tenants).

1. Tenancy Termination Requiring At Least three-day Notice

The landlord must give at least a three-day notice where:

- the tenant has defaulted in the payment of rent;[14]
- the tenant has failed to comply with a condition or a covenant of the lease, including covenants related to subletting and assignment;[15]
- the tenant has committed (or is committing) a nuisance;[16]
- the tenant has committed waste;[17]
- the tenant uses the premises for an unlawful purpose;[18] or
- the premises have been sold under execution, mortgage, or trust deed.[19]

2. Tenancy Termination Requiring At Least 30-Day or 60-Day Notice

In the following situations, the landlord must give at least a 30-day or 60-day notice:

- termination of a periodic tenancy without a tenant default;[20]
- termination of the tenancy of a sole lodger who holds-over in an owner-occupied dwelling;[21] and
- termination of a tenancy at will.[22]

3. Tenancy Termination Requiring Other Notice

The landlord must give special notice if:

- the tenant has abandoned the property (in which case, the landlord must give 15-days' notice, if personally served, or 18-days' notice, if served by mail, of the landlord's reasonable belief that the tenant has abandoned the property, prior to re-taking possession of the premises);[23]
- the premises are taken under eminent domain;[24] or
- the premises are to be removed from rental housing under the Ellis Act (in which case a 120-day notice is required).[25]

4. Tenancy Termination Requiring No Notice

In the following situations, the tenancy terminates automatically, and the landlord may file an unlawful detainer action without first serving a prerequisite notice:

- the lease term has expired.[26] (Expiration may occur either automatically at the end of a fixed term or after termination by means of a 30-day or 60-day notice under Cal. Civ. Code Section 1946 or 1946.1.);
- death of the tenant;[27]
- termination of the employment of a resident employee;[28]
- the tenant has given written notice (which has been accepted by the landlord in writing), terminating the tenancy under Cal. Civ. Code Section 1946 or 1946.1;
- the landlord and tenant have agreed in writing to terminate the tenancy (also known as an "offer of surrender"[29]); or
- destruction of the premises.[30]

5. Method of Service of the Eviction Notice

Under Cal. Code Civ. Proc. Section 1162, the eviction notice may be served on the tenant in one of three ways:

- personal service;
- substitute service (i.e., if the tenant is absent from the residence and from the tenant's usual place of business, by leaving a copy with someone of suitable age and discretion at either place, and mailing a copy addressed to the tenant at the residence); or
- posting and mailing (i.e., if the residence and business cannot be ascertained, or a person of suitable age or discretion cannot be found, then the notice may be served by posting a copy in a conspicuous place on the property and delivering a copy to anyone found residing there, and mailing a copy addressed to the tenant where the property is situated).

Service on a subtenant may be made in the same manner.[31]

B. Filing and Service of the Unlawful Detainer Action

1. Summons and Complaint

The Judicial Council has approved a form Summons that must be used in unlawful detainer actions.[32]

The Judicial Council has also approved a form Complaint that may be used in unlawful detainer actions.[33] Alternatively, landlord practitioners may use pleading-based Complaints. Such tailored Complaints are easier to customize; however, they are generally more susceptible to attack by means of Demurrer or Motion to Strike than the Judicial Council forms.

In general, the Complaint must allege: (1) the plaintiff's legal capacity to sue; (2) the existence of the requisite relationship between the plaintiff and the defendant; (3) whether the lease or rental agreement is written or oral; (4) facts showing that the action is commenced in the proper county and court (i.e., that venue is proper); (5) a sufficient description of the premises; (6) that the required notice was served on the tenant and the notice period expired; and (7) facts to support the plaintiff's right to recover possession of the premises from the defendant. Failure to properly allege these elements will subject to the Complaint to attack by way of Demurrer or Motion to Strike.

2. Prejudgment Claim of Right of Possession

Often, persons other than the known tenants occupy the premises. If the landlord pursues an unlawful detainer action against the known tenants, without also taking steps to assert a claim of the right to possession against other occupants, the other occupants may have the right to continue occupying the premises.

The landlord's right to retake possession from the other occupants will depend on whether the landlord has properly served a "Prejudgment Claim of Right of Possession."

Cal. Code Civ. Proc. Section 415.46 provides a procedure for removing occupants who are not tenants. When the Complaint and Summons are served on the tenant, the landlord may also have other occupants served with a blank Judicial Council form entitled "Prejudgment Claim of Right of Possession." The manner in which this document is served is complicated and is detailed in Cal. Code Civ. Proc. Section 415.46.

