

California Cases - 2004 to Present
LISTED WITH MOST RECENT CASES FIRST
[Go to cases 2000 - 2003](#)

[Liberty National Enterprises v. Chicago Title Insurance Company](#) [Docket](#)

Cal.App. 2nd Dist. (B234341) 5/22/13 (Pub. Order 6/13/13)

TITLE INSURANCE: The court followed *Safeco Title Ins. Co. v. Moskopoulos* (1981) 116 Cal.App.3d 658, holding that the insuring clause of a title insurance policy did not cover an action that did not allege defective title, but rather tortious conduct in the manner in which the insured acquired title. There was no potential for coverage and therefore no duty to defend. The court did not address whether any policy exclusions applied because an occurrence not within the insuring clause does not also have to be excluded by the policy's exclusions.

[Fuller v. First Franklin Financial](#) [Docket](#)

Cal.App. 3rd Dist. (C070452) 5/1/13 (Cert. for pub. 5/29/13)

PREDATORY LENDING: The court overruled the trial court's sustaining of a demurrer because the complaint's allegations of an overstatement of the appraisal value, concealment of plaintiffs' eligibility for more favorable loans, and hidden kickbacks stated a claim for deceit, and this alleged conduct, along with the alleged failure to explain the terms of the loans to plaintiffs, stated a claim for breach of fiduciary duty and for unfair business practices. The court also concluded that defendants had failed to establish the expiration of the statute of limitations period on the face of the pleading.

[Jenkins v. JP Morgan Chase Bank](#) [Docket](#)

Cal.App. 4th Dist., Div. 3 (G046121) 5/17/13

TRUSTEE'S SALES: The court upheld the trial court's sustaining of a demurrer without leave to amend, finding:

1. Production of the note is not required for a lender to process a trustee's sale.
2. Plaintiff's claim that defendant violated the terms of a securitized investment trust's pooling and servicing agreement fails because plaintiff was not a third party beneficiary of that agreement.
3. A borrower cannot bring a preemptive judicial action to challenge whether the person initiating the foreclosure is authorized to do so because California's trustee's sale statutes do not allow for an additional requirement that the foreclosing entity must demonstrate in court that it is authorized to initiate a foreclosure.
4. Civil Code Section 2932.5's requirement that an assignment be recorded before the power of sale can be exercised applies to mortgages, but not to deeds of trust.
5. Plaintiff lacked standing under Business and Professions Code Section 17200 et seq. (Unfair Competition Law) because one of the requirements is for a plaintiff to show economic injury resulting from the defendant's unlawful acts. Here, plaintiff's economic injury was a result of her default on her loan, which occurred *prior to* defendants' allegedly unlawful acts.
6. Plaintiff's claim of a breach of the implied covenant of good faith and fair dealing fails because

the covenant must be related to a contract. Here, the only contracts were the note and deed of trust and defendants' alleged conduct was in connection with plaintiff's efforts to have the loan modified and in connection with the conduct of the trustee's sale, not to a violation of any provision of the note and deed of trust.

7. Plaintiff did not state a cause of action for violation of RESPA's Qualified Written Request rules because any harm plaintiff suffered occurred as a result of her own default on the loan.

[Corrie v. Soloway](#) [Docket](#)

216 Cal.App.4th 436 - 1st Dist. (A135963) 5/16/13

SUBDIVISION MAP ACT: An option agreement was originally illegal because it permitted the sale of a parcel of real property before the filing of a final parcel map and without being expressly conditioned upon the approval and filing of such a map, as required by the Subdivision Map Act (Gov. Code Section 66499.30(e)). However, a subsequent amendment to the option agreement provided that it was conditioned on the filing of a parcel map. The court held that the option was valid and did not violate Section 66499.30(e) because the amendment was in substance a new and different option agreement that stood on its own feet independently of the prior illegality.

[Biancalana v. T.D. Service Company](#) [Docket](#)

56 Cal.4th 807 - Cal. Supreme Court (S198562) 5/16/13

TRUSTEE'S SALES: A trustee under a deed of trust may declare a trustee's sale to be void where the trustee made an error in communicating the lender's credit bid to the auctioneer, and the error was coupled with a grossly inadequate bid price. The court pointed out that its holding was premised on the trustee discovering its mistake before it issues the deed, and that after the deed is issued, a bona fide purchaser is entitled to conclusively presume that the sale was conducted regularly and properly.

[Bock v. California Capital Loans](#) [Docket](#)

216 Cal.App.4th 264 - 3rd Dist. (C069863) 5/14/13

USURY: Even when the lender on a loan arranged by a licensed real estate broker is a corporation that is wholly owned by the broker, the broker can still be found to have arranged the loan "for another" for purposes of the usury exemption in Civil Code section 1916.1. Also, in such a situation, the broker may be found to have met the requirement that the broker arranged the loan "in expectation of compensation" even if the only compensation the broker will receive is the profit his wholly owned corporation reaps from the interest on the loan. The court also found that a loan would be arranged "for another" if it was arranged for the borrower instead of the lender.

[Multani v. Witkin & Neal](#) [Modification](#) [Docket](#)

215 Cal.App.4th 1428 - 2nd Dist. (B237295) 5/1/13 **Case complete 7/2/13**

HOA LIEN FORECLOSURE:

1. A non-judicial foreclosure of a homeowner's association lien can be set aside where the HOA fails to provide notice of the homeowner's 90-day right of redemption, as required by C.C.P.

729.050.

2. Plaintiffs were excused from complying with the usual requirement that they tender the amount due in order to maintain an action to set aside a foreclosure because requiring tender of the amount due would undermine a debtor's right under C.C.P. 729.070 to seek a judicial determination of the redemption price.

[Chanda v. Federal Home Loans Corporation](#) [Docket](#) [Sup.Ct. Docket](#)

215 Cal.App.4th 746 - 4th Dist., Div. 1 (D059976) 4/19/13 **Petition for review by Cal Supreme Ct. filed 5/30/13**

INSURANCE: Under the Collateral Source Rule, payments under an insurance policy are not deducted from the damages a plaintiff can otherwise collect from a tortfeasor. Therefore, a plaintiff may not normally introduce evidence that the defendant had insurance coverage. Here, however, evidence that a loan broker obtained title insurance for plaintiff's deed of trust was admissible as to the issue of whether the loan broker satisfied industry standards and met its fiduciary duty toward plaintiff. Any prejudicial effect of the existence of insurance could be eliminated by an appropriate jury instruction.

[Hamilton Court, LLC v. East Olympic, L.P.](#) [Docket](#) [Sup.Ct. Docket](#)

215 Cal.App.4th 501 - 2nd Dist. (B240052) 4/16/13 **Petition for review by Cal Supreme Ct. filed 5/29/13**

EASEMENTS: The doctrine of merger does not apply to eliminate an easement where a servient and dominant tenement come under common ownership, and the dominant tenement is encumbered by a mortgage which later forecloses.

[Hagman v. Meher Mount Corporation](#) [Docket](#)

215 Cal.App.4th 82 - 2nd Dist. (B239014) 4/13/13 **Case complete 6/12/13**

ADVERSE POSSESSION: A nonprofit religious organization's status as a "public benefit corporation" does not make it a "public entity" immune from adverse possession under Civil Code section 1007. Since the organization did not pay property taxes, the adverse possessor was able to establish adverse possession without the usual requirement that he pay taxes on the disputed land for five years. Also, the adverse possessor was not required to pay a mosquito abatement assessment because the assessment was not a tax.

[Intengan v. BAC Home Loans Servicing](#) [Docket](#)

214 Cal.App.4th 1047 - 1st Dist. (A135782) 3/22/13 **Case complete 5/24/13**

DEEDS OF TRUST / FORECLOSURE:

1. Plaintiff stated a cause of action sufficient to overcome a demurrer where plaintiff alleged that defendant did not contact her to explore options to foreclosure as required by Civil Code Section 2923.5. The trial court improperly took judicial notice of defendant's statements in the declaration attached to the recorded notice of default asserting that defendant attempted with due diligence to contact plaintiff. While judicial notice may be taken of the *existence* of the declaration, the court

may not take judicial notice of the facts asserted *in* the declaration.

2. Plaintiff did not need to tender payment of the loan in order to maintain this action because while the tender requirement may apply to causes of action to *set aside* a foreclosure sale, it does not apply to actions seeking to *enjoin* a foreclosure sale where the lender has allegedly not complied with a condition precedent to foreclosure.

[West v. JPMorgan Chase Bank](#) [Docket](#) [Sup.Ct. Docket](#)

214 Cal.App.4th 780 - 4th Dist., Div. 3 (G046516) 3/18/13 **Petition for review by Cal Supreme Ct. filed 4/26/13**

DEEDS OF TRUST: When a borrower complies with the terms of a "trial period plan" under the Home Affordable Mortgage Program, and the borrower's representations remain true and correct, the loan servicer must offer the borrower a permanent loan modification. Accordingly, the plaintiff stated causes of action for damages and breach of contract where defendant foreclosed rather than offer a permanent loan modification. However, the court upheld the trial court's sustaining of a demurrer to the cause of action to set aside the trustee's sale because the complaint alleged only procedural irregularities in the sale notice and procedure, and the trustee's deed upon sale recited that the trustee complied with the deed of trust and all applicable statutory requirements. Thus, any notice defects were deemed voidable, not void, and plaintiff was therefore required to allege tender of the indebtedness in order to set aside the trustee's sale, which plaintiff did not do. The court also upheld the sustaining of a demurrer to the cause of action to quiet title because plaintiff did not name as a defendant the person who purchased at the trustee's sale.

[Scott v. JPMorgan Chase Bank](#) [Docket](#) [Sup.Ct. Docket](#)

214 Cal.App.4th 743 - 1st Dist. (A132741) 3/18/13 **Petition for review by Cal Supreme Ct. DENIED 6/12/13**

DEEDS OF TRUST: Plaintiff asserted that he had been fraudulently induced to enter into a subprime loan with the original lender, First Magnus Financial Corporation, and that consequently defendant could not foreclose. First Magnus had assigned the loan to Washington Mutual Bank, which was taken over by the FDIC, and the FDIC sold the loan to defendant pursuant to a Purchase and Assumption Agreement (P&A Agreement). The court upheld the trial court's sustaining of defendant's demurrer without leave to amend on the basis that under the P&A Agreement defendant obtained the beneficial interest under the deed of trust without assuming related liabilities.

[Appel v. Superior Court](#) [Docket](#)

214 Cal.App.4th 329 - 2nd Dist. (B244590) 3/11/13 **Case complete 4/3/13**

MECHANICS LIENS: Where the value of a mechanics lien claimant's work exceeds the contract price, the amount of the lien is limited to the contract price under former Civil Code Section 3123(a) (substantially reenacted as CC 8430), even where the property has been conveyed to a person who was not a party to the contract. That code section provided that the amount of a mechanics lien is the *lesser* of 1) the reasonable value of the work or 2) the price agreed to by the

claimant and the person that contracted for the work.

[Jolley v. Chase Home Finance](#) [Docket](#) [Sup.Ct. Docket](#)

213 Cal.App.4th 872 - 1st Dist. (A134019) 2/11/13 **Petition for review and depublication DENIED by Cal Supreme Ct. 5/22/13**

LOAN AGREEMENTS: In an action to enjoin a trustee's sale and for damages in connection with a construction loan, the court reversed a summary judgment in favor of the defendant lender, finding that there were triable issues of fact as to whether the lender was negligent or engaged in misconduct that allegedly lead plaintiff to believe the loan would be modified. The court held that, while the "Homeowner Bill of Rights" (Assem. Bill 278; Sen. Bill 900 (2011-2012 Reg. Sess.)) did not apply in this case, the legislation sets forth policy considerations that should affect a court's assessment of whether a duty of care was owed to plaintiff, and courts should not rely mechanically on the general rule that lenders owe no duty of care to their borrowers.

[Aguayo v. Amaro](#) [Docket](#)

213 Cal.App.4th 1102 - 2nd Dist. (B231194) 1/31/13 **Case complete 4/3/13**

ADVERSE POSSESSION: The doctrine of unclean hands can serve as a defense to adverse possession by color of title, but normally is not a defense when it is based on claim of right. The court held that unclean hands can be a defense to a claim of adverse possession by claim of right where plaintiff recorded a "wild" deed executed by a non-title holder in order to divert property tax bills from the true owner. The doctrine applied to defeat the adverse possession claim because recordation of the deed constituted deceitful interference with the true owner's ability to defeat the claim.

[Hutton v. Fidelity National Title Company](#) [Modification](#) [Docket](#)

213 Cal.App.4th 486 - 5th Dist. (F063318/F063922) 1/31/13 **Case complete 4/24/13**

NOTARIES: Government Code section 8211.1 limits that amount a notary may charge for taking an acknowledgment to \$10 per signature, but does not limit the amount a notary may charge for performing other services, such as traveling to the location of signing, presenting multiple documents for signature, showing where to sign or initial each document, answering questions, etc. In the unpublished portion of the opinion the court held that the attorney's fee provision in the General Provisions of defendant's escrow instructions was unconscionable because it was buried in the middle of extensive provisions in small font, was one of numerous documents signed by plaintiff and was one-sided because it provided for attorney's fees only for defendant, and not for plaintiff.

[Windsor Pacific v. Samwood Co.](#) [Docket](#)

213 Cal.App.4th 263 - 2nd Dist. (B233514) 1/30/13 **Case complete 4/3/13**

PRESCRIPTIVE EASEMENTS:

1. Plaintiff could not establish a prescriptive easement over access roads where the use was permissive pending the parties' negotiations regarding development of the property.

2. Plaintiff was equitably estopped from asserting a prescriptive easement where defendants were entitled to rely on plaintiff's conduct indicating that use of the roads was permissive.

[R.E. Loans v. Investors Warranty of America](#) [Docket](#) [Sup.Ct. Docket](#)

212 Cal.App.4th 1432 - 2nd Dist. (B234384) 1/23/13 **Petition for review by Cal Supreme Ct. DENIED 5/1/13**

SUBORDINATION AGREEMENTS: The court held that defendant did not violate a subordination agreement pursuant to which plaintiff agreed to subordinate its deed of trust to a deed of trust in favor of defendant securing a loan in the amount of \$4,006,600, even though defendant cross-collateralized the loan with two other loans for \$11,227,500 and \$5,912,750. To the extent defendant's trust deed secured a note in the amount of \$4,006,600, it was senior to plaintiff's trust deed. To the extent defendant's trust deed secured other notes it is junior to plaintiff's trust deed. Plaintiff could have protected its interest by tendering the amount necessary to cure the default under the \$4,006,600 note alone.

[Bank of American v. Superior Court](#) [Docket](#) [Sup.Ct. Docket](#)

212 Cal.App.4th 1076 - 4th Dist., Div. 3 (G046829) 1/15/13 **Petition for review by Cal Supreme Ct. DENIED 4/10/13**

ATTORNEY-CLIENT PRIVILEGE: A tripartite attorney-client relationship arises when a title insurer retains counsel to prosecute an action on behalf of an insured pursuant to a title policy. The privilege applies even where the insurer asserted a reservation of rights in a non-*Cumis* situation.

[Riverisland Cold Storage v. Fresno-Madera Production Credit Assn.](#) [Sup.Ct. Docket](#)

191 Cal.App.4th 611 - Cal. Supreme Court (S190581) 1/14/13

PAROL EVIDENCE RULE: The California Supreme Court held that evidence of oral promises or agreements at variance with the terms of a written contract may be considered to determine if the contract should be invalidated as having been procured by fraud, even where the contract contains an "integration clause". The court overruled its 1935 decision in *Bank of America v. Pendergrass*, which held that evidence offered to prove fraud "must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing." The court pointed out that a showing of justifiable reliance would still be necessary to establish the alleged fraud.

[Pfeifer v. Countrywide Home Loans](#) [Docket](#) [Sup.Ct. Docket](#)

211 Cal.App.4th 1250 - 1st Dist. (A133071) 12/13/12 **Petition for review by Cal Supreme Ct. & Depublication Request DENIED 2/20/13**

FORECLOSURE:

1. A trustee is not subject to, and does not have to comply with the requirements of, the Fair Debt Collection Practices Act because processing a non-judicial foreclosure is not a debt collection

activity under the Act.

2. Where a deed of trust incorporates by reference the servicing requirements of HUD, including a face-to-face interview, the lender had to comply with the servicing terms prior to conducting a valid nonjudicial foreclosure.

3. A tender of the amount owed was not required in this case because a) the tender rule applies only in cases seeking to set aside a completed sale, rather than an action seeking to prevent a sale in the first place, and b) the lender allegedly violated laws related to avoiding the necessity for a foreclosure.

4. Plaintiff's default does not bar their claim that the lender cannot proceed with the foreclosure prior to complying with the HUD servicing requirements.

5. Borrowers may seek to enjoin a lender from proceeding with a foreclosure based on the lender's failure to perform a HUD servicing requirement, but a private right of action for damages does not exist.

[Wooster v. Dept. of Fish and Game](#) [Docket](#) [Sup.Ct. Docket](#)

211 Cal.App.4th 1020 - 3rd Dist. (C068816) 11/26/12 (Pub. Order 12/11/12) **Petition for review by Cal Supreme Ct. DENIED 2/13/13**

CONSERVATION EASEMENTS:

1. The Department of Fish and Game's failure to comply with its obligation to post signs on the subject property did not extinguish a conservation easement or give the plaintiff a basis for rescinding the easement.

2. The grant of hunting rights to the department, so that the department could prohibit all hunting on the property, was legal and consistent with the statutes governing conservation easements.

[Shuster v. BAC Home Loans Servicing](#) [Docket](#)

211 Cal.App.4th 505 - 2nd Dist. (B235890) 11/29/12 **Case complete 1/29/13**

TRUSTEE'S SALES: 1. Omission of the name of the trustee in a deed of trust does not preclude a non-judicial sale. It was sufficient that a trustee was substituted prior to the foreclosure.

