Lender's Remedies to Protect Its Security During Foreclosure and Borrower's Abandonment as an Unpermitted Transfer

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As the economy moves into what appears to be another troubling time for commercial real estate owners and their lenders, it is worthwhile for lenders facing the prospects of foreclosing a defaulted mortgage to consider creative leverage to preserve their security and to possibly pursue claims for post foreclosure deficiencies. It is regularly reported that central business district office properties are subject to mortgage balances substantially more than the likely market values of such properties. Since most commercial mortgage loans are limited recourse to the borrower, as circumstances worsen and cash flows from rents decline, more owners may attempt to quickly shift the burden of negative cash flows to their lenders, including initiating conversations regarding stipulations for the appointment of receivers, or alternatively, deed-in-lieu of foreclosure transactions. Despite the fact that most commercial lenders have limited recourse guaranty agreements, which typically include guarantees of losses suffered by lenders as a result of a borrower's waste in failing to maintain their properties and borrower's misappropriation of rents, such lenders may feel that they have limited alternatives to obtaining relatively quick control of an asset declining in value.

There may be another alternative available to such lenders for properties in default. Other standard provisions in such limited recourse guaranty agreements include the guarantor's agreement for liability for the full amount of the unpaid loan amounts where there is a transfer of the property in violation of the restrictions on transfer in the loan documents. Typical provisions restricting transfer include the following constituting a default: "If the trustor sells, conveys, alienates… said property or any part thereof, or any interest therein… or becomes divested of [his] title or any interest therein… in any manner or way, whether voluntarily or involuntarily."[1]

This potential guarantor liability for the full loan amount in the event of unpermitted transfers may provide a basis for a foreclosing lender to keep the borrower engaged with the property while the foreclosure proceeds, or alternatively to provide an opportunity to recover a deficiency following a foreclosure. A borrower seeking to walk away from its property obligations during foreclosure may be deemed to have abandoned its property, implicating the limited recourse guaranty.

This article discusses the benefits and risks of deed-in-lieu of foreclosure transactions and receivership appointments. Borrowers in default may try to convince lenders that the alternative to not taking aggressive action to secure the collateral early is to face the risk of borrower walking away from the property during foreclosure. Following an explanation of certain risks to lenders involved in deed-in-lieu transactions and receivership appointments, this article advances a legal theory that a borrower's abandonment or attempt to relinquish or surrender possession and control of a property in foreclosure would constitute an unpermitted transfer triggering a limited recourse guarantor's full recourse liability for the unpaid loan.

Deed-In-Lieu of Foreclosure

In commercial mortgage lending it is axiomatic that it is in the lender's best interest to gain control of a property from a borrower in default to prevent misappropriation of rents and waste, notwithstanding the fact that the lender may hold a limited recourse guaranty from a solvent guarantor protecting lender against losses resulting from such bad acts. Taking a deed-in-lieu of foreclosure accelerates a lender's timing to take over the project, avoiding the time and expense of noticing and completing a foreclosure sale. However, such transactions are not without risk. A borrower could have second thoughts after the transaction and seek to set aside the transfer. Such claims could include that the deed was intended as a mortgage[2], that the deed was delivered as a result of unfair advantage or undue influence by the grantee[3], or that the effect of the deed was to forfeit the trustor's equity of redemption.[4]

To prevail on a defense to a claim that a deed delivered in lieu of foreclosure was in fact an absolute deed rather than a mortgage, the conveyance should clearly include no continuing interest of the grantor in the property, and mutual acknowledgements that (1) the value of the property is

substantially less than the amount owed, (2) the grantor has no further liability for payments or other obligations of the loan originally secured, (3) the consideration to be received by borrower pursuant to the terms of the deed-in-lieu transfer agreement represents the payment by lender of full, fair and adequate consideration to Borrower, and (4) the deed is intended to be an absolute conveyance of title and not intended as a mortgage, trust conveyance or security of any kind.