Any occupant who has been served with the Prejudgment Claim of Right of Possession and who wishes to contest the eviction must file the completed form in court within 10 days of the date it was served (including Saturdays and Sundays, but excluding other court holidays). If the 10th day falls on a Saturday, Sunday, or holiday, the occupant has until the following court day to file.[34] The claimant is then added as a defendant to the unlawful detainer action and has a further five days within which to respond to the Summons and Complaint.

This time period may or may not coincide with the deadlines applicable to the tenant. If service on a tenant is by mail (by means of one of the processes set forth in Cal. Code Civ. Proc. Sections 415.20, 415.30, 415.40, and 415.45), the tenant has 15 days to respond (10 days because of the mailing, and an additional five days to respond[35]). If the tenant is personally served, he or she has only five days to respond. Whether the occupant is personally served or served by substituted service, he or she has 10 days within which to file a claim, and then another five days within which to file a response.

3. Methods of Service

The Summons and Complaint may be served as follows:

- by personal delivery;[36]
- when after reasonable diligence personal delivery cannot be accomplished, by substituted service;[37]
- when service is on a defendant other than a natural person (such as a corporation), by substituted service;[38]
- by mail service (by means of the "acknowledgment of receipt of Summons" method);[39]
- by posting and mailing (pursuant to court order) when service described above is not possible even with reasonably diligent efforts;[40] or
- when the defendant cannot with reasonable diligence be served by one of the methods described above, or lives out of state, by a court order for publication of the Summons (with copies mailed if the tenant's address can be ascertained).[41]

C. Default Judgment Against Tenant

When unlawful detainer actions are uncontested, courts will typically enter Default Judgments (upon request by landlords) against the non-responding tenants.[42] A Default Judgment may be set aside and vacated based on several grounds (e.g., a motion under Cal. Code Civ. Proc. Section 473 due to the tenant's or the tenant's attorney's mistake, inadvertence, surprise, or excusable neglect).

If a Default Judgment is entered, a tenant may:

- move to set aside the Default Judgment under Cal. Code Civ. Proc. Section 473 on the basis that the judgment is void;
- move to set aside the Default Judgment under Cal. Code Civ. Proc. Section 473.5 on the basis that service of the Summons did not result in actual notice to the tenant;
- move to set aside the Default Judgment under Cal. Code Civ. Proc. Section 473 on the basis of mistake, inadvertence, surprise, or excusable neglect; and/or
- file a motion or initiate a separate equitable action to vacate the Default Judgment on the grounds of fraud or mistake.

D. Motion to Quash

If any part of the Summons (or service of the Summons) is defective under either the California Constitution or the statutes governing service of process, the tenant's attorney may file a Motion to Quash service of the Summons due to lack of jurisdiction.[43]

Failure to bring a Motion to Quash under Cal. Code Civ. Proc. Section 418.10 at the time of the filing of a Demurrer or Motion to Strike constitutes a waiver of the issues of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution.[44]

By filing a Motion to Quash, a tenant will delay the unlawful detainer process, which can be helpful to the tenant. If the tenant prevails at the hearing on the Motion to Quash, the landlord will have to properly re-serve a Summons on the tenant in order to continue with the unlawful detainer action.

E. Demurrer and Motion to Strike

Tenants can cause time delays and gain tactical advantages by filing Demurrers and Motions to Strike, which challenge the legal sufficiency of the Complaint and any documentation (e.g., eviction notices, etc.) attached to the Complaint. This is why it is so important for landlords to prepare Complaints which are free of defects.

Grounds for a General Demurrer for failure to state a cause of action include:

- improper venue;
- the premises are improperly described;
- the landlord-tenant relationship is improperly pled;
- failure to allege a default in the rent and amount due;
- the Complaint seeks rent due for a period more than one year prior to service of the eviction notice;
- failure to allege a breach of covenant and a demand that the tenant perform or quit;
- failure to allege a violation of the lease or a statutory

provision, when the Complaint alleges waste, nuisance, or use of the premises for an unlawful purpose;

- failure to allege that the fixed term of the lease has expired and that the tenant's continued possession is without the landlord's permission (or is wrongful or in bad faith);
- if the tenancy is periodic, a failure to allege the service of a proper notice, and that the notice period has expired;
- failure to allege that the tenant remains in possession; and
- failure to comply with the local rent control ordinance, and failure to allege such compliance.

Grounds for a Special Demurrer include:

- an improper defendant is named;
- an improper plaintiff is asserting the action (i.e., lack of legal standing);
- uncertainty (e.g., inconsistency between allegations in the Complaint and allegations in the eviction notice);
- the tenancy is based on an oral agreement, but the Complaint alleges a breach of a covenant; and
- the parties have another action pending on the same cause of action.