2. The foreclosing party does not have to have an interest in or possession of the note. CC 2924(a)(1) permits the "trustee, mortgagee, or beneficiary, or any of their authorized agents" to institute foreclosure.

3. Plaintiff's claims fail because they did not allege tender of the amounts due and owing under the loan. The court pointed out that there are exceptions to the tender rule, such as when the borrower challenges the validity of the underlying debt, asserts a counterclaim or set-off against the beneficiary or demonstrates the deed of trust is void on its face, but none of those exceptions was applicable in this case.

[La Jolla Group II v. Bruce](#) [Docket](#)

211 Cal.App.4th 461 - 5th Dist. (F061829) 11/28/12 **Case complete 1/28/13**

LIS PENDENS / FORGERY: 1. In order to be privileged under CC 47(b)(4), a lis pendens must a) identify a previously filed action and b) the previously filed action must be one that affects title or right of possession of real property. The court declined to add a third requirement that the

plaintiff must make a showing of evidentiary merit.

2. The name of the beneficiary in a deed of trust was altered in an attempt by a loan broker to support an unrelated loan. The court held that since the deed of trust was materially altered after it was signed, it was a forgery and was therefore void *ab initio*.

[Twenty-Nine Palms Enterprises Corporation v. Bardos](#) [Docket](#) [Sup.Ct. Docket](#)

210 Cal.App.4th 1435 - 4th Dist., Div. 2 (E051769) 10/11/12 (Pub. order 11/8/12) **Petition for review by Cal Supreme Ct. DENIED 2/20/13**

INDIANS / CONTRACTOR LAW: In an Indian tribal corporation's suit to recover money paid for construction work done on tribal land, on the ground that defendant was unlicensed at the time of the contract, a grant of summary judgment in favor of the plaintiff was affirmed where:

1. Defendant argued that sovereign immunity prevented plaintiff from asserting that defendant was not licensed as a contractor under state law because the work was performed on tribal land. This defense was rejected because it is only available to tribal entities and not to non-tribal entities;

2. Defendant was the sole shareholder of a corporation that had a contractor's license, with defendant as Responsible Managing Officer. But the work was performed as a sole proprietorship under a different fictitious business name, and defendant did not obtain a contractor's license in that name until after the work was complete. Even though a sole proprietorship is not a legal entity separate from the individual owner, the corporate license belonged to the corporation, which is a separate entity, so he could not perform work under the name of the sole proprietorship;

3. Defendant was the sole shareholder of a corporation that had a contractor's license, with defendant as Responsible Managing Officer. But the work was performed as a sole proprietorship under a different fictitious business name, and defendant did not obtain a contractor's license in that name until after the work was complete. Even though a sole proprietorship is not a legal entity separate from the individual owner, the corporate license belonged to the corporation, which is a separate entity, so he could not perform work under the name of the sole proprietorship;

3. The court rejected defendant's contention that the corporate identity should be disregarded via the alter ego doctrine because defendant used the sole proprietorship for the purpose of self-dealing, and equity does not require piercing the corporate veil in that circumstance.

4. Defendant could not establish substantial compliance with the licensing requirement because he did not meet the criteria of Business and Professions Code Section 7031(e); and

5. Defendant contended that plaintiff should be estopped from relying on Section 7031 because plaintiff told defendant that a license was not required for work performed on tribal land. But equitable principles may not be used to circumvent Business and Professions Code section 7031.

[Cottonwood Duplexes, LLC v. Barlow](#) [Docket](#)

210 Cal.App.4th 1501 - 3rd Dist. (C069564) 11/13/12 **Case complete 1/15/13**

EASEMENTS: The court held that an easement cannot be reduced in size on the basis that the reasonable use requirements of the easement, both presently and in the future, do not require the full size and scope of the original easement. Even though defendant had no apparent use for more than 15 feet of the 60-foot easement, an easement acquired by deed cannot be lost by mere non-user. The court distinguished *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, in which the court permitted the servient tenement to maintain water tanks and grape vines in the easement area because such use did not interfere with the dominant tenements use of the remainder of the easement for ingress and egress. *Scruby* dealt with the scope of use of an easement, whereas here plaintiff sought to entirely terminate defendant's rights as to a portion of the easement.

[JP Morgan Chase Bank v. Banc of America Practice Solutions](#) [Docket](#)209 Cal.App. 4th 855 - 4th Dist., Div. 3 (G045943) 9/27/12 **Case complete 11/29/12**

EQUITABLE SUBROGATION: The court applied the Doctrine of Equitable Subrogation to subrogate respondent's deed of trust to two deeds of trust that had been paid off with the loan proceeds, thereby making respondent's deed of trust senior to appellant's earlier recorded deed of trust. The evidence showed that respondent intended to be in first position, and that appellant had intended to be in third position junior to the two deeds of trust that were paid off with the proceeds of respondent's loan.

[Ragland v. U.S. Bank](#) [Docket](#)209 Cal.App.4th 182 - 4th Dist., Div. 3 (G045580) 9/11/12 **Case complete 11/13/12**

FORECLOSURE: The court overruled the trial court's order sustaining the bank's motion for summary judgment, holding that:

1. Plaintiff raised a triable issue of fact as to whether the bank's representative told her not to make a payment. Plaintiff's failure to tender the amount due does not preclude her from raising this issue because the amount claimed by the bank includes late charges and other charges that would not have been incurred if plaintiff had continued to make payments.
2. Civil Code section 2924g(d), prohibiting a trustee's sale from being conducted prior to the seventh day after an injunction is terminated, creates a private right of action and is not preempted by federal law.

NOTE: Plaintiff conceded that her cause of action for rescission of the trustee's deed was no longer viable because the property was resold to a bona fide purchaser for value.

[Martin v. Van Bergen](#) [Docket](#)209 Cal.App.4th 84 - 2nd Dist. (B232570) 9/6/12 **Case complete 11/6/12**

BOUNDARY DISPUTES: The doctrine of boundary by agreement does not apply where: 1) a boundary was not uncertain where it can be ascertained by an accurate survey; and 2) evidence of an actual agreement to resolve a boundary dispute does not exist.

[Burnham v. California Public Employees' Retirement System](#) [Docket](#)208 Cal.App.4th 1576 - 3rd Dist. (C067715) 8/31/12 **Case complete 10/31/12**

DOMESTIC PARTNERS: Presenting a declaration of domestic partnership for filing with the Secretary of State is a necessary prerequisite for a valid domestic partnership. Signing a declaration of domestic partnership and having it notarized is not sufficient alone. Here, because plaintiff's purported domestic partner was deceased when plaintiff presented the declaration of domestic partnership for filing with the Secretary of State, they never became domestic partners. Therefore, Plaintiff was not entitled to the decedent's state pension survivor benefits. The court also held that the putative spouse doctrine did not apply because that doctrine protects the expectation of parties who accumulate property over time believing they are part of a valid union. Here, plaintiff and the decedent attempted to establish a domestic partnership shortly before one of them died, so they did not accumulate property over time in expectation of having a valid

union.

[JCC Development Corp. v. Levy](#) [Docket](#) [Sup.Ct. Docket](#)

208 Cal.App.4th 1522 - 2nd Dist. (B231920) 8/31/12 **Petition for review by Cal Supreme Ct. DENIED 11/20/12**

PROMISSORY NOTES: A promissory note provided for a higher rate of interest to be charged if the due date of the note was accelerated due to a default. The court held that the higher interest rate did not apply after the note became due and payable by its own terms because at that point the due date was not being accelerated, and the higher interest rate was only contained within the acceleration clause.

[Barroso v. Ocwen Loan Servicing](#) [Docket](#) [Sup.Ct. Docket](#)

208 Cal.App.4th 1001 - 2nd Dist. (B229112) 8/21/12 **Request for depublication DENIED by Cal Supreme Ct. 11/14/12**

LOAN MODIFICATION: In this action to set aside a trustee's sale, the trial court sustained the loan servicer's demurrer, and the appellate court reversed. The court held that the demurrer was properly sustained to the extent the action was based on a Revised Modification Agreement because the borrower's signature was not notarized as required by the agreement and the borrower signed it after the deadline for accepting the offer. However, the demurrer should not have been sustained as to a previous Modification Agreement because that agreement did not contain a requirement that the signature be notarized, and it was timely submitted. Also, the general rule that a borrower must tender payment of the debt in order to set aside a trustee's sale did not apply here because there was no default under the terms of the Modification Agreement.

[Vieira Enterprises v. City of East Palo Alto](#) [Docket](#) [Sup.Ct. Docket](#)

208 Cal.App.4th 584 - 1st Dist. (A132754) 8/15/12 **Request for depublication DENIED by Cal Supreme Ct. 11/28/12**

[Modification of Opinion](#): 209 Cal.App.4th 120

FIXTURES: The court held that Health & Safety Code Section 18551, which sets forth the requirements for approving the installation of a manufactured homes on a foundation, does not preempt the common law of fixtures. The notice and recording requirements of Section 18551 serve the sole purpose of placing the manufactured homes on the property tax rolls to permit taxing them as an improvement of real property. Accordingly, the manufactured home in this case became a fixture at the time it was installed even though that was prior to the City's issuance of a notice of installation. *[Ed. note: The case would not normally be of interest because it is an action against a city for inverse condemnation and due process violations, but the discussion pertaining to the law of fixtures is relevant for our purposes.]*

[Pinnacle Museum Tower Assn. v. Pinnacle Market Development](#) [Docket](#)

55 Cal.4th 223 - Cal. Supreme Court (S186149) 8/16/12

CC&R's: The court held that a provision in CC&R's providing that the homeowners association

and each condominium owner agree to waive their right to a jury trial and to have any construction dispute resolved exclusively through binding arbitration is not unconscionable and is properly enforced against the association, as well as the individual owners.

[Arabia v. BAC Home Loans Servicing](#) [Docket](#) [Sup.Ct. Docket](#)

208 Cal.App.4th 462 - 4th Dist., Div. 1 (D060923) 8/13/12 **Petition for review by Cal Supreme Ct. DENIED 10/31/12**

JUDICIAL FORECLOSURE: The court held:

1. A loan servicer may prosecute a judicial foreclosure action in its own name as long as the right to foreclose has been assigned to the loan servicer. Here the lender assigned that right pursuant to a Pooling and Servicing Agreement.
2. Failure to name a junior lienholder does not preclude a judgment against the named parties, although the judgment does not affect the junior lien.
3. Filing a cross-complaint for judicial foreclosure in an action by the borrower for alleged violations concerning earlier attempts to non-judicially foreclose is valid and does not undermine the extensive procedures California has put in place for non-judicial foreclosure. Judicial foreclosures are conducted under the supervision of a court and do not require the same procedural protections as non-judicial foreclosures.

[Weinstein v. Rocha](#) [Docket](#) [Sup.Ct. Docket](#)

208 Cal.App.4th 92 - 2nd Dist. (B235931) 8/1/12 **Petition for review by Cal Supreme Ct. DENIED 10/31/12**

ANTI-DEFICIENCY: The seller (Rocha) carried back a note secured by a second deed of trust on property he sold to defendant (Weinstein). The note was later modified pursuant to a settlement agreement in an action in which Weinstein sued Rocha for failing to disclose housing code violations. Weinstein defaulted on both deeds of trust and the holder of the first deed of trust foreclosed, wiping out Rocha's deed of trust. Rocha sued to recover the amount due on the note. The court held that the settlement agreement was inextricably tied to the promissory note, and was a modification of the terms of the note. Therefore, a deficiency judgment is precluded by C.C.P. Section 580b, which prohibits a seller who carries back a purchase money deed of trust from recovering a deficiency judgment.

[Wilson v. Hynek](#) [Docket](#)

207 Cal.App.4th 999 - 4th Dist., Div. 1 (D057620) 6/20/12 (Pub. Order 7/16/12) **Case complete 9/19/12**

TRUSTEE'S SALES: A loan was secured by two deeds of trust, one securing a vacant parcel of land and the other securing plaintiffs' residence. The court rejected plaintiffs' claim that defendants were bound by alleged oral representations that defendants would first foreclose on the vacant parcel, because the deeds of trust specifically provided: "Borrower hereby expressly waives any right which it may have to direct the order in which any of the Property shall be sold in the event of any sale or sales pursuant to this Deed of Trust." The court also rejected plaintiffs' claim that the notice of default was invalid because it was executed by an agent for the

beneficiary rather than by the trustee, because Civil Code Section 2942(a)(1) provides that a notice of default can be recorded by a trustee, beneficiary *or any of their authorized agents*.

[Skov v. U.S. Bank National Association](#) [Docket](#)

207 Cal.App.4th 690 - 6th Dist. (H036483) 6/8/12 (Partial Pub. Order 7/3/12) **Case complete 9/5/12**

TRUSTEE'S SALES: The trial court sustained defendant's demurrer to a complaint asserting that defendant failed to comply with Civil Code Section 2923.5 (which requires that before recording a notice of default, a lender must contact the borrower to "explore" options for avoiding foreclosure). The appellate court reversed, holding that:

1. A court can take judicial notice of the fact that a Notice of Default has been recorded with an attached declaration asserting compliance with CC 2923.5. But whether the lender actually complied with CC 2923.5 is a question of fact that cannot be resolved on demurrer.
2. A private cause of action exists to enjoin a trustee's sale for a violation of CC 2923.5.
3. CC 2923.5 is not preempted by the National Bank Act (12 U.S.C. 21, et seq.).

[Fait v. New Faze Development](#) [Docket](#) [Sup.Ct. Docket](#)

207 Cal.App.4th 284 - 3rd Dist. (C067630) 6/27/12 **Petition for review by Cal Supreme Ct. DENIED 10/17/12**

ANTIDEFICIENCY LAW: Plaintiffs sold a parcel of property and carried back a note secured by a deed of trust to finance the balance of the purchase price. The purchaser demolished a building on the property to make way for new development, but was unable to complete the development and defaulted on the loan. Plaintiffs foreclosed non-judicially and purchased the property at the foreclosure sale. They then sued for waste and impairment of security based on the demolition of the building and the resulting loss of value. Defendants claimed that the action was barred by California's antideficiency laws. The court held that the antideficiency laws bar recovery for waste only if it is caused by the economic pressures of a depressed market, such as where an owner is compelled as a result of an economic downturn to forego the general maintenance and repair of the property in order to keep up with payments on the mortgage debt. But antideficiency laws do not preclude this action because defendants' demolition of the building was not induced by an economic downturn.

[Cadlerock Joint Venture v. Lobel](#) [Docket](#) [Sup.Ct. Docket](#)

206 Cal.App.4th 1531 - 4th Dist., Div. 3 (G045936) 6/20/12 **Petition for review by Cal Supreme Ct. DENIED 10/10/12**

TRUSTEE'S SALES / DEFICIENCY JUDGMENTS: When a single lender contemporaneously makes two non-purchase money loans secured by two deeds of trust referencing a single parcel of real property and soon thereafter assigns the junior loan to a different entity, the assignee of the junior loan, who is subsequently "sold out" by the senior lienholder's nonjudicial foreclosure sale, may pursue the borrower for a money judgment in the amount of the debt owed. The court pointed out that there was no suggestion in the record that the loan originator and assignees were affiliated in any way or that two loans were created, when one would have sufficed, as an artifice

to evade C.C.P. Section 580d. (Section 580d prohibits a lender from obtaining a deficiency judgment after non-judicially foreclosing its deed of trust.)

[Nickell v. Matlock](#) [Docket](#) [Sup.Ct. Docket](#)

206 Cal.App.4th 934 - 2nd Dist. (B230321) 6/4/12 **Petition for review by Cal Supreme Ct. DENIED 8/15/12**

QUIET TITLE: Normally, a defendant has no right to participate in the case after its default has been entered. But Code of Civil Procedure Section 764.010, pertaining to quiet title actions, provides that "[t]he court shall not enter judgment by default but shall in all cases require evidence of plaintiff's title and hear such evidence as may be offered respecting the claims of any of the defendants . . ." The court held that, while default may be entered, Section 764.010 requires that before issuing a default judgment the trial court must hold an evidentiary hearing in open court, and that defendants were entitled to participate in the hearing even though their answers to the complaint had been stricken as a result of sanctions, and their defaults had been entered.

[Cal Sierra Construction v. Comerica Bank](#) [Docket](#) [Sup.Ct. Docket](#)

206 Cal.App.4th 841 - 3rd Dist. (C060707) 5/31/12 **Petition for review by Cal Supreme Ct. DENIED 8/29/12**

MECHANICS LIENS: The court held that only owners, and not lenders, are entitled to bring a "Lambert" motion. This term refers to [Lambert v. Superior Court](#) (1991) 228 Cal.App.3d 383, which held that where a claimant has already filed suit to enforce a mechanics lien or stop notice, the owner may file a motion in the action to have the matter examined by the trial court. On such motion, the claimant bears the burden of establishing the "probable validity" of the claim underlying the lien or stop notice. If the claimant fails to meet that burden, the lien and stop notice may be released in whole or in part.

[Cyr v. McGovran](#) [Docket](#)

206 Cal.App.4th 645 - 2nd Dist. (B231155) 5/29/12

OPTIONS: The 3-year statute of limitation under C.C.P. 338(b) for injury to real property does not apply to plaintiff's alleged injury to rights under an option because an option is a contractual right, and not an interest in real property.