In *Beeler v. American Trust Co.* (1944) 24 Cal. 2d 1, the California Supreme Court upheld a trial court's determination that a deed conveying property to a bank in satisfaction of a loan in default, where the grantor and grantee entered into a leaseback of the property, was indeed a mortgage and not an absolute deed. The plaintiff, Beeler, acquired title to a property in default under a loan from the bank, pursuant to an agreement that the bank would accept a discounted payoff if made within the next several weeks. Payment did not occur, and the bank served a notice of default on the original borrower and Beeler. Beeler met with the bank to seek to obtain a refinance of the original indebtedness and an extension of time for payment. The bank was unwilling to maintain the indebtedness as a security arrangement and proposed an alternative arrangement: "Beeler would deed the property to the bank and in return the bank would execute to Beeler a lease of the premises for the period of one year at a rental of $3,000 per annum, Beeler to pay all taxes and maintenance expense on the ranch and to have an option to purchase the land at any time during the term of the lease for the sum of $60,000."[5] Pursuant to an absolute deed, which included express intention by Beeler that it was an absolute conveyance and was not intended as a mortgage, deed of trust or other security arrangement, as well as statements that it was intended as full payment and cancellation of all obligations to the bank, Beeler conveyed the property to the Bank. Upon such conveyance the bank executed a reconveyance of the deed of trust, which reconveyance included the statement that the indebtedness had been paid in full.

Approximately six months after the recordation of the deed, the property taxes were unpaid and the bank brought suit to recover possession from Beeler as a result of the breach of the lease. Beeler was able to defend the unlawful detainer complaint based on a defective notice and then sued the bank "to have his deed of conveyance to defendant bank declared a mortgage to secure an antecedent debt."[6] Judgment at trial was rendered in favor of Beeler. Upon appeal, the California Supreme Court acknowledged that "it is without doubt the law, as repeatedly declared in our decisions, that clear and convincing evidence is required to justify a court in finding that a deed which purports to convey land absolutely in fee simple was intended to be a mortgage… and it has been universally held that the character of the instrument cannot be thus changed except upon clear and convincing evidence."[7] Furthermore, the court noted that it is settled law that a deed, including on its face or with an accompanying affidavit, language purporting to unambiguously assert an absolute deed and not a security instrument.[8] Citing *Vance v. Anderson* (1896) 113 Cal. 532, the court repeated what it characterized as a basic doctrine:

> "A deed absolute on its face may be shown, by parol, to be intended as a mortgage. It may be stated, as a general proposition, that in this state, at least, every conveyance of real property made as security for the performance of an obligation is, in equity, a mortgage, irrespective of the form in which it is made. Equity looks beyond the mere form in which the transaction is clothed, and shapes its relief in such way as to carry out the true intent of the parties to the agreement, and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, their relations to one another, and to the subject matter, are subjects for consideration."[9]

Reviewing the evidence presented to the trial court, including testimony of the conversations between Beeler and the bank in the decision to structure the sale/leaseback transaction, a determination that the actual value of the property was substantially greater than the indebtedness forgiven and that the fair rental value of the property was substantially in excess of the rent payable under the lease, the court concluded that there was sufficient evidence to support the determination that the deed was in fact intended as a mortgage.[10] Two other factors involving action taken by Beeler as the purported tenant under the lease were identified by the court as further evidence of Beeler's exercise of ownership rights with respect to the property. A month after the sale/leaseback a flood of the Sacramento River resulted in damages to permanent improvements on the property. When Beeler requested a loan from the bank to repair such improvements, the bank declined to make the loan and Beeler proceeded to use his own funds for such repairs. Additionally, Beeler discussed with the bank his plan to sell approximately 276 walnut trees growing on the property. The bank agreed that the removal of the trees would improve the property and did not object to Beeler's retention of the proceeds of the sale.[11]

The deed-in-lieu transaction imposes additional risks in the context of junior liens, where the holder of the senior lien agrees to accept an absolute deed. Absent a clear and unequivocal non-merger provision in the deed-in-lieu transfer documentation preserving the validity of the senior mortgage and permitting a subsequent foreclosure to wipe out any junior encumbrances, a deed-in-lieu transaction can reverse priorities to the detriment of a senior lender.[12]