Grounds for a Motion to Strike include:

- the Complaint contains irrelevant or redundant matters;
- the Complaint prays for a declaration of forfeiture, but the Complaint does not allege or demonstrate that the eviction notice indicated the landlord's election to declare a forfeiture;
- the Complaint seeks damages not caused by the unlawful detention itself;
- punitive damages are sought, but the Complaint fails to allege facts constituting malice;
- accrued rental damages for the post-Complaint period are sought, but the reasonable rental value is not alleged;
- attorneys' fees are sought, but the Complaint fails to allege the lease provision on which the request is based; and
- the Complaint is unverified or improperly verified.

F. Tenant's Answer

In lieu of filing a motion (or multiple motions), or after all motions are heard and decided, the tenant will typically file an Answer to the Complaint. In the Answer, the tenant will usually deny certain allegations set forth in the Complaint and will assert affirmative defenses. In general, if the tenant prevails at trial on any one of his or her affirmative defenses, the tenant will be the prevailing party and will be permitted to remain in possession of the premises.

1. The Tenant's Denials

In the Answer, tenants commonly assert denials to specific allegations set forth in the Complaint. For example, if the Complaint alleges facts constituting a nuisance, the tenant is likely to allege that a nuisance was not created; if the Complaint alleges non-payment of rent, the tenant is likely to assert that rent was paid; etc. Because such issues are determinative of the plaintiff-landlord's *prima facie* case, the landlord has the burden of proof on these issues.

2. The Tenant's Affirmative Defenses

In the Answer, tenants commonly assert affirmative defenses, for which the tenant bears the burden of proof at trial.

Possible affirmative defenses include the usual equitable defenses such as waiver, estoppel, unclean hands, and laches, as well as the following:

- the attempted eviction violates anti-discrimination laws;
- the attempted eviction is retaliatory;[45]
- the landlord is guilty of fraud;
- the rental agreement was an adhesion contract;
- the landlord breached an express promise in the lease;
- the landlord breached the implied covenant of good faith and fair dealing;
- the landlord is guilty of applicable code violations;
- the landlord breached the implied warranty of habitability (applies to residential tenancies only);
- the landlord is guilty of other statutory violations;
- the attempted eviction is without "just cause" (in rent ordinance jurisdictions or government-owned or subsidized property); and
- the notice is defective or was improperly served.

3. The Implied Warranty of Habitability - The Residential Tenant's Most Common Affirmative Defense

Almost invariably, residential tenants who are being evicted for non-payment of rent will assert as a defense the landlord's breach of the implied warranty of habitability.

The implied warranty of habitability doctrine provides that landlords of residential dwelling units are deemed to warrant that the property is, and will be, repaired and maintained in a condition that meets certain minimum standards of habitability. Failure to meet those minimum standards constitutes a breach by the landlord of that warranty. This doctrine was made a part of the common law by *Green v Superior Court*[46] and has been codified in Cal. Code Civ. Proc. Section 1174.2 and Cal. Civ. Code Section 1941.1.

If the landlord has breached the implied warranty of habitability, the tenant may assert that breach as a defense to an eviction action based on non-payment of rent. If the tenant prevails on this defense, the tenant will be permitted to remain in possession of the premises, but the tenant must pay to the landlord the reasonable rental value of the premises in its untenantable state through the date of trial.[47]

G. Discovery

The parties to an unlawful detainer action are entitled to conduct discovery.

The four statutory discovery procedures most often used in unlawful detainer proceedings include:

- oral depositions of witnesses and parties, including a demand to produce documents or things at a deposition;
- written interrogatories (Judicial Council form interrogatories and special interrogatories) to adverse parties;
- demands for inspection of an adverse party's records, things, and places (including a site inspection of the tenant's unit, which may be very helpful in cases based on nuisance, waste, unlawful purpose, etc.); and
- requests for Admission.

Unlawful detainer discovery is subject to shortened time deadlines. Generally, responses are due within five days after the discovery is hand-served (five days are added for mailing, pursuant to Cal. Code Civ. Proc. Section 1013). Both landlord and tenant practitioners can use the shortened deadlines to apply pressure to the opposing side in order to gain leverage to negotiate a favorable settlement for his or her client.