[American Property Management Corporation v. Superior Court](#) [Docket](#) [Sup.Ct. Docket](#)

206 Cal.App.4th 491 - 4th Dist., Div. 1 (D060868) 5/24/12 **Petition for review by Cal Supreme Ct. DENIED 8/22/12**

INDIANS - SOVEREIGN IMMUNITY: The court held that a California limited liability company ("the LLC"), which was wholly owned through a series of California limited liability companies by an Indian tribe, was not entitled to sovereign immunity. The LLC owned a hotel and the lawsuit involved a dispute with its property management company. The court stated that the dispositive fact was that the LLC was a California limited liability company. Nevertheless, it went through the weighing process prescribed by the US 10th Circuit Court of Appeals in

[Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort](#) 629 F.3d 1173, which concluded that a court needs to determine whether a tribe's entities are an "arm of the tribe" by looking to a variety of factors when examining the relationship between the tribe and its entities, including but not limited to: (1) their method of creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) whether the tribe intended for the entities to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entities. The court concluded that the balance of these factors weighed heavily against sovereign immunity, and reiterated that the most significant fact was the LLC's organization as a California limited liability company.

The concurring opinion would not accord the same dispositive effect of formation under state law as a limited liability company that the majority did, but agreed that the factors set forth by the 10th Circuit weighed against sovereign immunity.

[Ed. note: The "weighing" process is impossible to do with any certainty at the time of contracting with an LLC (or other entity) in which an Indian tribe owns an interest. In spite of the favorable outcome of this state court appellate opinion, it seems that in order to be safe, you need to insist on a specific waiver of sovereign immunity from a tribe that has an interest in any entity you enter into a contract with.]

[Shady Tree Farms v. Omni Financial](#) [Docket](#)

206 Cal.App.4th 131 - 5th Dist. (F062924) 5/22/12 **Case complete 7/23/12**

MECHANICS LIENS: Plaintiff contracted directly with the owner of a development to deliver trees, and recorded a mechanics lien after not being paid. The court held that plaintiff's mechanics lien was invalid because it failed to provide defendant construction lender with a preliminary 20-day notice under Civil Code Section 3097(b). Section 3097(a), requiring a 20-day notice to the owner, original contractor and construction lender, did not apply because plaintiff was under direct contract with the owner, and the subsection contains an exception for such persons. However, Section 3097(b) requires a 20-day notice to the construction lender by anyone under direct contract with the owner, except "the contractor". The court interpreted that term to refer only to the general contractor, so the exception did not apply to plaintiff.

[Deutsche Bank v. McGurk](#) [Docket](#)

206 Cal.App.4th 201 - 2nd Dist. (B231591) 5/22/12 **Case complete 7/26/12**

QUIET TITLE: Defendant McGurk filed a previous quiet title action against a purchaser who had defrauded her, and recorded a lis pendens. She also named as a defendant the lender holding a deed of trust executed by the purchaser. McGurk dismissed the lender after the lender filed bankruptcy intending to pursue the lender in the bankruptcy action. The lender then assigned the note and deed of trust to plaintiff, after which McGurk took the default of the purchaser. Plaintiff brought this declaratory relief action seeking a determination of the validity of the deed of trust. The court held that 1) even though the assignment was recorded subsequent to the lis pendens, plaintiff stands in the shoes of the lender, whose deed of trust recorded prior to the lis pendens, 2)

while plaintiff took the assignment subject to the risk that its assignor's interest would be proven to have been invalid, that risk never came to fruition because the assignor was dismissed, 3) the case was remanded to the trial court to determine the validity of the deed of trust.

[Herrera v. Federal National Mortgage Association](#) [Docket](#) [Sup.Ct. Docket](#)
205 Cal.App.4th 1495 - 4th Dist., Div. 2 (E052943) 5/17/12 **Petition for review DENIED by Cal Supreme Ct. 8/8/12**

TRUSTEE'S SALES: MERS, as nominee beneficiary, has the power to assign its interest under a deed of trust. Even assuming plaintiffs can allege specific facts showing that MERS' assignment of the deed of trust was void, a plaintiff in a suit for wrongful foreclosure is required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests. Not only did plaintiffs fail to show prejudice, but if MERS lacked the authority to assign the deed of trust, the true victim would not be the plaintiffs, who were admittedly in default, but the lender whose deed of trust was improperly assigned. Finally, Civil Code Section 2932.5, requiring recordation of an assignment of a mortgage, applies only to mortgages that give a power of sale to the creditor, not to deeds of trust which grant a power of sale to the trustee.

[Estates of Collins and Flowers \(Flowers v. Dancy\)](#) [Docket](#) [Sup.Ct. Docket](#)
205 Cal.App.4th 1238 - 3rd Dist. (C064815) 5/10/12 **Petition for review DENIED by Cal Supreme Ct. 7/25/12**

FORGERY: The son of one of two property owners forged a deed after they both had died. The court held that the administrator of the estates of the property owners was precluded from attacking the admittedly forged deed due to the "unclean hands" doctrine. The administrator, prior to being appointed as such, wrongfully sought to control the house by filing a defective mechanics lien, filing a baseless quiet title action for his own benefit, and renting the property to tenants for his own benefit, without regard for the other heirs of the two deceased property owners. The court pointed out that a forged deed is a nullity, but a party's conduct may estop him from asserting that the deed is forged, and that the unclean hands doctrine can prevent a party from attacking a forged deed.

The court also addressed the fact that as the other heirs should not suffer as a result of the administrator's wrongful conduct. However, the court found that there was no evidence that any heirs who had not aided, ratified, or acquiesced in the administrator's actions actually exist in this case.

[Sumner Hill Homeowners' Association v. Rio Mesa Holdings](#) [Docket](#)
205 Cal.App.4th 999 - 5th Dist. (F058617) 5/2/12 **Petition for review DENIED by Cal Supreme Ct. 7/24/12**

EASEMENTS: In the published portion of the opinion, the court held that a subdivision map failed to provide public access to a river as required by Government Code Section 66478.4 if the river is navigable, but that the challenge to the map was barred by the 90-day statute of limitations in Government Code Section 66499.37. The court did not reach the question of

whether or not the river is navigable. The court also held that implied and equitable easement rights are sufficient "title" to support a slander of title action, and that defendant slandered plaintiffs' title by recording a Notice of Permission to Use Land Under Civil Code Section 813 that purported to restrict plaintiffs use of the easement.

The court also addressed Streets and Highways Code Section 8353, which provides that the vacation of a street or highway extinguishes all private easements claimed by reason of the purchase of a lot by reference to a map on which the street or highway is shown, unless within two years after the vacation, the claimant records a notice describing the private easement. The court held that this section does not apply to private easements that are based on other or additional grounds besides the fact that the purchase was by reference to a map depicting a street.

[Haynes v. EMC Mortgage Corporation](#) [Docket](#) [Sup.Ct. Docket](#)

205 Cal.App.4th 329 - 1st Dist. (A131023) 4/9/12 (Pub. Order 4/14/12) **Petition for review DENIED by Cal Supreme Ct. 8/8/12**

TRUSTEE'S SALES: Civil Code Section 2932.5, which requires the assignee of a mortgagee to record the assignment before exercising a power to sell the real property, applies only to mortgages and not to deeds of trust. Section 2932.5 requires the assignment of a mortgage to be recorded so that a prospective purchaser knows that the mortgagee has the authority to exercise the power of sale. This is not necessary when a deed of trust is involved, since the trustee conducts the sale and transfers title. (*Ed. note: The result was not affected by the fact that the assignee substituted a new trustee.*)

[Brown v. Wells Fargo Bank](#) [Docket](#)

204 Cal.App.4th 1353 - 2nd Dist (B233679) 4/16/12 **Case complete 6/20/12**

TRUSTEE'S SALES: Plaintiff filed suit and sought a preliminary injunction to prevent a trustee's sale. The trial court granted the injunction on the condition that plaintiff deposit \$1,700 a month into a client trust account. The trial court subsequently dissolved the injunction after plaintiff failed to make any payments. The appellate court affirmed, and further determined that the appeal was frivolous because no viable issue was raised on appeal. It directed the court clerk to send a copy of the opinion to the California State Bar for consideration of discipline of plaintiff's attorney.

[Connolly v. Trabue](#) [Docket](#) [Sup.Ct. Docket](#)

204 Cal.App.4th 1154 - 1st Dist. (A131984) 4/10/12 **Petition for review and depublication request DENIED by Cal Supreme Ct. 6/27/12**

PRESCRIPTIVE EASEMENTS: Plaintiffs brought an action to establish a prescriptive easement to a portion of defendant's property they had fenced in 1998. Plaintiff and defendant's predecessor intended to do a lot line adjustment that would transfer the disputed area to plaintiffs, but it was not accomplished because of an error in a deed. The trial court ruled that, even if such an easement had been acquired by Plaintiffs, their claim was barred by the doctrine of laches because they had delayed in asserting their claim in a timely manner. The appellate court

reversed, holding that the doctrine of laches is inapplicable in an action involving a claim for a prescriptive easement because 1) once a prescriptive easement is established for the statutory period, the owner of the easement is under no obligation to take further action, rather, it is the record owner who must bring an action within 5 years after the prescriptive period commences, 2) this was an action at law, not equity, and laches applies only to equitable actions and 3) there was no evidence that plaintiffs were aware of the error in deed until shortly before they filed this action. *[Ed. note: Plaintiff's occupation of the disputed area was apparently exclusive, but the court did not discuss cases holding that a prescriptive easement cannot be established where the use is exclusive. For example, see [Harrison v. Welch](#).]*

[Bank of America v. Mitchell](#) [Docket](#)

204 Cal.App.4th 1199 - 2nd Dist. (B233924) 4/10/12 **Case complete 6/11/12**

TRUSTEE'S SALES / DEFICIENCY JUDGMENTS: The court acknowledged existing case law holding that a "sold out" junior holder of a deed of trust can obtain a deficiency judgment when the junior lien is wiped out by a trustee's sale under a senior deed of trust. But the court held that a deficiency judgment was not available in this case where the same lender held both deeds of trust and assigned the junior deed of trust to plaintiff after the trustee's sale. The court also held that this applies regardless of whether the lender purchases at its own trustee's sale or where, as here, a 3rd party purchases at the sale.

[Montgomery Sansome LP v. Rezai](#) [Docket](#)

204 Cal.App.4th 786 - 1st Dist. (A130272, A130694) 3/28/12 **Case complete 5/29/12**

MECHANICS LIENS/CONTRACTOR LICENSING: Plaintiff's certificate of limited partnership with the California Secretary of State was in the name of "Montgomery-Sansome, LP". Its contractor's license was in the name of Montgomery Sansome LTD. A fictitious business name statement named Montgomery Sansome LTD, L.P. and incorrectly stated that it was a general partnership. The contract entered into with defendant to perform certain repairs named plaintiff as Montgomery Sansome LTD, LP. The trial court granted a summary judgment in favor of defendant, holding that plaintiff could not recover because the entity that signed the contract was not licensed. The appellate court reversed, holding that there is a triable issue of fact regarding whether there is actually only a single entity. Plaintiff did not violate the licensing law if the entity that entered into the contract is actually the same as the entity that signed the contract. The court distinguished cases holding that the licensing law is violated where a corporation or partnership enters into a contract and the principal is licensed, but not the entity.

[Debrunner v. Deutsche Bank](#) [Docket](#) [Sup.Ct. Docket](#)

204 Cal.App.4th 433 - 6th Dist. (H036379) 3/16/12 **Petition for review and depublication request DENIED by Cal Supreme Ct. 6/13/12**

TRUSTEE'S SALES: The court upheld the trial court's grant of a demurrer in favor of the lender without leave to amend, holding:

1. Since each assignment of deed of trust provided for the assignment "together with the note or notes therein described", it was not necessary to separately endorse the promissory note.

2. Physical possession of the note is not a precondition to nonjudicial foreclosure.
3. A notice of default does not need to be filed by the person holding the note. C.C. 2924(a)(1) permits a notice of default to be filed by the "trustee, mortgagee or beneficiary, or any of their authorized agents".
4. A notice of default (NOD) is valid even though the substitution of the trustee identified in the NOD is not recorded until after the NOD records.

[Walker v. Ticor Title Company of California](#) [Docket](#)

204 Cal.App.4th 363 - 1st Dist. (A126710) 3/15/12 **Case complete 5/16/12**

ESCROW: Plaintiffs filed suit against Ticor and 12 other defendants alleging defendants conspired to fraudulently induce them to refinance real estate loans. The court upheld the judgment in favor of Ticor, holding as follows:

1. Even though Ticor gave the loan documents to the loan broker in order to have plaintiffs sign them at home, this did not violate a provision of the lender's closing instructions prohibiting the release of loan documents without lender's prior approval because the lender was fully aware that this was Ticor's and the loan broker's practice so, therefore, it impliedly consented to it.
2. It was reasonable for the jury to conclude that Ticor did not violate a provision of the lender's closing instructions requiring the closing agent to "coordinate the settlement" because the loan broker's activity of obtaining signatures was only part of the larger coordination of the settlement handled and supervised by Ticor.
3. It was permissible for the loan broker to provide copies of the "Notice of Right to Cancel" because nothing in the language of the instructions precluded Ticor from delegating this task, nor could plaintiffs have been damaged by such a delegation.
4. One of the plaintiffs notified Ticor after the loan closed that his wife had not signed the loan documents. This was insufficient to establish that Ticor aided and abetted the loan broker's fraud because it did not show that Ticor had actual knowledge of the fraud.
5. It was improper for the trial court to reduce the amount of attorney's fees awarded to Ticor based on plaintiff's financial condition.

[Kavin v. Frye](#) [Docket](#)

204 Cal.App.4th 35 - 2nd Dist. (B230076) 3/5/12 **Case complete 5/7/12**

OPTION TO RENEW LEASE:

1. An option to renew a lease was not effective where it was exercised by only one of four tenants, and the other tenants did not authorize the first tenant to do so.
2. A lease provision stating that all lessees are jointly and severally liable for lease obligations is not an authorization for only one lessee to execute an option to extend the lease.
3. The option was executed late per the terms of the lease. Normally, a lessor can waive the time requirement for an option since the provision normally benefits only the lessor. Here, however, the lessor could not waive the provision on behalf of two of the tenants who, since they signed the lease basically as guarantors, also stood to benefit by the expiration of the option period.

[SCI California Funeral Services v. Five Bridges Foundation](#) [Docket](#)

203 Cal.App.4th 549 - 1st Dist. (A126053) 2/14/12 **Case complete 4/17/12**

DAMAGES-DIMINUTION IN VALUE: *In this non-title insurance case, plaintiff purchased property, including an easement that was determined, in another action, to be invalid. The court held that the buyer's damages for loss of the easement included, in addition to diminution in value caused by loss of the easement, damages attributable to the fact that the easement had additional unique value to a neighbor, which plaintiff could have used as a "bargaining chip" to obtain a higher price when negotiating a sale of the easement to the neighbor.*

[Ed. Note: This case may not be applicable to title insurance because standard ALTA policies contain a provision limiting liability for damages to "the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy". CLTA policies contain a similar provision. The ALTA/CLTA Homeowners Policy of Title Insurance contains a provision limiting damages to "your actual loss".]

[California Redevelopment Association v. Matosantos](#) [Docket](#)

53 Cal.4th 231 - Cal. Supreme Court (S194861) 12/29/11

REDEVELOPMENT AGENCIES:

1. Assembly Bill 1X 26, which bars redevelopment agencies from engaging in new business and provides for their windup and dissolution, is constitutional.
2. Assembly Bill 1X 27, which offers redevelopment agencies the alternative to continue to operate if the cities and counties that created them agree to make payments into funds benefiting the state's schools and special districts, is unconstitutional.

[Stebly v. Litton Loan Servicing](#) [Docket](#) [Sup.Ct. Docket](#)

202 Cal.App.4th 522 - 3rd Dist. (C066130) 11/30/11 (Pub. Order 12/29/11) **Petition for review and depublication request by Cal Supreme Ct. DENIED 3/14/12**

TRUSTEE'S SALES: The court upheld the trial court's sustaining of a demurrer without leave to amend in an action alleging that defendant violated Civil Code Section 2923.5, which requires that before a notice of default can be filed, a lender must attempt to contact the borrower and explore options to prevent foreclosure. The court held:

1. Section 2923.5 does not provide for damages or for setting aside a foreclosure sale. The only remedy available is to provide the borrower more time before a foreclosure sale occurs. After the sale, the statute provides no relief.
2. The statute does not require a lender to modify the loan.
3. While a tender of the loan amount is not necessary to delay a foreclosure sale, it is necessary in order to set aside a sale after it occurs.
4. Plaintiff's cause of action for dependant adult abuse fails because plaintiff failed to allege that the property was taken *wrongfully* where an ordinary foreclosure sale occurred.

[Portico Management Group v. Harrison](#) [Docket](#) [Sup.Ct. Docket](#)

202 Cal.App.4th 464 - 3rd Dist. (C062060) 12/28/11 **Petition for review by Cal Supreme Ct. DENIED 4/11/12**

TRUSTS: In the published portion of the opinion, the court held that an arbitration award and judgment against a trust, and not against the trustees in their capacity as trustees, were not valid because a trust is not an entity or person capable of owning title to property. A trust is, rather, a fiduciary relationship with respect to property. The court pointed out that if the judgment had been against the trustees in their representative capacities, it would have also bound successor trustees. Although the lawsuit properly named the trustees, for some reason plaintiff did not seek to correct or modify the arbitration award or judgment to indicate that it was properly against the trustees.

[Gray1 CPB v. Kolokotronis](#) [Docket](#)

202 Cal.App.4th 480 - 3rd Dist (C064954) 12/2/11 (Pub. Order 12/28/11) **Case complete 2/28/12**

GUARANTY: The court rejected defendant's contention that the guaranty he signed was actually a demand note, which would have meant that he could compel the lender to foreclose on the security first and that the waiver of his rights under various antideficiency statutes would be invalid. The court held that the following language in the guaranty did not turn the guaranty into a promissory note: "whether due or not due," "on demand," and "not contingent upon and are independent of the obligations of Borrower."