Because a deed styled as an absolute deed does not include a power of sale, if such a deed is deemed to constitute a mortgage, judicial foreclosure becomes the only remedy available to the grantee.[13] Since a judicial foreclosure is more expensive and takes more time to complete, and in California includes a post-sale redemption in favor of the borrower, a borrower's successful challenge to a deed-in-lieu of foreclosure can be extremely problematic for a lender holding a defaulted mortgage. Similarly, assignment of rents provisions are generally absent in absolute deeds.[14] As a result, the lender has no right to the rents until completion of the foreclosure sale.[15]

Collection of Rents Through Enforcement of Assignment of Rents Provisions

An alternative to a deed-in-lieu, that provides lenders with some comfort that the secured property will be properly managed and that rents will be protected from being misappropriated by a defaulting borrower, is enforcement of lender's assignment of rents provisions in its loan documents. California Civil Code Section 2938(c) establishes certain permissible methods of enforcement of the assignment, after which the assignee is entitled to collect and receive all accrued but unpaid rents and all rents that accrue thereafter. The four permissible methods of enforcement are: (1) appointment of a receiver; (2) possession of the rents, issues or profits; (3) written demand for payment of rents delivered to the tenant, the assignor and other assignees of record; and (4) written demand for payment of the rents, issues and profits delivered to the assignor and other assignees.[16]

Although a lender holding a valid assignment of rents can, with the consent of the borrower, take possession of the secured property and collect the rents, the lender becomes a mortgagee-in-possession. A mortgagee-in-possession has the right to collect the rents and has the obligation to apply such rents to property expenses and senior obligations, including payments of assessed taxes. However, that right is subject to the obligation to account both for the rents collected and the application of such rents. "The mortgagee may be held chargeable for rents and profits not actually received where, and only where, he has failed to use reasonable diligence, or where he is guilty of fraud, gross negligence or willful default."[17] Additionally, the mortgagee-in-possession has liability if it fails to act with "the care of a reasonably prudent business" person in managing the property and the rents which it collects.[18] Although a mortgagee-in-possession does have the right to collect and apply rents, it has no right to receive compensation for such activities.[19]

California Civil Code Section 2938(e)(1) provides that the exercise of any of the collection remedies permitted under Section 2938(c) will not trigger mortgagee-in-possession designation unless "the assignee obtains actual possession of the real property, or an agent of the assignor." Nevertheless, Civil Code Section 2938(g)(1) provides that if the rents assignment is enforced without the appointment of a receiver, and the lender receives rents, the borrower and any other assignee of the rents (e.g. a senior lender or junior lender) "may make written demand upon the assignee to pay reasonable costs of protecting and preserving the property, including payment of taxes and insurance and compliance with building and housing codes."[20] In light of the foregoing and the substantial authority carefully scrutinizing the conduct of lenders collecting rents prior to the enactment of Civil Code Section 2938 in 1997, prudent lenders will typically seek to exercise their assignment of rents provisions with the appointment of a receiver.

Most commercial mortgages include a specific consent by the borrower to lender's appointment of a receiver in the event of a default, including the language in California Code of Civil Procedure Section 564(b)(11), for specific performance of an assignment of rents provision "to protect, operate, or maintain real property encumbered by a deed of trust or mortgage or to collect rents therefrom while a pending nonjudicial foreclosure under power of sale in a deed of trust or mortgage is being completed."[21] Additionally, most commercial mortgages also require a borrower to protect against neglect or waste, and that failure to do so constitutes an event of default. In such circumstances California Code of Civil Procedure Section 564(b)(2)‍ provides the right of a lender to obtain an appointment of a receiver in the context of a foreclosure where the property is at risk of "being lost, removed, or materially injured, or that the condition of the deed of trust or mortgage has not been performed, and that the property is probably insufficient to discharge" the obligation secured.[22]