H. Summary Judgment

Either party in an unlawful detainer action may move for summary judgment.[48] The purpose of the summary judgment procedure is to determine whether a trial is necessary to resolve the dispute.[49] The court should grant the motion if the papers submitted show that the moving party is entitled to judgment as a matter of law because there is no triable issue of material fact.[50] Summary judgment is also appropriate when there are no disputed facts and the sole question before the court is one of law.[51]

If a landlord fails to strictly comply with the statutory prerequisites and procedures of unlawful detainer, it may be wise for a tenant to seek the summary judgment remedy. Conversely, if a tenant lacks evidence to support its defenses, it may be prudent for the landlord to file a Motion for Summary Judgment.

Summary Judgment is difficult to obtain in cases in which retaliatory motive or good cause for an eviction is at-issue.[52]

The prevailing party in a Motion for Summary Judgment may be entitled to an award of its attorneys' fees, depending on whether there is an attorneys' fee provision in the lease.

Where appropriate, a party that has summary judgment entered against it might have that judgment set aside under Cal. Code Civ. Proc. Section 473 for inadvertence or excusable neglect.[53]

I. Trial

1. The Landlord's Prima Facie Case

To prevail at trial, the landlord must first make out a *prima facie* case by offering evidence of the landlord-tenant relationship, the termination of the relationship (usually through service of a proper three-day, 30-day, or 60-day notice), and the tenant remaining in possession after expiration of the notice.[54] Failure to prove any of the above elements, if in issue, may result in a dismissal of the action.[55]

2. Bases for Defending an Unlawful Detainer Action

The tenant's defense in an unlawful detainer trial based on a three-day, a 30-day, or a 60-day notice generally turns on the disposition of the tenant's denials and affirmative defenses. (*See* Section III.F above.)

When the tenant's Answer presents admissible defenses, the tenant is entitled to a jury trial.[56]

J. Judgment

A landlord who wins the unlawful detainer action may obtain a judgment for the following:

- restitution of the premises (i.e., possession);
- accrued rent through the date the tenancy was terminated;
- holdover rental damages through the date of judgment; and
- forfeiture of the lease (if notice of forfeiture was included in the eviction notice and requested in the Complaint).

The judgment may also, in certain circumstances, award the landlord punitive damages, interest, attorneys' fees, and costs.

If the tenant wins the unlawful detainer action, the tenant will be allowed to remain in possession of the premises, but may be required to pay the landlord a reasonable amount of rent for the period preceding and including the date on which judgment is entered.

For extreme hardship, the tenant may obtain relief from forfeiture pursuant to the provisions of Cal. Code Civ. Proc. Sections 1174 and 1179. This remedy affords the tenant an opportunity to stay in possession on condition that the tenant compensate the landlord for any monies owed (i.e., rent and attorneys' fees to the landlord). Such a remedy requires a motion, a sworn declaration, and an offer by the tenant to compensate the landlord.

Defects in the judgment should be attacked by a motion to set aside the judgment under Cal. Code Civ. Proc. Section 663.[57] Alternatively, the tenant can move to amend the judgment.

K. Writ of Possession and Execution

When the tenant does not comply with a judgment by vacating the premises and paying any rent and damages awarded, the landlord must apply to the court for a Writ of Possession to have the tenant removed by the marshal or sheriff.[58] That Writ may be issued on the landlord's request immediately after entry of the judgment granting possession to the landlord. Therefore, any tenant actions to stay enforcement of the judgment (by means of post-trial motions, appeals, and/or writs) should be taken as soon as possible after judgment is entered. The Writ of Possession may also be enforced as a Writ of Execution to satisfy any money judgment included in the judgment for possession.[59] The Judicial Council's optional form combines a Writ of Execution with a Writ of Possession.

To be valid, the Writ must contain the following information required by Cal. Code Civ. Proc. Section 712.020, which covers enforcement of non-monetary judgments generally, and Cal. Code Civ. Proc. Section 715.010, which concerns writs for possession of real property:

- a description of the real property;[60]

- a statement that the sheriff will remove the occupants if the property is not vacated within five days;[61]
- a statement that personal property left on the premises will be sold;[62]
- the date on which the Complaint was filed;[63]
- the date or dates on which the court will hear objections to enforcement of a judgment that are filed under Cal. Code Civ. Proc. Section 1174.3;[64]
- the daily rental value as of the date the Complaint for unlawful detainer was filed;[65] and
- if the Summons, Complaint, and Prejudgment Claim of Right of Possession were served in accordance with Cal. Code Civ. Proc. Section 415.46, the Writ must contain a statement that it applies to all tenants; subtenants, if any; named claimants, if any; and any other occupants of the premises.[66]

L. Posting of Eviction Notice at Premises by Sheriff or Other Levying Officer

After the court issues a Writ of Possession, landlord practitioners should promptly deliver the original Writ to the sheriff's office so that the sheriff's eviction can be scheduled as soon as possible. Once the sheriff's eviction is scheduled, the sheriff will post at the premises a notice advising the tenant that he or she will be evicted and setting forth the date and time of the eviction as well as other information required by statute.