[Lona v. Citibank](#) [Docket](#)

202 Cal.App.4th 89 - 6th Dist (H036140) 12/21/11 **Case complete 2/22/12**

TRUSTEE'S SALES: The court reversed a summary judgment in favor of defendants in an action seeking to set aside a trustee's sale on the basis that the loan was unconscionable. The court held that summary judgment was improper for two reasons:

1. The homeowner presented sufficient evidence of triable issues of material fact regarding unconscionability. Plaintiff asserted that the loan broker ignored his inability to repay the loan (monthly loan payments were four times his monthly income) and, as a person with limited English fluency, little education, and modest income, he did not understand many of the details of the transaction which was conducted entirely in English.
2. Plaintiff did not tender payment of the debt, which is normally a condition precedent to an action by the borrower to set aside the trustee's sale, but defendants' motion for summary judgment did not address the exceptions to this rule that defendant relied upon.

The case contains a good discussion of four exceptions to the tender requirement: 1. If the borrower's action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt. 2. A tender will not be required when the person who seeks to set aside the trustee's sale has a counter-claim or set-off against the beneficiary. 3. A tender may not be required where it would be inequitable to impose such a condition on the party challenging the sale. 4. No tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee's deed is void on its face.

[Pioneer Construction v. Global Investment Corp.](#) [Modification Order](#) [Docket](#) [Sup.Ct. Docket](#)

202 Cal.App.4th 161 - 2nd Dist. (B225685) 12/21/11 **Request for depublication DENIED 3/28/12**

MECHANICS LIENS: The court held that:

1. A mechanics lien claimant who provided labor and materials prepetition to a debtor in bankruptcy can record a mechanics lien after the property owner files for bankruptcy without violating the automatic stay. (11 U.S.C. §362(b)(3).)
2. A mechanics lienor must, and defendant did, file a notice of lien in the debtor's bankruptcy proceedings to inform the debtor and creditors of its intention to enforce the lien. (11 U.S.C. §546(b)(2))
3. The 90-day period to file an action after recording a mechanics lien is tolled during the pendency of the property owner's bankruptcy. Accordingly, an action to enforce the lien was timely when filed 79 days after a trustee's sale by a lender who obtained relief from the automatic stay. (The property ceased to be property of the estate upon completion of the trustee's sale.)

[Harbour Vista v. HSBC Mortgage Services](#) [Docket](#)

201 Cal.App.4th 1496 - 4th Dist., Div. 3 (G044357) 12/19/11 **Case complete 2/21/12**

QUIET TITLE: Normally, a defendant has no right to participate in the case after its default has been entered. But Code of Civil Procedure Section 764.010, pertaining to quiet title actions, provides that "[t]he court shall not enter judgment by default but shall in all cases require evidence of plaintiff's title and hear such evidence as may be offered respecting the claims of any of the defendants . . ." The court held that, while default may be entered, Section 764.010 requires that before issuing a default judgment the trial court must hold an evidentiary hearing in open court, and that a defendant is entitled to participate in the hearing even when it has not yet answered the complaint and is in default.

[Park v. First American Title Insurance Company](#) [Docket](#)

201 Cal.App.4th 1418 - 4th Dist., Div. 3 (G044118) 11/23/11 (Pub. Order 12/16/11) **Case complete 2/15/12**

TRUSTEE'S SALES: A trustee's sale was delayed due to defendant's error in preparing the deed of trust. However, the court held that plaintiff could not establish damages because she could not prove that a potential buyer was ready, willing and able to purchase the property when the trustee's sale was originally scheduled. Such proof would require showing that a prospective buyer made an offer, entered into a contract of sale, obtained a cashier's check, or took any equivalent step that would have demonstrated she was ready, willing, and able to purchase plaintiff's property. Also, plaintiff would need to show that the prospective buyer was financially able to purchase the property, such as by showing that the prospective buyer had obtained financing for the sale, preapproval for a loan or had sufficient funds to purchase the property with cash.

[Bardasian v. Superior Court](#) [Docket](#)

201 Cal.App.4th 1371 - 3rd Dist. (C068488) 12/15/11

TRUSTEE'S SALES: Civil Code Section 2923.5 requires that before a notice of default can be filed, a lender must attempt to contact the borrower and explore options to prevent foreclosure. Where the trial court ruled on the merits that a lender failed to comply with Section 2923.5, it was proper to enjoin the sale pending compliance with that section, but it was not proper to require plaintiff to post a bond and make rent payments. Also, discussions in connection with a loan modification three years previously did not constitute compliance with the code section.

[Lang v. Roche](#) [Docket](#)201 Cal.App.4th 254 - 2nd Dist. (B222885) 11/29/11 **Case complete 2/3/12**

SHERIFF'S SALES: Plaintiff sought to set aside a Sheriff's sale arising from the execution on a judgment rendered in another action. Defendant had obtained that judgment by default after service by publication even though plaintiff was defendant's next door neighbor and could easily be found. The court set the sale aside, holding that even though C.C.P. 701.780 provides that an execution sale is absolute and cannot be set aside, that statute does not eliminate plaintiff's right of equitable redemption where the judgment is void due to lack of personal jurisdiction.

[Promenade at Playa Vista HOA v. Western Pacific Housing](#) [Docket](#) [Sup.Ct. Docket](#)200 Cal.App.4th 849 - 2nd Dist. (B225086) 11/8/11 **Petition for review by Cal Supreme Ct. GRANTED 1/25/12**

CAL SUPREME COURT 10/10/12: Transferred back to the Court of Appeal with directions to vacate its decision and to reconsider the cause in light of [Pinnacle Museum Tower Assn. v. Pinnacle Market Development \(US\), LLC](#) (2012) 55 Cal.4th 223.

2nd DISTRICT COURT OF APPEALS 12/6/12: Prior decision [vacated](#) because it is inconsistent with [Pinnacle](#).

CC&R'S: In a construction defect action brought by a condominium homeowners association, the court held that a developer cannot compel binding arbitration of the litigation pursuant to an arbitration provision in the Declaration of Covenants, Conditions, and Restrictions. CC&R's are not a contract between the developer and the homeowners association. Instead, the provisions in the CC&R's are equitable servitudes and can be enforced only by the homeowners association or the owner of a condominium, not by a developer who has sold all the units.

[Alpha and Omega Development v. Whillock Contracting](#) [Docket](#) [Sup.Ct. Docket](#)200 Cal.App.4th 656 - 4th Dist., Div. 1 (D058445) 11/2/11 **Petition for review by Cal Supreme Ct. DENIED 2/15/12**

LIS PENDENS: This is a slander of title and malicious prosecution action brought after defendant's unsuccessful action to foreclose a mechanics lien. Plaintiff's slander of title allegation is based on defendant's recordation of a lis pendens in the prior mechanics lien action. The

appellate court upheld the trial court's granting of defendant's anti-SLAPP motion and striking the slander of title cause of action, because recording a lis pendens is privileged under Civil Code Section 47(b)(4).

[Biancalana v. T.D. Service Company](#) [Docket](#) [Sup.Ct. Docket](#)

200 Cal.App.4th 527 - 6th Dist. (H035400) 10/31/11 **Petition for review by [Cal Supreme Ct.](#)**
[REVERSED 5/16/13](#)

TRUSTEE'S SALES: Inadequacy of the sale price is not a sufficient ground for setting aside a trustee's sale of real property in the absence of any procedural errors. The unpaid balance of the loan secured by the subject deed of trust was \$219,105. The trustee erroneously told the auctioneer to credit bid the delinquency amount (\$21,894.17). Plaintiff was the successful bidder with a bid of \$21,896. The court refused to set aside the sale because there were no procedural errors and the mistake was within the discretion and control of the trustee, who was acting as agent for the lender. The court distinguished [Millennium Rock Mortgage, Inc. v. T.D. Service Co.](#) because here the mistake was made by defendant in the course and scope of its duty as the beneficiary's agent, not by the auctioneer as in *Millennium Rock*.

The case also contains a discussion of the rule that once the trustee's deed has been delivered, a rebuttable presumption arises that the foreclosure sale has been conducted regularly and properly. But where the deed has not been delivered, the sale may be challenged on the grounds of procedural irregularity.

[First Bank v. East West Bank](#) [Docket](#)

199 Cal.App.4th 1309 - 2nd Dist. (B226061) 10/17/11 **Case complete 12/19/11**

RECORDING: Where two deeds of trust secured by the same real property were simultaneously time-stamped for recording by the County Recorder's Office but were indexed at different times, the lenders have equal priority. The recording laws protect *subsequent purchasers* and neither bank was a subsequent purchaser. The court acknowledged that a *subsequent purchaser* (or lender) who records his interest before the prior interest is indexed has priority, but this rule does not apply when both deeds of trust were recorded simultaneously.

[Dollinger DeAnza Assoc. v. Chicago Title Insurance Company](#) [Docket](#) [Sup.Ct. Docket](#)

199 Cal.App.4th 1132 - 6th Dist. (H035576) 9/9/11 (Pub. Order 10/6/11) **Request for depublication DENIED 1/4/12**

TITLE INSURANCE: Plaintiff's title insurance policy, which was issued in 2004, insured property that originally consisted of seven parcels, but which had been merged into a single parcel pursuant to a Notice of Merger recorded by the City of Cupertino in 1984. The policy did not except the Notice of Merger from coverage. Plaintiff filed this action after Chicago Title denied its claim for damages alleged to result from the inability to sell one of the parcels separately. The court ruled in favor of Chicago, holding:

1. While the notice of merger may impact Plaintiff's ability to *market* the separate parcel, it has no affect on Plaintiff's *title* to that parcel, so it does not constitute a defect in title. It does not

represent a third person's claim to an interest in the property.

2. Chicago is not barred by principals of waiver or estoppel from denying plaintiff's claim, after initially *accepting* the claim, because 1) waiver only applies to insurers that do not reserve rights when accepting a tender of defense and 2) plaintiff failed to show detrimental reliance, which is one of the elements of estoppel.

3. Plaintiff's claim for breach of the implied covenant of good faith and fair dealing cannot be maintained where benefits are not due under plaintiff's insurance policy.

4. Since the court held that the Notice of Merger was not a defect in title, it did not need to consider Chicago's contention that the Notice of Merger was void because the County Recorder indexed it under the name of the City, rather than the name of the property owner.

5. Market value and marketable title are not synonymous. One can have marketable title to land while the land itself is unmarketable.

[Ed. note: This case must have dealt with an ALTA 1992 policy. The ALTA 2006 policy made changes to the Covered Risks.]

[Sukut Construction v. Rimrock CA](#) [Docket](#) [Sup.Ct. Docket](#)

199 Cal.App.4th 817 - 4th Dist., Div. 1 (D057774) 9/30/11 **Petition for review by Cal Supreme Ct. DENIED 12/14/11**

MECHANICS LIENS: Plaintiff could not establish a mining lien under Civil Code Section 3060 for removing rocks from a quarry because a quarry is not a mine and the rocks were not minerals. The court did not address whether plaintiff could establish a regular mechanics lien because it held that plaintiff was judicially estopped from asserting that position after leading defendant to believe that it was asserting only a mining claim.

UNPUBLISHED: [First American Title Insurance Company v. Ordin](#) [Docket](#)

Cal.App. 2nd Dist. (B226671) 9/14/11 **Case complete 11/17/11**

TITLE INSURANCE: An arbitrator found that defendants did not lose coverage under their title policy when they conveyed title to their wholly owned corporation, then to themselves as trustees of their family trust and finally to a wholly owned limited liability company. This conflicts with the holding in [Kwok v. Transnation Title Insurance Company](#) and this could have been an interesting case, except that whether the ruling was right or wrong was not before the court. The court held only that the arbitrator's award could not be overturned, even if the the law was applied incorrectly, because there was no misconduct by the arbitrator.

[Calvo v. HSBC Bank](#) [Docket](#) [Sup.Ct. Docket](#)

199 Cal.App.4th 118 - 2nd Dist. (B226494) 9/13/11 **Petition for review by Cal Supreme Ct. DENIED 1/4/12**

TRUSTEE'S SALES: Notice of the assignment of a deed of trust appeared only in the substitution of trustee, which was recorded on the same date as the notice of trustee's sale, and which stated that MERS, as nominee for the assignee lender, was the present beneficiary. Plaintiff sought to set aside the trustee's sale for an alleged violation of Civil Code section 2932.5, which requires the assignee of a mortgagee to record an assignment before exercising a power to sell real property.

The court held that the lender did not violate section 2932.5 because that statute does not apply when the power of sale is conferred in a deed of trust rather than a mortgage.

[Robinson v. Countrywide Home Loans](#) [Docket](#)

199 Cal.App.4th 42 - 4th Dist., Div. 2 (E052011) 9/12/11 **Case complete 11/15/11**

TRUSTEE'S SALES: The trial court properly sustained defendant lender's demurrer without leave to amend because 1) the statutory scheme does not provide for a preemptive suit challenging MERS authority to initiate a foreclosure and 2) even if such a statutory claim were cognizable, the complaint did not allege facts sufficient to challenge the trustee's authority to initiate a foreclosure.

[Hacienda Ranch Homes v. Superior Court \(Elissagaray\)](#) [Docket](#)

198 Cal.App.4th 1122 - 3rd Dist. (C065978) 8/30/11 **Case complete 11/1/11**

ADVERSE POSSESSION: Plaintiffs (real parties in interest) acquired a 24.5% interest in the subject property at a tax sale. The court rejected plaintiffs' claim of adverse possession under both 1) "color of title" because the tax deed by which they acquired their interest clearly conveyed only a 24.5% interest instead of a 100% interest, and 2) "claim of right" because plaintiffs' claims of posting for-sale signs and clearing weeds 2 or 3 times a year did not satisfy the requirement of protecting the property with a substantial enclosure or cultivating or improving the property, as required by Code of Civil Procedure Section 325. The court also pointed out that obtaining adverse possession against cotenants requires evidence much stronger than that which would be required against a stranger, and plaintiffs failed to establish such evidence in this case.

[Gramercy Investment Trust v. Lakemont Homes Nevada, Inc.](#) [Docket](#)

198 Cal.App.4th 903 - 4th Dist., Div. 2 (E051384) 8/24/11 **Case complete 10/27/11**

ANTIDEFICIENCY: After a judicial foreclosure, the lender obtained a deficiency judgment against a guarantor. The court held that the choice of law provision designating the law of New York was unenforceable because there were insufficient contacts with New York. California is where the contract was executed, the debt was created and guaranteed, the default occurred and the real property is located. Also, Nevada law does not apply, even though the guarantor was a Nevada corporation, because Nevada had no connection with the transaction. The court also held that the guarantor was not entitled to the protection of California's antideficiency statutes because the guaranty specifically waived rights under those statutes in accordance with Civil Code Section 2856.

[Hill v. San Jose Family Housing Partners](#) [Docket](#)

198 Cal.App.4th 764 - 6th Dist. (H034931) 8/23/11 **Case complete 10/25/11**

EASEMENTS: Plaintiff, who had entered into an easement agreement with defendant's predecessor to maintain a billboard on a portion of defendant's property, filed an action to prevent defendant from constructing a multi-unit building that would allegedly block the view of the billboard. Defendant asserted that the easement was unenforceable because it violated city and

county building codes. The court held:

1. The easement was enforceable because the property's use for advertising purposes is not illegal in and of itself. Although the instrumentality of that use, i.e., the billboard, may be illegal, that is not a bar to the enforcement of the agreement.
2. The easement agreement did not specifically state that it included the right to view the billboard from the street, but the parties necessarily intended the easement to include that right since viewing the billboard by passing traffic is the purpose of the easement.
3. Nevertheless, the trial court improperly denied a motion for a retrial to re-determine damages based on new evidence that the city had instituted administrative proceedings to have the billboard removed. The award of damages was based on plaintiff's expected revenue from the billboard until 2037, and such damages will be overstated if the city forces plaintiff to remove the billboard.

[Fontenot v. Wells Fargo Bank](#) [Docket](#) [Sup.Ct. Docket](#)

198 Cal.App.4th 256 - 1st Dist. (A130478) 8/11/11 **Depublication request DENIED 11/30/11**

FORECLOSURE / MERS: Plaintiff alleged a foreclosure was unlawful because MERS made an invalid assignment of an interest in the promissory note and because the lender had breached an agreement to forbear from foreclosure. The appellate court held that the trial court properly sustained a demurrer to the fourth amended complaint without leave to amend. The court held that MERS had a right to assign the note even though it was not the beneficiary of the deed of trust because in assigning the note it was acting on behalf of the beneficiary and not on its own behalf. Additionally, Plaintiff failed to allege that the note was not otherwise assigned by an unrecorded document. The court also held that plaintiff failed to properly allege that the lender breached a forbearance agreement because plaintiff did not attach to the complaint a copy of a letter (which the court held was part of the forbearance agreement) that purportedly modified the agreement. Normally, a copy of an agreement does not have to be attached to a complaint, but here the trial court granted a previous demurrer with leave to amend specifically on condition plaintiff attach a copy of the entire forbearance agreement to the amended pleading.

[Boschma v. Home Loan Center](#) [Docket](#)

198 Cal.App.4th 230 - 4th Dist., Div. 3 (G043716) 8/10/11 **Case complete 10/11/11**

LOAN DISCLOSURE: Borrowers stated a cause of action that survived a demurrer where they alleged fraud and a violation of California's Unfair Competition Law (B&PC 17200, et seq.) based on disclosures indicating that borrowers' Option ARM loan *may* result in negative amortization when, in fact, making the scheduled payments would *definitely* result in negative amortization. However, the court also pointed out that at trial in order to prove damages plaintiffs will have to present evidence that, because of the structure of the loans, they suffered actual damages beyond their loss of equity. For every dollar by which the loan balances increased, plaintiffs kept a dollar to save or spend as they pleased, so they will not be able to prove damages if their "only injury is the psychological revelation . . . that they were not receiving a free lunch from defendant".