Once appointed by the court on motion of the foreclosing lender, the receiver becomes the agent of the court, responsible for managing the property, collecting rent and paying property expenses, including insurance and secured

real property taxes. The appointment of a receiver, with the receiver taking possession of the property and collecting rents, avoids potential liability of the foreclosing lender as a mortgagee in possession. Among the many benefits of a receivership are its ability to, with the approval of the court administering the receivership, borrow money to finance the receiver's activities in administering the property and issuing receivership certificates securing the funds so borrowed with a super priority lien on the property. Courts administering receiverships have "substantial discretion to authorize a receiver to borrow money to fund the preservation and management of property in the receivership estate."[23] When such borrowing is authorized receivership certificates are issued "as evidence of the indebtedness and become liens on the subject property…usually with priority over all other liens, including preexisting liens."[24]

Lender's Claim of Abandonment or Relinquishment

As noted in the foregoing, a carefully documented and implemented deed-in-lieu of foreclosure transaction can quickly vest control of encumbered property in the lender or its designee, with limited transaction costs. Similarly, the appointment of a receiver can provide a lender comfort that the subject property will be properly managed and maintained during the pendency of a foreclosure. However both circumstances require a lender to step up and fund cash flow deficiencies that would otherwise be the responsibility of the borrower in default. In loan transactions where the lender holds a limited recourse guaranty from a solvent person or entity, which includes a guaranty of the full amount of the loan upon a transfer in violation of the restrictions in the loan documents, the lender may have some additional leverage to hold the borrower and the limited recourse guarantor continued responsibility to manage and maintain the property, including funding negative cash flow, during the pendency of the foreclosure. Such transfer restrictions typically include the requirement of lender's consent to transfers to parties other than parties affiliated with the borrower or its principals. Under certain circumstances, where the borrower approaches a lender to take over its property in default, the potential claim of abandonment or relinquishment may be sufficient to keep the borrower involved with the limited recourse guarantor funding net cash flow deficiencies while lender proceeds with its foreclosure remedy.

The law of abandonment provides that abandonment is a unilateral act and a person cannot abandon property to a particular person. In addition, consistent with the foregoing, the common law generally includes an acknowledgement that fee title to real property cannot be divested by abandonment. However, there is much case law analyzing abandonment in the context of incorporeal property interests, including mineral rights and perpetual easements, where, in each case the abandonment results in a reversion of the interest to an identified person. Several cases, discussed below, extend the concept of abandonment to quasi-corporeal interests.

Definition of Abandonment

The legal definition of abandonment is "a unilateral, nondestructive means of ridding oneself of ownership"[25] As explained by a California Court of Appeal in its decision *Bright v Geneste* (1955) 133 Cal. App. 2d 725: "to constitute an abandonment in the strict legal sense there must be a parting with title that is unilateral, the owner must leave the property free to the acquisition of whoever wishes to claim it, and [be] indifferent as to what may become of it. A transfer of property from one person to another cannot be effected by abandonment, and abandonment cannot be made to a particular individual."[26] In *Strong v. Detroit & Mackinac Railway Company* (1988) 167 Mich. App. 562 (1988) a Michigan Appellate Court recognized that "[t]he essential elements of abandonment are an intent to relinquish the property and acts putting that intention into effect."[27] A provision in a limited recourse guaranty implicating a transfer where the borrower "becomes divested of [his] title or any interest therein" fits squarely within the concept of abandonment.

Evidence of Intent and Acts Implementing Intent to Abandon

The *Bright* court involved an appeal from a judgment in favor of a defendant landlord on a conversion claim brought by the tenant. The parties were involved in a lease of a business property that included a chattel mortgage encumbering certain business assets in favor of the landlord to secure tenant's obligations under the lease. Testimony indicated that the tenant and its predecessor had been operating the business at a loss. One morning, the tenant's principal advised his foreman that the principal was "through", handed him the keys to the plant and instructed the foreman to advise landlord's representatives. The tenant's principal then packed some personal belongings into a briefcase and left the premises. Later that day tenant's principal, the foreman and the landlord met off-site and the tenant signed a cancellation of the lease, understanding that the tenant would be released from any further lease obligations. Testimony also included the fact that tenant indicated that, in consideration for the release of liability, the property subject to the chattel mortgage would be given to landlord, although the document

effecting the cancellation of lease was silent as to such property. Tenant subsequently sued landlord for conversion of the personal property. The trial court held in favor of landlord finding that the personal property was abandoned in the morning, and that the lease was subsequently cancelled in the afternoon.