M. Post-Trial Motions, Appeals, Stays

When the tenant has appeared in court to contest the action and has lost, several post-trial motions, including a Motion to Stay Execution of the Judgment, are available. Usually, however, a stay of execution is discretionary with the trial judge, except for an automatic five-day stay required under very narrow circumstances for redemptive purposes.[67]

1. Post-Trial Motions

Depending on the circumstances, the following post-trial motions are generally available to the tenant:

- Application for a five-day statutory stay of execution. This gives the tenant five days' delay in the issuance of a Writ of Possession. If the Complaint does not seek forfeiture, the tenant can be reinstated upon the payment of rent and damages due. The court must grant a five-day stay if all of the following elements are met: (a) the eviction is for non-payment of rent; (b) the rental agreement has not on its face expired; (c) the three-day notice did not declare a forfeiture of the rental agreement; and (d) the rental agreement is in writing, is for a term exceeding one year, and does not contain a forfeiture clause.
- Application for a discretionary stay of execution. This is used to obtain a temporary stay of execution of the judgment pending the hearing on a post-trial motion or in hardship circumstances.
- Motion for a judgment notwithstanding the verdict. This is used to grant a judgment contrary to the verdict when a directed verdict should have been entered.
- Motion for a new trial. This is used to seek re-examination of an issue of fact in the same court after a decision by the court or jury.
- Motion to set aside and vacate the judgment. This is used when the judgment is not properly supported by the evidence.
- Application for relief from forfeiture. This is used to seek restoration of the tenant to the premises upon the performance of certain covenants when the tenant would otherwise suffer substantial hardship.
- Application for stay of the judgment pending an appeal.[68]

2. Appeals

Subject to certain exceptions, judgments and orders in unlawful detainer actions are subject to the rules that govern appeals generally from other actions.[69]

Judgments and orders that are appealable include the following:

- a final judgment;
- an order made after a final judgment;
- an order granting a new trial or denying a motion for judgment notwithstanding the verdict; and
- an order granting a Motion to Quash service, to stay the action on the ground of inconvenient forum, or to dismiss the action under Cal. Code Civ. Proc. Section 581d following an order granting a motion to dismiss the action on an inconvenient forum basis.[70]

A postjudgment award of attorneys' fees is separately appealable. A notice of appeal from the original judgment alone does not give the appellate court jurisdiction to hear a challenge to the award of attorneys' fees.[71]

An order granting a summary judgment, unlike entry of a judgment following the order, is not an appealable order.[72]

V. DEVELOPMENTS RELATED TO FINANCIAL CRISIS

In response to the recent financial crisis, the legislature has modified existing statutes to assist tenants who occupy residential properties that are subject to foreclosure.[73] Pursuant to Senate Bill 1137, the foreclosing lender must now give such tenants a 60-day notice instead of the previous 30-day notice. [For Section 8 tenants, however, the notice period is not changed and remains 90 days.]

Residential tenants must also receive from the foreclosing lender a statutory notice of the foreclosure (in six different languages) once a notice of sale has been posted on the property. This foreclosure notice must be posted along with the notice of sale and also mailed to the tenant. Under appellate law, tenants in rent-controlled jurisdictions cannot be evicted by the foreclosing party (or the former landlord) absent a separate and independent just cause to evict under the local ordinance.[74]

VI. CONCLUSION

While this primer attempts to touch upon the basics of unlawful detainer litigation, relying upon the information presented is not

a substitute for carefully reviewing the applicable cases and statutes. Landlord-tenant issues are very complex, and attorneys practicing in this area must review the cases, statutes, and any updates. The intricacies of relevant case decisions and statutes, and how they may be subsequently interpreted by appellate courts or affected by municipal ordinances, create potential traps for the unwary within landlord-tenant practice. It is increasingly important to stay current on applicable laws in the landlord-tenant arena, which are never stagnant and are continually evolving.