[Thorstrom v. Thorstrom](#) [Docket](#)196 Cal.App.4th 1406 - 1st Dist. (A127888) 6/29/11 **Case complete 8/30/11**

EASEMENTS: Plaintiffs were not able to preclude defendants' use of a well on plaintiffs' property. The historic use of the well by the common owner (the mother of the current owners) indicated an intent for the well to serve both properties, and an implied easement was created in favor of defendants when the mother died and left one parcel to each of her two sons. However, the evidence did not establish that defendants were entitled to exclusive use of the well, so both properties are entitled to reasonable use of the well consistent with the volume of water available at any given time.

[Herrera v. Deutsche Bank](#) [Docket](#)196 Cal.App.4th 1366 - 3rd Dist. (C065630) 5/31/11 (Cert. for pub. 6/28/11) **Case complete 8/30/11**

TRUSTEE'S SALES: Plaintiffs sought to set aside a trustee's sale, claiming that the Bank had not established that it was the assignee of the note, and that the trustee ("CRC") had not established that it was properly substituted as trustee. To establish that the Bank was the beneficiary and CRC was the trustee, defendants requested that the trial court take judicial notice of the recorded Assignment of Deed of Trust and Substitution of Trustee, and filed a declaration by an employee of CRC referring to the recordation of the assignment and substitution, and stating that they "indicated" that the Bank was the assignee and CRC was the trustee. The trial court granted defendants' motion for summary judgment and the appellate court reversed. The Court acknowledged that California law does not require the original promissory note in order to foreclose. But while a court may take judicial notice of a recorded document, that does not mean it may take judicial notice of factual matters stated therein, so the recorded documents do not prove the truth of their contents. Accordingly, the Bank did not present direct evidence that it held the note.

Ed. notes: 1. It seems that the Bank could have avoided this result if it had its own employee make a declaration directly stating that the Bank is the holder of the note and deed of trust, 2. In the unpublished portion of the opinion, the Court held that if the Bank is successful in asserting its claim to the Property, there is no recognizable legal theory that would require the Bank to pay plaintiffs monies they expended on the property for back taxes, insurance and deferred maintenance.

[Tashakori v. Lakis](#) [Docket](#) [Sup.Ct. Docket](#)196 Cal.App.4th 1003 - 2nd Dist. (B220875) 6/21/11 **Petition for review by Cal Supreme Ct. DENIED 9/21/11**

EASEMENTS: The court granted plaintiffs an "equitable easement" for driveway purposes. Apparently, plaintiffs did not have grounds to establish a prescriptive easement. But a court can award an equitable easement where the court applies the "relative hardship" test and determines, as the court did here, that 1) the use is innocent, which means it was not willful or negligent, 2) the user will suffer irreparable harm if relief is not granted and 3) there is little harm to the

underlying property owner.

[Conservatorship of Buchenau \(Tornel v. Office of the Public Guardian\)](#) [Docket](#)

196 Cal.App.4th 1031 - 2nd Dist. (B222941) 5/31/11 (Pub. order 6/21/11) **Case complete 8/24/11**

CONTRACTS: A purchaser of real property was held liable for damages for refusing to complete the purchase contract, even though the seller deposited the deed into escrow 19 days after the date set for close of escrow. The escrow instructions did not include a "time is of the essence" clause, so a reasonable time is allowed for performance. The purchaser presented no evidence that seller's delay of 19 days was unreasonable following a two-month escrow.

[Diamond Heights Village Assn. v. Financial Freedom Senior Funding Corp.](#) [Docket](#) [Sup.Ct. Docket](#)

196 Cal.App.4th 290 - 1st Dist. (A126145) 6/7/11 **Petition for review by Cal Supreme Ct. DENIED 9/21/11**

HOMEOWNERS ASSOCIATION LIENS:

1. A homeowner's association recorded a notice of assessment lien, judicially foreclosed and obtained a judgment against the homeowners. However, it did not record an abstract of judgment, which would have created a judgment lien, nor did it record a writ of execution, which would have created an execution lien. The court held that a subsequently recorded deed of trust had priority because when an assessment lien is enforced through judicial action, the debt secured by the lien is merged into the judgment. The association's previous rights were merged into the judgment, substituting in their place only such rights as attach to the judgment.
2. After defendant lender prevailed on summary judgment as to the single cause of action naming the lender, trial proceeded as to the owners of the property, including a cause of action for fraudulent conveyance of a 1/2 interest in the property pertaining to a transfer from the original owner to himself and his mother. The trial court ruled in favor of the Association on the fraudulent conveyance cause of action AND held that defendant lender's deed of trust was set aside as to that 1/2 interest. The appellate court held that trial of those remaining claims was proper, including trial of the Association's cause of action against the homeowners for fraudulent conveyance of their condominium unit. It was not proper, however, to void the lender's security interest in the property (in whole or part) when the lender had not been joined as a party to the fraudulent conveyance cause of action, and final judgment had already been entered in its favor.

[Hamilton v. Greenwich Investors XXVI](#) [Modification](#) [Docket](#)

195 Cal.App.4th 1602 - 2nd Dist. (B224896) 6/1/11 **Case complete 8/17/11**

TRUSTEE'S SALES:

1. Plaintiff/borrower's failure to disclose, in earlier bankruptcy proceedings, the existence of his breach of contract and fraud claims against the lender bars the borrower from litigating those claims now. The court distinguished several cases that permitted a debtor in bankruptcy from subsequently pursuing a cause of action that was not disclosed in the bankruptcy pleadings on the basis that in those cases the defendant was not a creditor in the bankruptcy and because the

schedules specifically asked the debtor to disclose any offsets against the debts that were listed. This action against the lender amounts to an offset against the loan, so by listing the loan and failing to list this claim, the borrower's bankruptcy schedules were inaccurate.

2. The borrower's causes of action for breach of contract and fraud fail in any event because the borrower did not allege the essential fact of payment of sums due from the borrower (i.e. performance by the borrower) or set forth an excuse for performance.

3. The borrower cannot state a cause of action for violations of Civil Code Section 2923.5, which requires lenders to contact borrowers to explore options to avoid foreclosure, because the only remedy for such violations is postponement of the foreclosure sale, and borrower's house has been sold.

*****DECERTIFIED*****

[Ferguson v. Avelo Mortgage](#) [Modification](#) [Docket](#) [Sup.Ct. Docket](#)

Cal.App. 2nd Dist. (B223447) 6/1/11 **Petition for review by Cal Supreme Ct. DENIED & DECERTIFIED 9/14/11**

FORECLOSURE / MERS:

1. A Notice of Default was defective because it was signed by a trustee before recordation of the substitution of trustee substituting it in place of the original trustee. But the Notice of Sale was properly given because it recorded at the same time as the substitution and included the statutorily required affidavit attesting to the mailing of a copy of the substitution to all persons to whom an NOD must be mailed. Since the NOS was valid, the court held that the sale was merely voidable and not void. Therefore, unlike a void sale (such as where a substitution of trustee is not recorded until after the trustee's sale is completed), where the sale is merely voidable the plaintiff must tender full payment of the debt in order to bring an action setting aside the sale. The plaintiff did not make such a tender, so the trial court properly refused to set aside the sale.

2. Mortgage Electronic Registration Systems (MERS), as nominee of the original lender had the authority to assign the note and deed of trust to defendant, even if MERS does not possess the original note.

[Creative Ventures, LLC v. Jim Ward & Associates](#) [Docket](#) [Sup.Ct. Docket](#)

195 Cal.App.4th 1430 - 6th Dist. (H034883) 5/31/11 **Petition for review by Cal Supreme Ct. DENIED 8/10/11**

USURY:

1. The real estate broker arranged loan exception to the Usury Law does not apply where a corporation was not licensed as a broker, even though the officer who negotiated the loan was licensed, where the officer was acting on behalf of the corporation and not on his own behalf.

2. The payee of the note assigned the note to multiple investors. In order to take free of the borrower's defenses against the original payee, the assignees would have had to be holders in due course. They were not holders in due course because a) the original payee did not endorse the note and transfer possession of the note to the assignees, both of which are requirements for holder in due course status, and b) each investor was assigned a partial interest and partial assignees cannot be holders in due course.

3. The individual investors did not receive usurious interest because the interest rate itself was not

usurious. But since the overall interest was usurious when the payee's brokerage fee was included, the investors must refund the illegal interest each received.

4. The fact that the investors did not intend to violate the Usury Law is irrelevant because the only intent required is the intent to receive payment of interest.

5. An award of treble damages is within the discretion of the trial court, and the trial court properly exercised its discretion not to award treble damages because the conduct of defendants was not intentional.

[Ribeiro v. County of El Dorado](#) [Docket](#) [Sup.Ct. Docket](#)

195 Cal.App.4th 354 - 3rd Dist. (C065505) 5/10/11 **Petition for review by Cal Supreme Ct. DENIED 8/24/11**

TAX SALES: "Caveat emptor" applies to tax sales. Accordingly, plaintiff/tax sale purchaser could not rescind the tax sale and obtain his deposit back where he was unaware of the amount of 1915 Act bond arrearages and where the County did not mislead him.

[The Main Street Plaza v. Cartwright & Main, LLC](#) [Docket](#)

194 Cal.App.4th 1044 - 4th Dist., Div. 3 (G043569) 4/27/11 **Case complete 6/27/11**

EASEMENTS: Plaintiff sought to establish a prescriptive easement for parking and access. The trial court granted a motion for summary judgment against plaintiff because it had not paid taxes on the easement. The appellate court reversed because, while payment of property taxes is an element of a cause of action for adverse possession, payment of taxes is not necessary for an easement by prescription, unless the easement has been separately assessed. A railway easement over the same area was separately assessed, but that is irrelevant because the railway easement and the prescriptive easement were not coextensive in use.

[Liberty National Enterprises v. Chicago Title Insurance Company](#) [Docket](#)

194 Cal.App.4th 839 - 2nd Dist. (B222455) 4/6/11 (pub. order 4/26/11) **Case complete 6/28/11**

NOTE: This case is not summarized because it deals with disqualification of a party's attorney, and not with issues related to title insurance. It is included here only to point out that fact.

[Barry v. OC Residential Properties](#) [Docket](#) [Sup.Ct. Docket](#)

194 Cal.App.4th 861 - 4th Dist., Div. 3 (G043073) 4/26/11 **Petition for review by Cal Supreme Ct. DENIED 7/13/11**

TRUSTEE'S SALES: Under C.C.P. 729.035 a trustee's sale to enforce a homeowners association lien is subject to a right of redemption for 90 days after the sale, and under C.C.P. 729.060 the redemption price includes reasonable amounts paid for maintenance, upkeep and repair. Defendant purchased plaintiff's interest in a common interest development at a foreclosure sale of a homeowners association lien. Plaintiff sought to redeem the property and defendant included certain repair costs in the redemption amount. Plaintiff asserted that the costs were not for reasonable maintenance, upkeep and repair. The court held that the costs were properly included

because the person seeking to redeem has the burden of proof, and plaintiff failed to carry that burden in this case. Plaintiff also asserted that she should not have to pay the repair costs because the work was performed by an unlicensed contractor. The court held that the cost of the repair work was properly included because plaintiff would receive a windfall if she did not have to reimburse those costs and because this is not an action in which a contractor is seeking compensation.

[McMackin v. Ehrheart](#) [Docket](#)

194 Cal.App.4th 128 - 2nd Dist. (B224723) 4/8/11 **Case complete 6/9/11**

CONTRACTS / PROBATE: This case involves a "*Marvin*" agreement, which is an express or implied contract between nonmarital partners. Plaintiff sought to enforce an alleged oral agreement with a decedent to leave plaintiff a life estate in real property. The court held that since the agreement was for distribution from an estate, it is governed by C.C.P. Section 366.3, which requires the action to be commenced within one year after the date of death. But the court further concluded that, depending on the circumstances of each case, the doctrine of equitable estoppel may be applied to preclude a party from asserting the statute of limitations set forth in section 366.3 as a defense to an untimely action where the party's wrongdoing has induced another to forbear filing suit.

[Ferwerda v. Bordon](#) [Docket](#)

193 Cal. App. 4th 1178 - 3rd Dist. (C062389) 3/25/11 **Petition for review by Cal Supreme Ct. DENIED 6/8/11**

CC&R's

In the published portion of the opinion, the court held:

1. The following language in the CC&R's gave the Homeowners Association the authority to adopt new design standards pertaining to development of lots in the subdivision: "in the event of a conflict between the standards required by [the Planning] Committee and those contained herein, the standards of said Committee shall govern"; and
2. The Planning Committee could not adopt a rule that allowed for attorney's fees to be awarded to the prevailing party in a lawsuit because such a provision was not contained in the CC&R's. Adopting the rule was an attempt by the committee to insert a new provision that binds homeowners without their approval.

In the unpublished portion of the opinion, the court held that the Planning Committee acted properly in denying the plaintiff's building plans. (The details are not summarized here because that part of the opinion is not certified for publication.)

[Capon v. Monopoly Game LLC](#) [Docket](#)

193 Cal. App. 4th 344 - 1st Dist. (A124964) 3/4/11 **Case complete 5/5/11**

HOME EQUITY SALES CONTRACT ACT: In the published portion of the opinion, the court held that plaintiff was entitled to damages under the Home Equity Sales Contract Act because the purchaser was subject to the Act and the purchase contract did not comply with it. There is an

exception in the Act for a purchaser who intends to live in the property. The principal member of the LLC purchase asserted that he intended to live in the property, but the court held the exception does not apply because the purchaser was the LLC rather than the member, so his intent was irrelevant.

[Gomes v. Countrywide Home Loans](#) [Docket](#) [Cal. Sup.Ct. Docket](#) [U.S. Supreme Ct. Docket](#)

192 Cal. App. 4th 1149 - 4th Dist., Div. 1 (D057005) 2/18/11 **Petition for review by Cal Supreme Ct. DENIED 5/18/11, Petition for a writ of certiorari DENIED 10/11/11**

FORECLOSURE / MERS: A borrower brought an action to restrain a foreclosure of a deed of trust held by MERS as nominee for the original lender. A Notice of Default had been recorded by the trustee, which identified itself as an agent for MERS. The court held that 1) There is no legal basis to bring an action in order to determine whether the person electing to sell the property is duly authorized to do so by the lender, unless the plaintiff can specify a specific factual basis for alleging that the foreclosure was not initiated by the correct party; and 2) MERS has a right to foreclose because the deed of trust specifically provided that MERS as nominee has the right to foreclose.

[Schuman v. Ignatin](#) [Docket](#)

191 Cal. App. 4th 255 - 2nd Dist. (B215059) 12/23/10 **Case complete 2/23/11**

CC&R's: The applicable CC&R's would have expired, but an amendment was recorded extending them. Plaintiff filed this action alleging that defendant's proposed house violated the CC&R's. The trial court held that the amendment was invalid because it was not signed by all of the lot owners in the subdivision. Since the CC&R's had expired, it did not determine whether the proposed construction would have violated them. The appellate court reversed and remanded, holding that the defect in the amendment rendered it *voidable*, not *void*, and it could no longer be challenged because the four-year statute of limitations contained in C.C.P. 343 had run.

[Schelb v. Stein](#) [Docket](#)

190 Cal. App. 4th 1440 - 2nd Dist. (B213929) 12/17/10 **Case complete 2/16/11**

MARKETABLE RECORD TITLE ACT: In a previous divorce action, in order to equalize a division of community property, the husband was ordered to give the wife a note secured by a deed of trust on property awarded to the husband. In this case (many years later), the court held that under the Marketable Record Title Act, the deed of trust had expired. (Civil Code Section 882.020.) However, under Family Code Section 291, the underlying family law judgment does not expire until paid, so it is enforceable as an unsecured judgment.

[Vuki v. Superior Court](#) [Docket](#)

189 Cal. App. 4th 791 - 4th Dist., Div. 3 (G043544) 10/29/10 **Case complete 1/3/11**

TRUSTEE'S SALES: Unlike section 2923.5 as construed by this court in [Mabry v. Superior Court](#) (2010) 185 Cal.App.4th 208, neither Section 2923.52 or Section 2923.53 provides any

private right of action, even a very limited one as this court found in *Mabry*. Civil Code section 2923.52 imposes a 90-day delay in the normal foreclosure process. But Civil Code section 2923.53 allows for an exemption to that delay if lenders have loan modification programs that meet certain criteria. The only enforcement mechanism is that a violation is deemed to be a violation of lenders license laws. Section 2923.54 provides that a violation of Sections 2923.52 or 2923.53 does not invalidate a trustee's sale, and plaintiff also argued that a lender is not entitled to a bona fide purchaser protection. The court rejected that argument because any noncompliance is entirely a regulatory matter, and cannot be remedied in a private action.

[Abers v. Rounsavell](#) [Mod Opinion](#) [Docket](#)

189 Cal. App. 4th 348 - 4th Dist., Div. 3 (G040486) 10/18/10 **Case complete 12/20/10**

LEASES: Leases of residential condominium units required a re-calculation of rent after 30 years based on a percentage of the appraised value of the "leased land". The term "leased land" was defined to consist of the condominium unit and an undivided interest in the common area of Parcel 1, and did not include the recreational area (Parcel 2), which was leased to the Homeowners Association. The Court held that the language of the leases was clear. The appraisals were to be based only on the value of the lessees' interest in Parcel 1 and not on the value of the recreational parcel.

UNPUBLISHED: [Residential Mortgage Capital v. Chicago Title Ins. Company](#) [Docket](#)

Cal.App. 1st Dist. (A125695) 9/20/10 **Case complete 11/23/10**

ESCROW: An escrow holder released loan documents to a mortgage broker at the broker's request in order to have the borrowers sign the documents at home. They were improperly backdated and the broker failed to provide duplicate copies of the notice of right to rescind. Due these discrepancies, the lender complied with the borrower's demand for a rescission of the loan, and filed this action against the escrow holder for amounts reimbursed to the borrower for finance charges and attorney's fees. The Court held that the escrow holder did not breach a duty to the lender because it properly followed the escrow instructions, and it is common for escrow to release documents to persons associated with the transaction in order for them to be signed elsewhere.