On appeal the tenant argued that there is no evidence to support a finding of abandonment and surrender of the personal property, that there was only one transaction involving the execution of the lease termination and the release. Tenant further argued that the lease termination released the chattel mortgage on the personal property terminating landlord's security interest in the personal property. However, the appellate court determined that there was sufficient evidence in the record to support the trial court's determination that the personal property had been abandoned in the morning. That determination of abandonment then supported the conclusion that the surrender of the personal property in the morning resulted in the mortgagee acquiring the estate of the mortgagors in the personal property, the mortgage interest was merged into the fee, the mortgage extinguished and title to the personal property became vested in the landlord.[28] In this regard, the court acknowledged that the trial court's findings "use the term 'abandonment' not in the technical legal sense but as synonymous with relinquishment or surrender," because "abandonment in the strict legal sense" quires a unilateral parting of title to property allowing such property to be acquired by whoever wishes to claim it. This concept of "relinquishment or surrender" would similarly likely constitute a violation of the typical restrictions on tranfer in loan documents.

Abandonment of Fee Interests

The common law rule recognized by courts is that fee title "to real property cannot be divested by abandonment."[30] The Michigan Supreme Court offered an interesting analysis of abandonment in the context of mineral interests severed from the surface estate in its decision to uphold the constitutionality of the Michigan dormant mineral act.[31] The act required holders of mineral rights to take possession of the mineral interests, transfer the interest by recorded instrument or record a notice of claim every twenty (20) years. Failing any of those acts, the interest will be deemed abandoned and will revert to the owner(s) of the surface estate. The court acknowledged that the severed mineral rights create "fee estates, corporeal hereditaments, for the owners of the severed mineral rights which could not be abandoned."[32]

Defendants challenged the constitutionality of the act arguing that "by making a corporeal hereditament subject to abandonment" the act changed the character of the severed mineral interests from a property right to a "mere cause of action," which constitutes the deprivation of a property right without due process.[33] While the court acknowledged that the act did indeed "convert a corporeal hereditament which at common law could not be abandoned into an interest which is subject to abandonment,"[34] it was an appropriate exercise of the legislature's police power absent defendants' proof that the act was unreasonable, arbitrary or capricious, that no public purpose is served by the act or that no reasonable relationship exists between the public purpose intended to be achieved and the remedy adopted. The court concluded that defendants failed to establish that the act was not a proper exercise of its police power.

In its decision, the Michigan Supreme Court acknowledged that in civil jurisdictions title to severed mineral interests, which are treated as fee interests, upon abandonment, vest in the owner of the estate from which such interests had been severed.[35] Similarly, the Michigan Supreme Court recognized that a similar result follows upon abandonment of incorporeal interests in land, citing the California Supreme Court decision, *Gerhard v. Stephens* (1968) 68 Ca. 2d 864.

In *Gerhard,* the California Supreme Court provided a more nuanced analysis of fee interest abandonment, a case involving claims by successors of stockholders of corporations with interests in oil, gas and certain minerals to quiet title to such interests against the owners – possessors of the surface of such lands. The surface owners asserted defenses based principally upon their long-time physical occupation of the lands and the failure of the plaintiffs and their predecessors to assert the mineral rights for 47 years, and only then when the defendants struck oil. In reliance upon the common law rule prohibiting the abandonment of fee interests, the plaintiffs challenged the trial court's determination that the oil, gas and mineral interest had been abandoned.

The court noted that the oil, gas and mineral interests in question involved the exclusive and perpetual right to drill and extract, which the court acknowledged under California law constitute "profits a prendre." Although such property interests are sometimes referred to in case law as "estates in fee" the court determined that they are indistinguishable from easements and other incorporeal hereditaments, and therefore can be abandoned.[36] The court distinguished the two contexts describing fee interests under the general rule that such real property cannot be abandoned. Some courts focus on "the perpetual nature of the interest" to support the

determination the a profit a prendre is a fee interest, other focus on the "possessory, or corporeal, nature of the interest" as the basis for the argument that a fee interest cannot be abandoned.[37]