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ENDNOTES

1 Cal. Code Civ. Proc. Section 1161(2) and 1161(3).
2 Cal. Code Civ. Proc. Section 1161(4).
3 Cal. Civ. Code Section 1946.1.
4 Cal. Code Civ. Proc. Section 415.46.
5 *Fish Constr. Co. v. Moselle Coach Works, Inc.*, 148 Cal. App.3d 654 (1983).
6 Cal. Code Civ. Proc. Section 1170.5(a).
7 Cal. Code Civ. Proc. Section 1167.
8 Cal. Code Civ. Proc. Section 1179(a).
9 Cal. Code Civ. Proc. Section 1170.5(a).
10 Cal. Code Civ. Proc. Section 1176.
11 *Kwok v. Bergren*, 130 Cal.App.3d 596, 599 (1982); *Vasey v. California Dance Co.*, 70 Cal.App.3d 742 (1977).
12 *Lamey v. Masciotra*, 273 Cal.App.2d 709, 713 (1969).
13 Cal. Civ. Code Section 791, 793.
14 Cal. Code Civ. Proc. Section 1161(2).
15 Cal. Code Civ. Proc. Section 1161(3).
16 Cal. Code Civ. Proc. Section 1161(4).
17 Cal. Code Civ. Proc. Section 1161(4).
18 Cal. Code Civ. Proc. Section 1161(4).
19 Cal. Code Civ. Proc. Section 1161(a) (3-day notice is generally required, with some exceptions).
20 Cal. Civ. Code Sections 1946, &1946.1.
21 Cal. Civ. Code Section 1946.5.
22 Cal. Code Civ. Proc. Section 1162; Cal. Civ. Code Sections 789-790.
23 Cal. Civ. Code Section 1951.3.
24 Cal. Civ. Code Section 1933; Cal. Code Civ. Proc. Section 1265.110.
25 Cal. Gov. Code Section7060, et seq.
26 Cal. Code Civ. Proc. Section 1161(1); Cal. Civ. Code Section 1933.
27 Cal. Civ. Code Section 1934.
28 Cal. Code Civ. Proc. Section 1161(1).
29 Cal. Code Civ. Proc. Section 1161(5).
30 Cal. Civ. Code Section 1933.
31 Cal. Code Civ. Proc. Section 1162.
32 Judicial Council Form SUM-130.
33 Judicial Council Form UD-100.
34 Cal. Code Civ. Proc. Section 1174.25(a).
35 Cal. Code Civ. Proc. Sections 415.20(b) & 1167.
36 Cal. Code Civ. Proc. Section 415.10.
37 Cal. Code Civ. Proc. Section 415.20(a).
38 Cal. Code Civ. Proc. Section 415.20(a).
39 *See* Cal. Code Civ. Proc. Section 415.30 and Section 415.40 for in-state and out-of-state service.
40 Cal. Code Civ. Proc. Section 415.45.
41 Cal. Code Civ. Proc. Section 415.50.
42 Cal. Code Civ. Proc. Section 1169.
43 *See Schering v. Superior Court*, 52 Cal.App.3d 737 (1975); Cal. Code Civ. Proc. Sections 410.50 & 418.10(a)(1).
44 Cal. Code Civ. Proc. Section 418.10(e)(3).
45 *See* Cal. Civ. Code Section1942.5 regarding presumption of retaliatory motive if eviction notice is served within six months of tenant asserting his or her legal rights.
46 *Green v. Super. Ct.*, 10 Cal.3d 616 (1974).
47 Cal. Code Civ. Proc. Section 1174.2.
48 Cal. Code Civ. Proc. Sections 437(c) & 1170.7.
49 *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826 (2001).
50 Cal. Code Civ. Proc. Section 437(c).
51 *See Varni Bros. Corp. v. Wine World, Inc.*, 35 Cal.App.4th 880, 887 (1995).
52 *See California Eviction Defense Manual (2d ed Cal. CEB 1993)* Section 22.1, citing, by way of example, *Rich v. Schwab*, 162 Cal.App.3d 739 (1984), (landlord's action in raising rent was arguably retaliation for tenant's political activities; summary judgment for landlord was improper), and *Ernst Enters v. Sun Valley Gasoline, Inc.,* 139 Cal.App.3d 355 (1983) (whether landlord had good cause to terminate commercial lease and whether notice stated correct amount of rent due were issues of fact that could not be decided by summary adjudication).
53 *See California Eviction Defense Manual (2d ed Cal. CEB 1993)* Section 22.1, citing *Uriarte v. United States Pipe & Foundry Co.*, 51 Cal.App.4th 780 (1996), and *Ambrose v. Michelin N. Am., Inc.*, 134 Cal.App.4th 1350 (2005) (Cal. Code Civ. Proc. Section 473(b) does not permit court to set aside summary judgment if losing party's counsel did file opposition, but failed to file affidavit seeking continuance to allow expert witness more time to examine evidence; request for continuance at hearing of summary judgment was insufficient).
54 *Knowles v. Murphy*, 107 Cal. 107, 112 (1895).