[Starr v. Starr](#) [Docket](#)

189 Cal. App. 4th 277 - 2nd Dist. (B219539) 9/30/10 **Case complete 12/16/10**

COMMUNITY PROPERTY: In a divorce action the Court ordered the husband to convey title to himself and his former wife. Title had been taken in the husband's name and the wife executed a quitclaim deed. But Family Code Section 721 creates a presumption that a transaction that benefits one spouse was the result of undue influence. The husband failed to overcome this presumption where the evidence showed that the wife executed the deed in reliance on the husband's representation that he would subsequently add her to title. The husband was, nevertheless, entitled to reimbursement for his separate property contribution in purchasing the property.

[Malkoskie v. Option One Mortgage Corp.](#) [Docket](#)188 Cal. App. 4th 968 - 2nd Dist. (B221470) 9/23/10 **Case complete 11/23/10**

TRUSTEE'S SALES: After plaintiff stipulated to a judgment in an unlawful detainer action, she could not challenge the validity of the trustee's sale in a subsequent action because the subsequent action is barred by collateral estoppel. Because the action was barred, the court did not reach the question of the validity of the trustee's sale based on the substitution of trustee being recorded after trustee's sale proceedings had commenced and based on assignments of the deed of trust into the foreclosing beneficiary being recorded after the trustee's deed.

[Lee v. Fidelity National Title Ins. Co.](#) [Docket](#) [Sup.Ct. Docket](#)188 Cal. App. 4th 583 - 1st Dist. (A124730) 9/16/10 **Petition for review and depublication by Cal Supreme Ct. DENIED 12/1/10**

TITLE INSURANCE:

1. The insureds could have reasonably expected that they were buying a title insurance policy on APN 22, and not just APN 9, where both the preliminary report and policy included a reference to APN 22, listed exclusions from coverage that were specific to APN 22, and attached an assessor's parcel map with an arrow pointing to both APN 9 and 22.
2. A preliminary report is merely an offer to issue a title policy, but an insured has the right to expect that the policy will be consistent with the terms of the offer.
3. There was a triable issue of fact as to whether a neighbor's construction of improvements on APN 22 was sufficient to commence the running of the statute of limitations, where the insureds testified that they did not know the precise location of APN 22 and assumed that the neighbors constructed the improvements on their own property.
4. There was a triable issue of fact as to whether Fidelity National Title Insurance Company acted as escrow holder or whether the escrow was conducted by its affiliate, Fidelity National Title Company (only the insurance company was named as a defendant).

[Chicago Title Insurance Company v. AMZ Insurance Services](#) [Docket](#) [Sup.Ct. Docket](#)188 Cal. App. 4th 401 - 4th Dist., Div. 3 (G041188) 9/9/10 **Petition for review and depublication by Cal Supreme Ct. DENIED 12/15/10**

ESCROW: A document entitled "Evidence of Property Insurance" ("EOI") constitutes a binder under Insurance Code Section 382.5(a). In this case an EOI was effective to obligate the insurer to issue a homeowner's policy even though the escrow failed to send the premium check. In order to cancel the EOI the insured has to be given notice pursuant to Insurance Code Section 481.1, which the insurer did not do. The escrow holder paid the insured's loss and obtained an assignment of rights. The court held that the escrow holder did not act as a volunteer in paying the amount of the loss, and is entitled to be reimbursed by the insurance company under the doctrine of equitable subrogation.

[Vanderkous v. Conley](#) [Docket](#)188 Cal. App. 4th 111 - 1st Dist (A125352) 9/2/10 **Case complete 11/3/10**

QUIET TITLE: 1) In a quiet title action the court has equitable powers to award compensation as necessary to do complete justice, even though neither party's pleadings specifically requested compensation. 2) Realizing that the court was going to require plaintiff to compensate defendant in exchange for quieting title in plaintiff's favor, plaintiff dismissed the lawsuit. However, the dismissal was invalid because it was filed following trial after the case had been submitted to the court.

[Purdum v. Holmes](#) [Docket](#)

187 Cal. App. 4th 916 - 2nd Dist. (B216493) 7/29/10 **Case complete 10/22/10**

NOTARIES: A notary was sued for notarizing a forged deed. He admitted that he knew the grantor had not signed the deed, but the lawsuit was filed more than six years after the deed was signed and notarized. The court held that the action was barred by the six-year limitation period in C.C.P. 338(f)(3) even though plaintiff did not discover the wrongful conduct until well within the six year period.

[Perlas v. GMAC Mortgage](#) [Docket](#)

187 Cal. App. 4th 429 - 1st Dist. (A125212) 8/11/10 **Case complete 10/10/10**

DEEDS OF TRUST: Borrowers filed an action against a lender to set aside a deed of trust, setting forth numerous causes of action. Borrowers' loan application (apparently prepared by a loan broker) falsely inflated the borrowers' income. In the published portion of the opinion. The court held in favor of the lender, explaining that a lender is not in a fiduciary relationship with borrowers and owes them no duty of care in approving their loan. A lender's determination that the borrowers qualified for the loan is not a representation that they could afford the loan. One interesting issue in the unpublished portion of the opinion was the court's rejection of the borrowers' argument that naming MERS as nominee invalidated the deed of trust because, as borrower argued, the deed of trust was a contract with MERS and the note was a separate contract with the lender.

[Soifer v. Chicago Title Company](#) [Modification](#) [Docket](#) [Sup.Ct. Docket](#)

187 Cal. App. 4th 365 - 2nd Dist. (B217956) 8/10/10 **Petition for review by Cal Supreme Ct. DENIED 10/27/10**

TITLE INSURANCE: A person cannot recover for errors in a title company's informal communications regarding the condition of title to property in the absence of a policy of title insurance or the purchase of an abstract of title. There are two ways in which an interested party can obtain title information upon which reliance may be placed: an abstract of title or a policy of title insurance. Having purchased neither, plaintiff cannot recover for title company's incorrect statement that a deed of trust in foreclosure was a first lien.

[In re: Hastie \(Weinkauf v. Florez\)](#) [Docket](#) [Sup.Ct. Docket](#)

186 Cal. App. 4th 1285 - 1st Dist. (A127069) 7/22/10 **Petition for review by Cal Supreme Ct. filed late and DENIED 9/21/10**

DEEDS: An administrator of decedent's estate sought to set aside two deeds on the basis that the grantees were the grandson and granddaughter of decedent's caregiver. Defendant did not dispute that the transfers violated Probate Code Section 21350, which prohibits conveyances to a fiduciary, including a caregiver, or the fiduciary's relatives, unless specified conditions are met. Instead, defendant asserted only that the 3-year statute of limitations had expired. The court held that the action was timely because there was no evidence indicating that the heirs had or should have had knowledge of the transfer, which would have commenced the running of the statute of limitations.

[Bank of America v. Stonehaven Manor, LLC](#) [Docket](#) [Sup.Ct. Docket](#)

186 Cal. App. 4th 719 - 3rd Dist. (C060089) 7/12/10 **Petition for review by Cal Supreme Ct. DENIED 10/20/10**

ATTACHMENT: The property of a guarantor of a debt--a debt which is secured by the real property of the principal debtor and also that of a joint and several co-guarantor--is subject to attachment where the guarantor has contractually waived the benefit of that security (i.e. waived the benefit of Civil Code Section 2849).

[Jackson v. County of Amador](#) [Docket](#)

186 Cal. App. 4th 514 - 3rd Dist. (C060845) 7/7/10 **Depublication request DENIED 9/15/10**

RECORDING LAW: An owner of two rental houses sued the county recorder for recording a durable power of attorney and two quitclaim deeds that were fraudulently executed by the owner's brother. The superior court sustained the recorder's demurrer without leave to amend. The court of appeal affirmed, holding that the legal insufficiency of the power of attorney did not provide a basis for the recorder to refuse to record the power of attorney under Government Code Section 27201(a) and the recorder did not owe the owner a duty to determine whether the instruments were fraudulently executed because the instruments were notarized.

[Luna v. Brownell](#) [Docket](#)

185 Cal. App. 4th 668 - 2nd Dist. (B212757) 6/11/10 **Case complete 8/17/10**

DEEDS: A deed transferring property to the trustee of a trust is not void as between the grantor and grantee merely because the trust had not been created at the time the deed was executed, if (1) the deed was executed in anticipation of the creation of the trust and (2) the trust is in fact created thereafter. The deed was deemed legally delivered when the Trust was established.

[Mabry v. Superior Court](#) [Docket](#) [Sup.Ct. Docket](#)

185 Cal. App. 4th 208 - 4th Dist., Div. 3 (G042911) 6/2/10 **Petition for review by Cal Supreme Ct. DENIED 8/18/10**

TRUSTEE'S SALES: The court answered, and provided thorough explanations for, a laundry list of questions regarding Civil Code Section 2923.5, which requires a lender to explore options for modifying a loan with a borrower prior to commencing foreclosure proceedings.

1. May section 2923.5 be enforced by a private right of action? **Yes.**
2. Must a borrower tender the full amount of the mortgage indebtedness due as a prerequisite to bringing an action under section 2923.5? **No.**
3. Is section 2923.5 preempted by federal law? **No.**
4. What is the extent of a private right of action under section 2923.5? **It is limited to obtaining a postponement of a foreclosure to permit the lender to comply with section 2923.5.**
5. Must the declaration required of the lender by section 2923.5, subdivision (b) be under penalty of perjury? **No.**
6. Does a declaration in a notice of default that tracks the language of section 2923.5(b) comply with the statute, even though such language does not on its face delineate precisely which one of three categories applies to the particular case at hand? **Yes.**
7. If a lender forecloses without complying with section 2923.5, does that noncompliance affect the title acquired by a third party purchaser at the foreclosure sale? **No.**
8. Did the lender comply with section 2923.5? **Remanded to the trial court to determine which of the two sides is telling the truth.**
9. Can section 2923.5 be enforced in a class action in this case? **Not under these facts, which are highly fact-specific.**
10. Does section 2923.5 require a lender to rewrite or modify the loan? **No.**

[612 South LLC v. Laconic Limited Partnership](#) [Docket](#)

184 Cal. App. 4th 1270 - Cal.App. 4th Dist., Div. 1 (D056646) 5/25/10 **Case complete 7/26/10**

ASSESSMENT BOND FORECLOSURE:

1. Recordation of a Notice of Assessment under the Improvement Act of 1911 imparted constructive notice even though the notice did not name the owner of the subject property and was not indexed under the owner's name. There is no statutory requirement that the notice of assessment be indexed under the name of the property owner.
2. A Preliminary Report also gave constructive notice where it stated: "The lien of special tax for the following municipal improvement bond, which tax is collected with the county taxes. . ."
3. A property owner is not liable for a deficiency judgment after a bond foreclosure because a property owner does not have personal liability for either delinquent amounts due on the bond or for attorney fees incurred in prosecuting the action.

[Tarlesson v. Broadway Foreclosure Investments](#) [Docket](#)

184 Cal. App. 4th 931 - 1st Dist. (A125445) 5/17/10 **Case complete 7/20/10**

HOMESTEADS: A judgment debtor is entitled to a homestead exemption where she continuously resided in property, even though at one point she conveyed title to her cousin in order to obtain financing and the cousin subsequently conveyed title back to the debtor. The amount of the exemption was \$150,000 (later statutorily changed to \$175,000) based on debtor's declaration that she was over 55 years old and earned less than \$15,000 per year, because there was no conflicting evidence in the record.

UNPUBLISHED: [MBK Celamonte v. Lawyers Title Insurance Corporation](#) [Docket](#) [Sup.Ct. Docket](#)

Cal.App. 4th Dist., Div. 3 (G041605) 4/28/10 **Petition for review by Cal Supreme Ct. DENIED 7/21/10**

TITLE INSURANCE / ENCUMBRANCES: A recorded authorization for a Mello Roos Assessment constitutes an "encumbrance" covered by a title policy, even where actual assessments are conditioned on the future development of the property.

[Plaza Home Mortgage v. North American Title Company](#) [Docket](#) [Sup.Ct. Docket](#)

184 Cal. App. 4th 130 - 4th Dist., Div. 1 (D054685) 4/27/10 **Depublication request DENIED 8/11/10**

ESCROW / LOAN FRAUD: The buyer obtained 100% financing and managed to walk away with cash (\$54,000) at close of escrow. (Actually, the buyer's attorney-in-fact received the money.) The lender sued the title company that acted as escrow holder, asserting that it should have notified the lender when it received the instruction to send the payment to the buyer's attorney-in-fact after escrow had closed. The court reversed a grant of a motion for summary judgment in favor of the escrow, pointing out that its decision is narrow, and holding only that the trial court erred when it determined the escrow did not breach the closing instructions contract merely because escrow had closed. The case was remanded in order to determine whether the escrow breached the closing instructions contract and if so, whether that breach proximately caused the lender's damages.

[Garcia v. World Savings](#) [Docket](#) [Sup.Ct. Docket](#)

183 Cal. App. 4th 1031 - 2nd (B214822) 4/9/10 **Petition for review and depublication by Cal Supreme Ct. DENIED 6/23/10**

TRUSTEE'S SALES: A lender told plaintiffs/owners that it would postpone a trustee's sale by a week to give plaintiffs time to obtain another loan secured by other property in order to bring the subject loan current. Plaintiffs obtained a loan the following week, but the lender had conducted the trustee's sale on the scheduled date and the property was sold to a third party bidder. Plaintiffs dismissed causes of action pertaining to setting aside the sale and pursued causes of action for breach of contract, wrongful foreclosure and promissory estoppel. The court held that there was no consideration that would support the breach of contract claim because plaintiffs promised nothing more than was due under the original agreement. Plaintiffs also could not prove a cause of action for wrongful foreclosure because that cause of action requires that the borrower tender funds to pay off the loan prior to the trustee's sale. However, plaintiffs could recover based on promissory estoppel because procuring a high cost, high interest loan by using other property as security is sufficient to constitute detrimental reliance.

[LEG Investments v. Boxler](#) [Docket](#)

183 Cal. App. 4th 484 - 3rd Dist. (C058743) 4/1/10 **Certified for Partial Publication Case complete 6/2/10**

PARTITION: A right of first refusal in a tenancy in common agreement does not absolutely waive the right of partition. Instead, the right of first refusal merely modifies the right of partition to require the selling cotenant to first offer to sell to the nonselling cotenant before seeking partition. *[Ed. note: I expect that the result would have been different if the right of partition had been specifically waived in the tenancy in common agreement.]*

[Steiner v. Thexton](#) [Docket](#)

48 Cal. 4th 411 - Cal. Supreme Court (S164928) 3/18/10

OPTIONS: A contract to sell real property where the buyer's performance was entirely conditioned on the buyer obtaining regulatory approval to subdivide the property is an option. Although plaintiffs' promise was initially illusory because no consideration was given at the outset, plaintiffs' part performance of their bargained-for promise to seek a parcel split cured the initially illusory nature of the promise and thereby constituted sufficient consideration to render the option irrevocable.

[Grotenhuis v. County of Santa Barbara](#) [Docket](#)

182 Cal. App. 4th 1158 - 2nd Dist. (B212264) 3/15/10 **Case complete 5/18/10**

PROPERTY TAXES: Subject to certain conditions, a homeowner over the age of 55 may sell a principle residence, purchase a replacement dwelling of equal or lesser value in the same county, and transfer the property tax basis of the principal residence to the replacement dwelling. The court held that this favorable tax treatment is not available where title to both properties was held by an individual's wholly owned corporation. The court rejected plaintiffs' argument that the corporation was their alter ego because that concept is used to pierce the corporate veil of an opponent, and not to enable a person "to weave in and out of corporate status when it suits the business objective of the day."

[Clear Lake Riviera Community Assn. v. Cramer](#) [Docket](#)

182 Cal.App. 4th 459 - 1st Dist. (A122205) 2/26/10 **Case complete 4/29/10**

HOMEOWNER'S ASSOCIATIONS: Defendant homeowners were ordered to bring their newly built house into compliance with the homeowners association's guidelines where the house exceeded the guidelines' height restriction by nine feet. Even though the cost to the defendants will be great, they built the house with knowledge of the restriction and their hardship will not be grossly disproportionate to the loss the neighbors would suffer if the violation were not abated, caused by loss in property values and loss of enjoyment of their properties caused by blocked views. The height restriction was contained in the associations guidelines and not in the CC&R's, and the association did not have records proving the official adoption of the guidelines. Nevertheless, the court held that proper adoption was inferred from the circumstantial evidence of long enforcement of the guidelines by the association.

[Forsgren Associates v. Pacific Golf Community Development](#) [Docket](#) [Sup. Ct. Docket](#)

182 Cal.App. 4th 135 - 4th Dist., Div. 2 (E045940) 2/23/10 **Petition for review by Cal**

Supreme Ct. DENIED 6/17/10

MECHANIC'S LIENS: 1. Owners of land are subject to mechanic's liens where they were aware of the work being done by the lien claimant and where they failed to record a notice of non-responsibility.

2. Civil Code Section 3128 provides that a mechanic's lien attaches to land on which the improvement is situated "together with a convenient space about the same or so much as may be required for the convenient use and occupation thereof". Accordingly, defendant's land adjacent to a golf course on which the lien claimant performed work is subject to a mechanic's lien, but only as to the limited portions where a tee box was located and where an irrigation system was installed.

3. The fact that adjacent property incidentally benefits from being adjacent to a golf course does not support extending a mechanic's lien to that property.

4. The owners of the adjacent property were liable for interest, but only as to their proportionate share of the amount of the entire mechanic's lien.