The court points to the "possibility of voids of titles" which has historically provided a basis for the refusal of courts to acknowledge abandonment of certain real property interests does not come into play" in the oil, gas and mineral interests scrutinized by the Gerhard Court.[38]

Recognizing the oil, gas and mineral interests at issue as similar to "perpetual easements" which can be abandoned,[39] the court determined court rulings described in its opinion holding "that a 'fee' interest in real property cannot be abandoned are explicable only upon an analysis of the facts involved in particular cases; in each case the court concerned itself with title to corporeal real property" supporting its determination that easements and certain other interests "in fee" can be abandoned.[40]

The court sought to support its determination that the interests in question can be abandoned based upon principle and policy: "Although the historical rationale for the rule that certain interests in real property cannot be abandoned finds little articulation in the cases, the reason appears to be that society cannot tolerate voids in the ownership of land."[41] Justifying its determination that abandonment of the interests in question does not result in "voids of ownership", the court notes that, upon abandonment the property interests do not become "the property of the first appropriator [citations omitted], but instead return to the estate out of which they were carved."[42]

Abandonment of Fee Interest in Encumbered Property

While the Gerhard Court took substantial pains to distinguish incorporeal hereditaments that are susceptible of abandonment from corporeal real property which cannot, it seemed to ignore the fundamental principal of abandonment: "a parting with title that is unilateral, the owner must leave the property free to the acquisition of whoever wishes to claim it, and [be] indifferent as to what may become of it."[43] The principle that appears to be articulated by the Michigan Supreme Court and the Gerhard Court that property interests, whether corporeal or incorporeal can be abandoned provided there is no resulting void of title. To the extent that conclusion overstates the analysis of *Gerhard,* then from a strict legal sense there has been no abandonment, rather, as noted by the *Bright* decision[44], there has been a transfer of the property interest relinquished or surrendered.

As the Gerhard Court and other have noted, abandonment must be established by the conduct of the owner which "clearly and convincingly demonstrates the necessary intent."[45] Mere non-use is not sufficient to establish abandonment: "[a]s a general rule, in order to constitute an abandonment of an easement there must be a nonuser accompanied by unequivocal and decisive acts on the part of the (dominant tenant), clearly showing an intent to abandon."[46]

A commercial property owner whose loan is in default seeking to relinquish possession and control of the property might try to execute a quitclaim deed in favor of its lender in an attempt to avoid continuing responsibility for the property, and to terminate its continuing obligations to the lender under the loan documents. However, any such effort would fail absent a lender's acceptance of such a deed. Absent clear evidence of the parties' intent to effect a valid and binding delivery of a deed of conveyance, any such deed is void.[47]

As a result, upon the occurrence of a material breach of a material obligation under the loan documents giving the lender the right to foreclose, where the lender initiates foreclosure proceedings but refuses to accept a deed-in-lieu of foreclosure and does not proceed to seek appointment of a receiver, the borrower may announce that it is surrendering possession and control of the property to avoid increasing its investment losses, essentially effecting an abandonment or relinquishment. As in the case of certain property interests described above, such abandonment does not create a void of title as the property title will remain in the foreclosing trustee, and upon completion of the foreclosure will vest in the successful bidder at the foreclosure sale. Additionally, in jurisdictions involving judicial foreclosure and post-sale redemption rights which would also have been abandoned, such abandonment also improves the marketability of title.

Whether such action by the property owner constitutes legal abandonment or abandonment "as synonymous with relinquishment or surrender"[48], the effect is an unconsented transfer contrary to the terms and conditions of the loan documents. Such a transfer, made without the consent of lender, where the borrower "becomes divested of [his] title or any interest therein …in any manner or way, whether voluntarily or involuntarily" triggers the liability for the full amount of the loan by the limited recourse guarantor. In such event, the foreclosing lender must carefully construct a record of such abandonment and surrender, and of the

defaulting borrower's clearly demonstrated intent to have no further involvement with the property.

This theory of abandonment as an unconsented transfer should provide a potentially liable limited recourse guarantor with a powerful incentive to compel the defaulting borrower to remain in possession of the encumbered security and covering cash flow deficiencies during the pendency of the foreclosure. Barring that, after establishing the fact of abandonment, the foreclosing lender may be able to seek to recover a deficiency from the limited recourse guarantor following the foreclosure.