55 *Ahlers v. Barrett*, 4 Cal.App. 158 (1906) (landlord-tenant relationship not shown).
56 Cal. Code Civ. Proc. Section 1171.
57 *See* 8 Witkin, Cal. Proc., *Attack on Judgment in Trial Court* Section147 (4th ed 1996).
58 Cal. Code Civ. Proc. Section 1174(a), (d).
59 Cal. Code Civ. Proc. Section 712.040(a).
60 Cal. Code Civ. Proc. Section 715.010(b)(1).
61 Cal. Code Civ. Proc. Section 715.010(b)(2).
62 Cal. Code Civ. Proc. Section 715.010(b)(3).
63 Cal. Code Civ. Proc. Section 715.010(b)(4).
64 Cal. Code Civ. Proc. Section 715.010(b)(5)); unless a Summons, Complaint, and Prejudgment Claim of Right of Possession were served on the occupants in accordance with Cal. Code Civ. Proc. Section 415.46.
65 Cal. Code Civ. Proc. Section 715.010(b)(6)); unless a Summons, Complaint, and Prejudgment Claim of Right of Possession were served on the occupants in accordance with Cal. Code Civ. Proc. Section 415.46.
66 Cal. Code Civ. Proc. Section 715.010(b)(7).
67 Cal. Code Civ. Proc. Section 1174.
68 Cal. Code Civ. Proc. Section 1176.
69 Cal. Code Civ. Proc. Section 1178.
70 *See* Cal. Code Civ. Proc. Section 904.1 (appeals from unlimited civil cases in superior courts) and Cal. Code Civ. Proc. Section 904.2 (appeals from limited civil cases in superior courts).
71 *DeZerega v. Meggs*, 83 Cal.App.4th 28 (2000).
72 *Sabell, Earlix & Assocs. v. Fillet*, 134 Cal.App.4th 1024 (2005).
73 *See* newly added Cal. Code Civ. Proc. Section 1161(b), and modified Cal. Civ. Code Sections 2923.5, 2923.6, and 2929.3.
74 *Gross v. Super. Ct.*, 171 Cal.App.3d 265 (1985).

CRPJ MCLE Test No. 15 (Vol. 27, No. 1)

Unlawful Detainer Actions: The Technical "Nuts and Bolts"

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1. True/False: Unlawful detainer proceedings are subject to the normal procedural rules applicable to civil litigation in Califonia.

2. True/False: A 3-day notice for breach of the lease must be stated "in the alternative" – that is, the notice must require that the tenant either vacate the premises or cure the breach.

3. True/False: All 3-day notices must be stated in the alternative.

4. True/False: Generally, 30- or 60-day notices are required for "no fault" evictions of month-to-month tenants.

5. True/False: An eviction notice is always needed for a landlord to evict a tenant.

6. True/False: In an unlawful detainer proceeding, the tenant may file a cross-complaint against the landlord.

7. True/False: Tenants must appear in the unlawful detainer action by filing a responsive pleading within 5 days after the landlord's service of the Summons and Complaint on the tenant.

8. True/False: The litigants in an unlawful detainer proceeding must respond to discovery requests within 30 days.

9. True/False: Unlawful detainer law is state law, and practitioners need not consult local statutes.

10. True/False: If the landlord successfully pursues an unlawful detainer against the tenant, the unlawful detainer will also terminate any right to possession of any unknown occupants of the premises.

11. True/False: If the tenant does not respond to the Complaint, and the court enters a Default Judgment against the tenant, the court may nevertheless set aside and vacate the Default Judgment.

12. True/False: The tenant can delay the unlawful detainer proceeding by filing a Motion to Quash only for material defects in the Summons or service of the Summons.

13. True/False: The General Demurrer, the Special Demurrer, and the Motion to Strike are all methods that tenants can use to challenge the legal sufficiency of the Complaint and the documentation attached to the Complaint.

14. True/False: If the tenant denies a specific allegation of the landlord's Complaint, the landlord has the burden of proof on that issue.

15. True/False: The implied warranty of habitability doctrine is an affirmative defense available only to occupants of residential units.

16. True/False: Discovery in unlawful detainer actions follows the same rules as other civil actions.

17. True/False: A landlord who wins the unlawful detainer action may obtain a judgment for possession, accrued rent though the termination of the tenancy, and holdover rent though the date of judgment, but may not obtain prospective damages in the unlawful detainer proceeding.

18. True/False: If the landlord wins the unlawful detainer proceeding, several post-trial motions and appeals are available to the tenant, but a stay of execution is discretionary with the trial judge.

19. True/False: Since an unlawful detainer proceeding is an expedited hearing, the tenant is never entitled to a jury trial.