[Steinhart v. County of Los Angeles](#) [Docket](#)

47 Cal.4th 1298 - Cal. Supreme Court (S158007) 2/4/10

PROPERTY TAXES: A "change in ownership", requiring a property tax reassessment, occurs upon the death of a trust settlor who transferred property to a revocable trust, and which became irrevocable upon the settlor's death. The fact that one trust beneficiary was entitled to live in the property for her life, and the remaining beneficiaries received the property upon her death, did not alter the fact that a change in ownership of the entire title had occurred.

[Kuish v. Smith](#) [Docket](#)

181 Cal.App.4th 1419 - 4th Dist., Div. 3 (G040743) 2/3/10 **Case complete 4/12/10**

CONTRACTS: 1. Defendants' retention of a \$600,000 deposit designated as "non-refundable" constituted an invalid forfeiture because a) the contract did not contain a valid liquidated damages clause, and b) plaintiff re-sold the property for a higher price, so there were no out-of-pocket damages. 2. The deposit did not constitute additional consideration for extending the escrow because it was labeled "non-refundable" in the original contract.

[Kendall v. Walker \(Modification attached\)](#) [Docket](#)

181 Cal.App.4th 584 - 1st Dist. (A105981) 12/30/09 **Case complete 3/29/10**

WATER RIGHTS: An owner of land adjoining a navigable waterway has rights in the foreshore adjacent to his property separate from that of the general public. The court held that the boundary in the waterway between adjacent parcels of land is not fixed by extending the boundary lines into the water in the direction of the last course ending at the shore line. Instead, it is fixed by a line drawn into the water perpendicular to the shore line. Accordingly, the court enjoined defendants from allowing their houseboat from being moored in a manner that crossed onto plaintiffs' side of that perpendicular boundary line.

[Junkin v. Golden West Foreclosure Service](#) [Docket](#)180 Cal.App.4th 1150 - 1st Dist. (A124374) 1/5/10 **Case complete 3/12/10**

USURY: The joint venture exception to the Usury Law, which has been developed by case law, provides that where the relationship between the parties is a bona fide joint venture or partnership, an advance by a joint venturer is an investment and not a loan, making the Usury Law inapplicable. The court applied the exception to a loan by one partner to the other because instead of looking at the loan in isolation, it looked at the entire transaction which it determined to be a joint venture. The case contains a good discussion of the various factors that should be weighed in determining whether the transaction is a bona fide joint venture. The presence or absence of any one factor is not, alone, determinative. The factors include whether or not: 1) there is an absolute obligation of repayment, 2) the investor may suffer a loss, 3) the investor has a right to participate in management, 4) the subject property was purchased from a third party and 5) the parties considered themselves to be partners.

[Banc of America Leasing & Capital v. 3 Arch Trustee Services](#) [Docket](#)180 Cal.App.4th 1090 - 4th Dist., Div. 3 (G041480) 12/11/09 **Case complete 3/8/10**

TRUSTEE'S SALES: A judgment lien creditor is not entitled to receive a notice of default, notice of trustee's sale or notice of surplus sale proceeds unless the creditor records a statutory request for notice. The trustee is required to disburse surplus proceeds only to persons who have provided the trustee with a proof of claim. The burden rests with the judgment creditor to keep a careful watch over the debtor, make requests for notice of default and sales, and to submit claims in the event of surplus sale proceeds.

[Park 100 Investment Group v. Ryan](#) [Docket](#)180 Cal.App.4th 795 - 2nd Dist. (B208189) 12/23/09 **Case complete 2/26/10**

LIS PENDENS: 1. A lis pendens may be filed against a dominant tenement when the litigation involves an easement dispute. Although title to the dominant tenement would not be directly affected if an easement right was shown to exist, the owner's right to possession clearly is affected

2. A recorded lis pendens is a privileged publication only if it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property. If the complaint does not allege a real property claim, or the alleged claim lacks evidentiary merit, the lis pendens, in addition to being subject to expungement, is not privileged.

[Millennium Rock Mortgage v. T.D. Service Company](#) [Modification](#) [Docket](#)179 Cal.App.4th 804 - 3rd Dist. (C059875) 11/24/09 **Case complete 1/26/10**

TRUSTEE'S SALES: A trustee's sale auctioneer erroneously read from a script for a different foreclosure, although the correct street address was used. The auctioneer opened the bidding with the credit bid from the other foreclosure that was substantially less than the correct credit bid. The errors were discovered after the close of bidding but prior to the issuance of a trustee's deed. The court held that the errors constituted an "irregularity" sufficient to give the trustee the right to

rescind the sale.

The court distinguished [6 Angels v. Stuart-Wright Mortgage](#), in which the court held that a beneficiary's negligent miscalculation of the amount of its credit bid was not sufficient to rescind the sale. In *6 Angels* the error was totally extrinsic to the proper conduct of the sale itself. Here there was inherent inconsistency in the auctioneer's description of the property being offered for sale, creating a fatal ambiguity in determining which property was being auctioned.

[Fidelity National Title Insurance Company v. Schroeder](#) [Docket](#)
179 Cal.App.4th 834 - 5th Dist. (F056339) 11/24/09 **Case complete 1/25/10**

JUDGMENTS: A judgment debtor transferred his 1/2 interest in real property to the other cotenant prior to the judgment creditor recording an abstract of judgment. The court held that if the trial court on remand finds that the transfer was intended to shield the debtor's property from creditors, then the transferee holds the debtor's 1/2 interest as a resulting trust for the benefit of the debtor, and the creditor's judgment lien will attach to that interest. The court also held that the transfer cannot be set aside under the Uniform Fraudulent Transfer Act because no recoverable value remained in the real property after deducting existing encumbrances and Gordon's homestead exemption.

The case contains a good explanation of the difference between a resulting ("intention enforcing") and constructive ("fraud-rectifying") trust. A resulting trust carries out the inferred intent of the parties; a constructive trust defeats or prevents the wrongful act of one of them.

[Zhang v. Superior Court](#) [Docket](#) [Sup.Ct. Docket](#)
Cal.App. 4th Dist., Div. 2 (E047207) 10/29/09 **Petition for review by Cal Supreme Ct. GRANTED 2/10/10**

INSURANCE / BAD FAITH: Fraudulent conduct by an insurer does not give rise to a private right of action under the Unfair Insurance Practices Act (Insurance Code section 790.03 et seq.), but it can give rise to a private cause of action under the Unfair Competition Law (Business and Professions Code section 17200 et seq.).

[Presta v. Tepper](#) [Docket](#)
179 Cal.App.4th 909 - 4th Dist., Div. 3 (G040427) 10/28/09 **Case complete 1/25/10**

TRUSTS: An ordinary express trust is not an entity separate from its trustee, like a corporation is. Instead, a trust is merely a relationship by which one person or entity holds property for the benefit of some other person or entity. Consequently, where two men entered into partnership agreements as trustees of their trusts, the provision of the partnership agreement, which required that upon the death of a partner the partnership shall purchase his interest in the partnership, was triggered by the death of one of the two men.

[Wells Fargo Bank v. Neilsen](#) [Modification](#) [Docket](#) [Sup.Ct. Docket](#)
178 Cal.App.4th 602 - 1st Dist. (A122626) 10/22/09 (Mod. filed 11/10/09) **Petition for**

review by Cal Supreme Ct. DENIED 2/10/10

CIRCUITY OF PRIORITY: The Court follows the rule in [Bratcher v. Buckner](#), even though *Bratcher* involved a judgment lien and two deeds of trust and this case involves three deeds of trust. The situation is that A, B & C have liens on the subject property, and A then subordinates his lien to C's lien. The problem with this is that C appears to be senior to A, which is senior to B, which is senior to C, so that each lien is senior and junior to one of the other liens.

The Court held that the lien holders have the following priority: (1) C is paid up to the amount of A's lien, (2) if the amount of A's lien exceeds C's lien, A is paid the amount of his lien, less the amount paid so far to C, (3) B is then paid in full, (4) C is then paid any balance still owing to C, (5) A is then paid any balance still owing to A.

This is entirely fair because A loses priority as to the amount of C's lien, which conforms to the intent of the subordination agreement. B remains in the same position he would be in without the subordination agreement since his lien remains junior only to the amount of A's lien. C steps into A's shoes only up to the amount of A's lien.

NOTE: The odd thing about circuity of priority cases is that they result in surplus proceeds after a foreclosure sale being paid to senior lienholders. Normally, only junior lienholders and the foreclosed out owner are entitled to share in surplus proceeds, and the purchaser takes title subject to the senior liens.

[Schmidli v. Pearce](#) [Docket](#)

178 Cal.App.4th 305 - 3rd Dist. (C058270) 10/13/09 **Case complete 12/15/09**

MARKETABLE RECORD TITLE ACT: This case was decided under the pre-2007 version of Civil Code Section 882.020, which provided that a deed of trust expires after 10 years if the maturity date is "ascertainable from the record". The court held that this provision was not triggered by a Notice of Default, which set forth the maturity date and which was recorded prior to expiration of the 10-year period. NOTE: In 2007, C.C. Section 882.020 was amended to make it clear that the 10-year period applies only where the maturity date is shown in the deed of trust itself.

[Nielsen v. Gibson](#) [Docket](#)

178 Cal.App.4th 318 - 3rd Dist. (C059291) 10/13/09 **Case complete 12/15/09**

ADVERSE POSSESSION: 1. The "open and notorious" element of adverse possession was satisfied where plaintiff possessed the subject property by actual possession under such circumstances as to constitute reasonable notice to the owner. Defendant was charged with constructive knowledge of plaintiff's possession, even though defendant was out of the country the entire time and did not have actual knowledge.

2. The 5-year adverse possession period is tolled under C.C.P. Section 328 for up to 20 years if the defendant is "under the age of majority or insane". In the *unpublished* portion of the opinion

the court held that although the defendant had been ruled incompetent by a court in Ireland, there was insufficient evidence that defendant's condition met the legal definition of "insane".

[Ricketts v. McCormack](#) [Docket](#) [Sup.Ct. Docket](#)

177 Cal.App.4th 1324 - 2nd Dist. (B210123) 9/27/09 **Petition for review by Cal Supreme Ct. DENIED 12/17/09**

RECORDING LAW: Civil Code Section 2941(c) provides in part, "Within two business days from the day of receipt, if received in recordable form together with all required fees, the county recorder shall stamp and record the full reconveyance or certificate of discharge." In this class action lawsuit against the County recorder, the court held that indexing is a distinct function, separate from recording a document, and is not part of section 2941(c)'s stamp-and-record requirement.

The court distinguished indexing, stamping and recording:

Stamping: The "stamping" requirement of Section 2941(c) is satisfied when the Recorder endorses on a reconveyance the order of receipt, the day and time of receipt and the amount of fees paid.

Recording: The reconveyance is "recorded" once the Recorder has confirmed the document meets all recording requirements, created an entry for the document in the "Enterprise Recording Archive" system, calculated the required fees and confirmed payment of the correct amount and, finally, generated a lead sheet containing, among other things, a bar code, a permanent recording number and the words "Recorded/Filed in Official Records."

Indexing: Government Code Section 27324 requires all instruments "presented for recordation" to "have a title or titles indicating the kind or kinds of documents contained therein," and the recorder is "required to index only that title or titles captioned on the first page of a document."

[Starlight Ridge South Homeowner's Assn. v. Hunter-Bloor](#) [Docket](#)

177 Cal.App.4th 440 - 4th Dist., Div. 2 (E046457) 8/14/09 (Pub. Order 9/3/09) **Case complete 10/19/09**

CC&R's: Under Code Civ. Proc. Section 1859, where two provisions appear to cover the same matter, and are inconsistent, the more specific provision controls over the general provision. Here the provision of CC&R's requiring each homeowner to maintain a drainage ditch where it crossed the homeowners' properties was a specific provision that controlled over a general provision requiring the homeowner's association to maintain landscape maintenance areas.

[First American Title Insurance Co. v. XWarehouse Lending Corp.](#) [Docket](#)

177 Cal.App.4th 106 - 1st Dist. (A119931) 8/28/09 **Case complete 10/30/09**

TITLE INSURANCE: A loan policy provides that "the owner of the indebtedness secured by the insured mortgage" becomes an insured under the loan policy. Normally, this means that an assignee becomes an insured. However, where the insured lender failed to disburse loan proceeds for the benefit of the named borrower, an indebtedness never existed, and the warehouse lender/assignee who disbursed money to the lender did not become an insured. The court pointed

out that the policy insures against defects in the mortgage itself, but not against problems related to the underlying debt.

NOTE: In Footnote 8 the court distinguishes cases upholding the right of a named insured or its assignee to recover from a title insurer for a loss due to a forged note or forged mortgage because in those cases, and unlike this case, moneys had been actually disbursed or credited to the named borrower by either the lender or its assignee.

[Wells Fargo v. D & M Cabinets](#) [Docket](#)

177 Cal.App.4th 59 - 3rd Dist. (C058486) 8/28/09 **Case complete 10/28/09**

JUDGMENTS: A judgment creditor, seeking to sell an occupied dwelling to collect on a money judgment, may not bypass the stringent requirements of C.C.P. Section 704.740 et seq. when the sale is conducted by a receiver appointed under C.C.P. Section 708.620. The judgment creditor must comply with Section 704.740, regardless of whether the property is to be sold by a sheriff or a receiver.

[Sequoia Park Associates v. County of Sonoma](#) [Docket](#) [Sup.Ct. Docket](#)

176 Cal.App.4th 1270 - 1st Dist. (A120049) 8/21/09 **Petition for review by Cal Supreme Ct. DENIED 12/2/09**

PREEMPTION: A County ordinance professing to implement the state mobilehome conversion statutes was preempted for the following reasons: (1) Gov. Code Section 66427.5 expressly preempts the power of local authorities to inject other factors when considering an application to convert an existing mobilehome park from a rental to a resident-owner basis, (2) the ordinance is impliedly preempted because the Legislature has established a dominant role for the state in regulating mobilehomes, and has indicated its intent to forestall local intrusion into the particular terrain of mobilehome conversions and (3) the County's ordinance duplicates several features of state law, a redundancy that is an established litmus test for preemption.

[Citizens for Planning Responsibly v. County of San Luis Obispo](#) [Docket](#) [Sup.Ct. Docket](#)

176 Cal.App.4th 357 - 2nd Dist (B206957) 8/4/09 **Petition for review by Cal Supreme Ct. DENIED 10/14/09**

PREEMPTION: The court held that the State Aeronautics Act, which regulates the development and expansion of airports, did not preempt an initiative measure adopted by the voters because none of the following three factors necessary to establish preemption was present: (1) The Legislature may so completely occupy the field in a matter of statewide concern that all, or conflicting, local legislation is precluded, (2) the Legislature may delegate exclusive authority to a city council or board of supervisors to exercise a particular power over matters of statewide concern, or (3) the exercise of the initiative power would impermissibly interfere with an essential governmental function.

[Delgado v. Interinsurance Exchange of the Auto Club of So. Cal.](#) [Docket](#)

47 Cal.4th 302 - Cal. Supreme Court (S155129) 8/3/09

INSURANCE / BAD FAITH: The case is not as relevant to title insurance as the [lower court case](#), which held that an insurance company acted in bad faith as a matter of law where a potential for coverage was apparent from the face of the complaint. The Supreme Court reversed, basing its decision on the meaning of "accident" in a homeowner's policy, and holding that an insured's unreasonable belief in the need for self-defense does not turn the resulting intentional act of assault and battery into "an accident" within the policy's coverage clause. Therefore, the insurance company had no duty to defend its insured in the lawsuit brought against him by the injured party.

[1538 Cahuenga Partners v. Turmeko Properties](#) [Docket](#)

176 Cal.App.4th 139 - 2nd Dist. (B209548) 7/31/09 **Case complete 10/7/09**

RECONVEYANCE: [This is actually a civil procedure case that it not of much interest to title insurance business, but it is included here because the underlying action sought to cancel a reconveyance.] The court ordered that a reconveyance of a deed of trust be cancelled pursuant to a settlement agreement. The main holding was that a trial court may enforce a settlement agreement against a party to the settlement that has interest in the subject matter of the action even if the party is not named in the action, where the non-party appears in court and consents to the settlement.

[Lee v. Lee](#) [Docket](#)

175 Cal.App.4th 1553 - 5th Dist. (F056107) 7/29/09 **Case complete 9/28/09**

DEEDS / STATUTE OF FRAUDS:

1. The Statute of Frauds does not apply to an executed contract, and a deed that is executed by the grantor and delivered to the grantee is an executed contract. The court rejected defendants' argument that the deed did not reflect the terms of sale under a verbal agreement.
2. While the alteration of an undelivered deed renders the conveyance void, the alteration of a deed after it has been delivered to the grantee does not invalidate the instrument as to the grantee. The deed is void only as to the individuals who were added as grantees after delivery.

[White v. Criddlebaugh](#) [Docket](#)

178 Cal.App.4th 506 - 5th Dist. (F053843) 7/29/09 (Mod. 10/20/09) **Case complete 12/21/09**

MECHANIC'S LIENS: Under Business and Professions Code Section 7031, a property owner may recover all compensation paid to an unlicensed contractor, in addition to not being liable for unpaid amounts. Furthermore, this recovery may not be offset or reduced by the unlicensed contractor's claim for materials or other services.

[Linthicum v. Butterfield](#) [Docket](#) [Sup.Ct. Docket](#)

175 Cal.App.4th 259 - 2nd Dist. (B199645) 6/24/09 **Petition for review by Cal Supreme Ct. DENIED 9/9/09**

NOTE: This is a new opinion following a rehearing. The only significant changes from the

original opinion filed [4/2/09](#) (modified [4/8/09](#)) involve the issue of a C.C.P. 998 offer, which is not a significant title insurance or escrow issue.