Bio

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Endnotes

[1] *Wellencamp v Bank of America* (1978) 21 Cal. 3d 943, 946.

[2] See e.g. *Gronenschild v. Ritzenthaler* (1947) 81 Cal. App. 2d 138.

[3] Se e.g. *De Martin v. Phelan* 51 F. 865 (9th Cir., 1892).

[4] See e.g. *Bradbury v. Davenport* (1898) 120 Cal. 152; Cal. Civ. Code Section 2889 Bernharts's California Real Estate Laws (2023).

[5] 24 Cal. 2d 5.

[6] Id. at 6.

[7] Id. at 7.

[8] Id. at 20-21.

[9] 133 Cal. a 532t 538

[10] 24 Cal. 2d at 7.

[11] Id. at 18.

[12] As a general rule, courts will not permit a merger to adversely impact a senior lender's position with respect to junior liens. See *Anglo-Californian Bank, Ltd. v Field* (1905) 146 Cal. 644, and *Decon Group, Inc. v Prudential Mortgage Capital Co.*, (2014) 227 Cal. app. 4th 665; but see *Jensen v Burton* (1931) 117 Cal. App. 66.

[13] See *Kaiser Industries Corp. v Taylor* (1971) 17 Cal. Appp. 3d 346.

[14] *Coast Bank v Minderhout* (1964) 61 Cal. 2d 311, overruled on other grounds in *Wellenkamp v Bank of America* (1978) 21 Cal. 3d 943, 953,

[15] *Kinnison v Guaranty Liquidating Corp.* (1941) 18 Cal. 2d 256.

[16] *California Civil Code Section 2938(c)* Bernharts's California Real Estate Laws (2023).

[17] *Johns v Moore* (1959) 168 Cal App. 2d, 709, 713 (citations omitted).

[18] *Davis v Stewart* (1944) 67 Cal. App. 2d 415, 418.

[19] *Earp v. Earp* (1991) 231 Cal. App. 3d 1008, 1014 (lease re-characterized as an equitable mortgage to the effect that the lessee is deemed a mortgagee-in-possession, and interest in rents is limited to the amount owed plus interest).

[20] *Cal. Code Civ. Proc. Section 564(g)(1)* Bernharts's California Real Estate Laws (2023).

[21] *Cal. Code Civ. Proc. Section 564(b)(11)* Bernharts's California Real Estate Laws (2023).

[22] *Cal. Code Civ. Proc. Section 564(b)(2)* Bernharts's California Real Estate Laws (2023).

[23] *City of Sierra Madre v SunTrust Mortgage, Inc.* (2019) 32 Cal. App. 5th 648, 657.

[24] Id. citing *12 Miller & Starr, Cal. Real Estate* (4th ed 2018) Section 41.12, p 41-43.

[25] The Right to Abandon by Lior Jacob Strahilevitz ,158 University of Pennsylvania Law Review 355, 360 (2010).

[26] 133 Cal. App. 2d at 731.

[27] 167 Mich. App. at 569 citing Van Slooten v Larsen (1980) 410 Mich. 21, 50.

[28] 133 Cal. App. 2d at 731.

[29] Id.

[30] 1 California Jurisprudence 3d p. 15 Section 5. See also *Pocono Springs Civi Association v MacKenzie,* 667 A.2d 233, 235-36 (Pa. Super. Ct. 1995).

[31] *Van Slooten v Larsen* (1980) 410 Mich. 21.

[32] 410 Mich at 37.

[33] Id. at 41.

[34] Id. at 42

[35] Id. at 49, note 19.

[36] 68 Cal. 2d at 877

[37] Id.

[38] Id.

[39] Id. at 884.

[40] Id. at 885-886.

[41] Id. at 886.

[42] Id. at 887.

[43] See infra note 26.

[44] Infra at notes 26 – 28.

[45] Id. at 890.

[46] Id.

[47] *Brereton v Burton* (1938) 27 Cal. app. 2d 464

[48] See infra at note 28.