20. True/False: The recent financial crisis has resulted in statutory changes designed to assist tenants in residential properties subject to foreclosure.

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READER ALERT: Secondhand Smoke: A Public Nuisance in Common Areas?

By Scott D. Rogers and Kenneth R. Whiting, Jr.

I. INTRODUCTION

In a recent California appellate court case, *Birke v. Oakwood Worldwide*, 2009 Cal. App. Lexis 19 (January 12, 2009), a resident of an apartment complex alleged that the apartment owner's failure to limit secondhand smoke in outdoor common areas created a public nuisance. Without commenting on the merits of the allegations or the potential difficulties in proof, the court found the facts as pled by the resident were sufficient to withstand a demurrer and state a valid cause of action.

II. THE FACTS

Oakwood owns and operates an apartment complex in which Birke (a five-year-old girl) and her parents reside. Oakwood prohibits smoking in all indoor apartment units and indoor common areas but allows smoking in the barbeque areas, pool areas, playground areas, and other outdoor common areas where it provides ashtrays and permits its employees to smoke. Oakwood declined Birke's repeated requests that smoking be limited or restricted in the outdoor common areas. Birke, an asthma patient, allegedly suffered allergic reactions and three bouts of pneumonia as a result of her exposure to the secondhand smoke.

III. THE NUISANCE ALLEGATIONS

Following its review of the applicable statute, the court stated that in order to adequately plead a cause of action for public nuisance based upon secondhand smoke in an apartment's common areas it is necessary to allege the following: (i) the apartment was operated and managed in a way that, by act or omission, created a condition harmful to health, or obstructed the free use of the common areas, so as to interfere with the comfortable enjoyment of life or property; (ii) the condition impacted a substantial number of people concurrently; (iii) an ordinary person would be reasonably annoyed or disturbed by the condition; (iv) the seriousness of the harm outweighs the social utility of the conduct; (v) the condition was nonconsensual; (vi) the harm suffered was different in kind from the harm suffered by the general public; and (vii) the objectionable conduct was a substantial factor in causing the alleged harm.[1]

The court found that each of the required elements of the cause of action had been adequately pled. With respect to requirement (vi)—the special injury requirement—the court held that it was not prepared to say that the aggravation of Birke's allergies and chronic asthma were of the same type and only different in degree from the harm to the general public of increased risk of developing heart and lung cancer. The court also suggested that where the injury is a private nuisance as well as a public nuisance the special injury requirement is inapplicable. With respect to requirements (i) and (vii) —regarding Oakwood's alleged conduct—the court found that Oakwood's policy of allowing smoking in the outdoor common areas, providing ashtrays for tenants and guests who smoke cigarettes and cigars, permitting its own employees to smoke in the common areas, and refusing Birke's request to limit or restrict smoking in the outdoor common areas, was sufficient to support the nuisance claim. The court also noted that Oakwood admitted that it made an affirmative business decision to allow outdoor smoking in part to help market the apartments to an international clientele.

As a result of the court's decision, the case now goes back to the trial court for a determination on its merits.

IV. THE POTENTIAL IMPACT

The cost of prosecuting and defending the trial will be substantial as the various factual and medical issues will be complex and contested. In addition, the opinion provides a roadmap to potential plaintiffs as to how to plead the public nuisance cause of action so as to survive demurrer. It is possible that numerous actions will be filed against owners and managers not only of apartment buildings, but also of office buildings, shopping centers, and resort properties, based upon similar allegations.

Owners of all property types are advised to carefully consider the nature and scope of their smoking/secondhand smoke regulations and policies so as to minimize the risk of potential secondhand smoke claims. In this regard, the court observed in a footnote that Birke did not allege the presence of secondhand smoke to be a nuisance *per se* or that banning all outdoor smoking is the only means to abate the alleged nuisance only that Oakwood had rejected Birke's suggestion that "designating smoking and nonsmoking areas or times might satisfactorily resolve the problem."[2] In another passage, the court noted that the issue presented by the complaint is not whether Oakwood has a duty to ban smoking completely, but rather whether Oakwood's "failure to impose any type of limitation on smoking in common areas" breached its duty as a landlord to take reasonable steps to maintain its premises in a reasonably safe condition.[3] Thus, it remains unclear to what extent, if any, reasonably crafted outdoor common area smoking restrictions may be sufficient to avoid potential liability.

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ENDNOTES

1 2009 Cal. App. Lexis 19 at *12.
2 2009 Cal. App. Lexis 19 at *22, n.6.
3 2009 Cal. App. Lexis 19 at *23.

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