EASEMENTS: The court quieted title to an "equitable easement" for access based on the doctrine of "balancing conveniences " or "relative hardship". Prohibiting the continued use of the roadway would cause catastrophic loss to the defendants and insignificant loss to the plaintiffs. However, the court remanded the case for the trial court to determine the width of the easement, which should be the minimal width necessary. The court reversed the judgment insofar as it awarded a utility easement to the defendants because they did not seek to quiet title to an easement for utilities, even though they denied the material allegations of that cause of action.

[United Rentals Northwest v. United Lumber Products](#) [Docket](#)

174 Cal.App.4th 1479 - 5th Dist. (F055855) 6/18/09 **Case complete 8/18/09**

MECHANIC'S LIENS: Under Civil Code Section 3106, a "work of improvement" includes the demolition and/or removal of buildings. The court held that lumber drying kilns are "buildings" so the contractor who dismantled and removed them was entitled to a mechanic's lien.

[People v. Shetty](#) [Docket](#) [Sup.Ct. Docket](#)

174 Cal.App.4th 1488 - 2nd Dist. (B205061) 6/18/09 **Petition for review by Cal Supreme Ct. DENIED 9/30/09**

HOME EQUITY SALES CONTRACT ACT: This case is not significant from a title insurance standpoint, but it is interesting because it is an example of a successful prosecution under the Home Equity Sales Contract Act (Civil Code Section 1695 et seq.).

[Strauss v. Horton](#) [Modification](#) [Docket](#)

46 Cal.4th 364 - Cal. Supreme Court (S168047) 5/26/09

SAME SEX MARRIAGE: The California Supreme Court upheld Proposition 8, which amended the California State Constitution to provide that: "Only marriage between a man and a woman is valid or recognized in California." Proposition 8 thereby overrode portions of the ruling of [In re Marriage Cases](#), which allowed same-sex marriages. But the Court upheld the marriages that were performed in the brief time same-sex marriage was legal from 5:00pm on June 16, 2008 (when *In re Marriage Cases* was final) through November 4, 2008 (the day before Proposition 8 became effective restricting the definition of marriage to a man and a woman).

[In re Marriage of Lund](#) [Docket](#)

174 Cal.App.4th 40 - 4th Dist., Div. 3 (G040863) 5/21/09 **Case complete 7/27/09**

COMMUNITY PROPERTY: An agreement accomplished a transmutation of separate property to community property even though it stated that the transfer was "for estate planning purposes". A transmutation either occurs for all purposes or it doesn't occur at all.

[St. Marie v. Riverside County Regional Park, etc.](#) [Docket](#)

46 Cal.4th 282 - Cal. Supreme Court (S159319) 5/14/09

OPEN SPACE DEDICATION: Property granted to a Regional Park District is not "actually dedicated" under Public Resources Code Section 5540 for open space purposes until the district's Board of Directors adopts a resolution dedicating the property for park or open space purposes. Therefore, until the Board of Directors adopts such a resolution, the property may be sold by the District without voter or legislative approval.

[Manhattan Loft v. Mercury Liquors](#) [Docket](#) [Sup.Ct. Docket](#)

173 Cal.App.4th 1040 - 2nd Dist. (B211070) 5/6/09 **Petition for review by Cal Supreme Ct. DENIED 8/12/09**

LIS PENDENS: An arbitration proceeding is not an "action" that supports the recordation of a notice of pendency of action. The proper procedure is for a party to an arbitration agreement to file an action in court to support the recording of a lis pendens, and simultaneously file an application to stay the litigation pending arbitration.

[Murphy v. Burch](#) [Docket](#)

46 Cal.4th 157 - Cal. Supreme Court (S159489) 4/27/09

EASEMENT BY NECESSITY: This case contains a good discussion of the law of easements by necessity, which the court held did not apply in this case to provide access to plaintiff's property. This means plaintiff's property is completely landlocked because the parties had already stipulated that a prescriptive easement could not be established.

An easement by necessity arises by operation of law when 1) there is a strict necessity as when a property is landlocked and 2) the dominant and servient tenements were under the same ownership at the time of the conveyance giving rise to the necessity. The second requirement, while not categorically barred when the federal government is the common grantor, requires a high burden of proof to show 1) the intent of Congress to establish the easement under federal statutes authorizing the patent and 2) the government's lack of power to condemn the easement. Normally, a reservation of an easement in favor of the government would not be necessary because the government can obtain the easement by condemnation.

The court pointed out that there is a distinction between an implied grant and implied reservation, and favorably quotes a treatise that observes: "an easement of necessity may be created against the government, but the government agency cannot establish an easement by necessity over land it has conveyed because its power of eminent domain removes the strict necessity required for the creation of an easement by necessity."

[Abernathy Valley, Inc. v. County of Solano](#) [Docket](#)

173 Cal.App.4th 42 - 1st Dist. (A121817) 4/17/09 **Case complete 6/22/09**

SUBDIVISION MAP ACT: This case contains a very good history of California's Subdivision Map Act statutes. The court held that parcels shown on a 1909 map recorded pursuant to the 1907 subdivision map law are not entitled to recognition under the Subdivision Map Act's grandfather

clause (Government Code Section 66499.30) because the 1907 act did not regulate the "design and improvement of subdivisions". The court also held that a local agency may deny an application for a certificate of compliance that seeks a determination that a particular subdivision lot complies with the Act, where the effect of issuing a certificate would be to effectively subdivide the property without complying with the Act.

[Linthicum v. Butterfield](#) [Modification](#) [Docket](#) [Sup.Ct. Docket](#)

172 Cal.App.4th 1112 - 2nd Dist. (B199645) 4/2/09

[SEE NEW OPINION FILED 6/24/09](#)

EASEMENTS: The court quieted title to an "equitable easement" for access based on the doctrine of "balancing conveniences " or "relative hardship". Prohibiting the continued use of the roadway would cause catastrophic loss to the defendants and insignificant loss to the plaintiffs. However, the court remanded the case for the trial court to determine the width of the easement, which should be the minimal width necessary. The court reversed the judgment insofar as it awarded a utility easement to the defendants because they did not seek to quiet title to an easement for utilities, even though they denied the material allegations of that cause of action.

[McAvoy v. Hilbert](#) [Docket](#)

172 Cal.App.4th 707 - 4th Dist., Div 1 (D052802) 3/24/09 **Case complete 5/27/09**

ARBITRATION: C.C.P. Section 1298 requires that an arbitration provision in a real estate contract be accompanied by a statutory notice and that the parties indicate their assent by placing their initials on an adjacent space or line. The court held that a listing agreement that is part of a larger transaction for the sale of both a business and real estate is still subject to Section 1298, and refused to enforce an arbitration clause that did not comply with that statute.

[Peak-Las Positas Partners v. Bollag](#) [Modification](#) [Docket](#)

172 Cal.App.4th 101 - 2nd Dist. (B205091) 3/16/09 **Case complete 5/27/09**

ESCROW: Amended escrow instructions provided for extending the escrow upon mutual consent which "shall not be unreasonably withheld or delayed". The court held that substantial evidence supported the trial court's determination that the seller's refusal to extend escrow was unreasonable. The court pointed out the rule that equity abhors a forfeiture and that plaintiff had paid a non-refundable deposit of \$465,000 and spent \$5 million in project costs to obtain a lot line adjustment that was necessary in order for the property to be sold.

[Alfaro v. Community Housing Improvement System & Planning Assn](#) [Modification](#)
[Docket](#) [Sup.Ct. Docket](#)

171 Cal.App.4th 1356 6th Dist. (H031127) 2/19/09 **Petition for review by Cal Supreme Ct. DENIED 5/13/09**

CC&R's: The court upheld the validity of recorded CC&R's containing an affordable housing restriction that required property to remain affordable to buyers with low to moderate income. The court reached several conclusions:

1. Constructive notice of recorded CC&R's is imparted even if they are not referenced in a

subsequent deed,

2. CC&R's may describe an entire tract, and do not need to describe individual lots in the tract,

3. An affordable housing restriction is a reasonable restraint on alienation even if it is of indefinite duration,

4. Defendants had a duty as sellers to disclose the existence of the CC&R's. Such disclosure was made if plaintiffs were given, prior to close of escrow, preliminary reports that disclosed the CC&R's.

5. The fact that a victim had constructive notice of a matter from public records is no defense to fraud. The existence of such public records may be relevant to whether the victim's reliance was justifiable, but it is not, by itself, conclusive.

6. In the absence of a claim that defendants somehow prevented plaintiffs from reading the preliminary reports or deeds, or misled them about their contents, plaintiffs cannot blame defendants for their own neglect in reading the reports or deeds. Therefore, the date of discovery of alleged fraud for failing to disclose the affordable housing restriction would be the date plaintiffs received their preliminary reports or if they did not receive a preliminary report, the date they received their deeds.

[Kwok v. Transnation Title Insurance Company](#) [Docket](#) [Sup.Ct. Docket](#)

170 Cal.App.4th 1562 - 2nd Dist. (B207421) 2/10/09 **Petition for review by Cal Supreme Ct. DENIED 4/29/09**

TITLE INSURANCE: Plaintiffs did not succeed as insureds "by operation of law" under the terms of the title insurance policy after transfer of the property from a wholly owned limited liability company, of which appellants were the only members, to appellants as trustees of a revocable family trust. This case highlights the importance of obtaining a 107.9 endorsement, which adds the grantee as an additional insured under the policy.

[Pro Value Properties v. Quality Loan Service Corp.](#) [Docket](#)

170 Cal.App.4th 579 - 2nd Dist. (B204853) 1/23/09 **Case complete 3/27/09**

TRUSTEE'S SALES: A Trustee's Deed was void because the trustee failed to record a substitution of trustee. The purchaser at the sale was entitled to a return of the money paid plus interest. The interest rate is the prejudgment interest rate of seven percent set forth in Cal. Const., Art. XV, Section 1. A trustee's obligations to a purchaser are based on statute and not on a contract. Therefore, Civil Code Section 3289 does not apply, since it only applies to a breach of a contract that does not stipulate an interest rate.

[Sixells v. Cannery Business Park](#) [Docket](#) [Sup.Ct. Docket](#)

170 Cal.App.4th 648 - 3rd Dist. (C056267) 12/29/08 **Petition for review by Cal Supreme Ct. DENIED 3/25/09**

CONTRACTS: The Subdivision Map Act (Gov. Code Section 66410 et seq.) prohibits the sale of a parcel of real property until a final subdivision map or parcel map has been filed unless the contract to sell the property is "expressly conditioned" upon the approval and filing of a final map (66499.30(e)). Here, the contract satisfied neither requirement because it allowed the purchaser to

complete the purchase if, at its election, the subject property was made into a legal parcel by recording a final map or if the purchaser "waived" the recording of a final map. Therefore the contract was void.

[Patel v. Liebermensch](#) [Docket](#)

45 Cal.4th 344 - Cal. Supreme Court (S156797) 12/22/08

SPECIFIC PERFORMANCE: The material factors required for a written contract are the seller, the buyer, the price to be paid, the time and manner of payment, and the property to be transferred, describing it so it may be identified. Here, specific performance of an option was granted even though it was not precise as to the time and manner of payment because where a contract for the sale of real property specifies no time of payment, a reasonable time is allowed. The manner of payment is also a term that may be supplied by implication.

[In re Marriage of Brooks and Robinson](#) [Docket](#) [Sup.Ct. Docket](#)

169 Cal.App.4th 176 - 4th Dist., Div. 2 (E043770) 12/16/08 **Request for review and depublication by Cal Supreme Ct. DENIED 3/25/09**

COMMUNITY PROPERTY: The act of taking title to property in the name of one spouse during marriage with the consent of the other spouse effectively removes that property from the general presumption that the property is community property. Instead, there is a presumption that the parties intended title to be held as stated in the deed. This presumption can only be overcome by clear and convincing evidence of a contrary agreement, and not solely by tracing the funds used to purchase the property or by testimony of an intention not disclosed at the time of the execution of the conveyance. Because the court found that there was no agreement to hold title other than as the separate property of the spouse who acquired title in her own name, it did not reach the issue of whether a purchaser from that spouse was a BFP or would be charged with knowledge of that the seller's spouse had a community property interest in the property.

[The Formula, Inc. v. Superior Court](#) [Docket](#)

168 Cal.App.4th 1455 - 3rd Dist. (C058894) 12/10/09 **Case complete 2/10/09**

LIS PENDENS: A notice of litigation filed in another state is not authorized for recording under California's lis pendens statutes. An improperly filed notice of an action in another state is subject to expungement by a California court, but not under the authority of C.C.P. Section 405.30, and an order of expungement is given effect by being recorded in the chain of title to overcome the effect of the earlier filing.

[Ekstrom v. Marquesa at Monarch Beach HOA](#) [Docket](#) [Sup.Ct. Docket](#)

168 Cal.App.4th 1111 - 4th Dist., Div. 3 (G038537) 12/1/08 **Depublication request DENIED 3/11/09**

CC&R's: A provision in CC&R's requiring all trees on a lot to be trimmed so as to not exceed the roof of the house on the lot, unless the tree does not obstruct views from other lots, applies to palm trees even though topping a palm tree will kill it. All trees means "all trees", so palm trees

are not exempt from the requirement that offending trees be trimmed, topped, or removed.

[Spencer v. Marshall](#) [Docket](#)

168 Cal.App.4th 783 - 1st Dist. (A119437) 11/24/08 **Case complete 1/26/09**

HOME EQUITY SALES: The Home Equity Sales Contract Act applies even where the seller is in bankruptcy and even where the seller's Chapter 13 Bankruptcy Plan allows the seller to sell or refinance the subject property without further order of the court.

[Kachlon v. Markowitz](#) [Docket](#)

168 Cal.App.4th 316 - 2nd Dist. (B182816) 11/17/08 **Case complete 1/27/09**

TRUSTEE'S SALES:

1. The statutorily required mailing, publication, and delivery of notices in nonjudicial foreclosure, and the performance of statutory nonjudicial foreclosure procedures, are privileged communications under the qualified, common-interest privilege, which means that the privilege applies as long as there is no malice. The absolute privilege for communications made in a judicial proceeding (the "litigation privilege") does not apply.
2. Actions seeking to enjoin nonjudicial foreclosure and clear title based on the provisions of a deed of trust are actions on a contract, so an award of attorney fees under Civil Code Section 1717 and provisions in the deed of trust is proper.
3. An owner is entitled to attorney fees against the trustee who conducted trustee's sale proceedings where the trustee did not merely act as a neutral stakeholder but rather aligned itself with the lender by denying that the trustor was entitled to relief.

[Hines v. Lukes](#) [Docket](#)

167 Cal.App.4th 1174 - 2nd Dist. (B199971) 10/27/08 **Case complete 12/31/08**

EASEMENTS: *[Not significant from a title insurance standpoint]*. The underlying dispute concerns an easement but the case involves only civil procedure issues pertaining to the enforcement of a settlement agreement.

[Satchmed Plaza Owners Association v. UWMC Hospital Corp.](#) [Docket](#)

167 Cal.App.4th 1034 - 4th Dist., Div. 3 (G038119) 10/23/08 **Case complete 12/23/08**

RIGHT OF FIRST REFUSAL: *[Not significant from a title insurance standpoint]*. The underlying dispute concerns a right of first refusal but the case involves only civil procedure issues pertaining to a party's waiver of its right to appeal where it has accepted the benefits of the favorable portion of judgment.

[Gray v. McCormick](#) [Docket](#) [Sup.Ct. Docket](#)

167 Cal.App.4th 1019 - 4th Dist., Div. 3 (G039738) 10/23/08 **Petition for review by Cal Supreme Ct. DENIED 1/14/09**

EASEMENTS: Exclusive easements are permitted under California law, but the use by the owner

of the dominant tenement is limited to the purposes specified in the grant of easement, not all conceivable uses of the property.

[In re Estate of Felder](#) [Docket](#)

167 Cal.App.4th 518 - 2nd Dist. (B205027) 10/9/08 **Case complete 12/11/08**

CONTRACTS: *[Not significant from a title insurance standpoint]*. The case held that an estate had the right to retain the entire deposit upon a purchaser's breach of a sales contract even though the estate had only a 1/2 interest in the subject property.

[Secrest v. Security National Mortgage Loan Trust](#) [Order Modifying Opinion](#) [Docket](#)
[Sup.Ct. Docket](#)

167 Cal.App.4th 544 - 4th Dist., Div. 3 (G039065) 10/9/08, Modified 11/3/08 **Petition for review by Cal Supreme Ct. DENIED 12/17/08**

LOAN MODIFICATION: Because a note and deed of trust come within the statute of frauds, a Forbearance Agreement also comes within the statute of frauds pursuant to Civil Code section 1698. Making the downpayment required by the Forbearance Agreement was not sufficient part performance to estop Defendants from asserting the statute of frauds because payment of money alone is not enough as a matter of law to take an agreement out of the statute, and the Plaintiffs have legal means to recover the downpayment if they are entitled to its return. In addition to part performance, the party seeking to enforce the contract must have changed position in reliance on the oral contract to such an extent that application of the statute of frauds would result in an unjust or unconscionable loss, amounting in effect to a fraud.

[FDIC v. Dintino](#) [Docket](#)

167 Cal.App.4th 333 - 4th Dist., Div. 1 (D051447) 9/9/08 (Pub. Order 10/2/08) **Case complete 12/2/08**

TRUST DEEDS: A lender who mistakenly reconveyed a deed of trust could not sue under the note because it would violate the one action rule. However, the lender prevailed on its unjust enrichment cause of action. The applicable statute of limitations was the 3-year statute for actions based on fraud or mistake, and not the 4-year statute for actions based on contract. Nevertheless, the action was timely because the statute did not begin to run until the lender reasonably discovered its mistake, and not from the date of recordation of the reconveyance. Finally, the court awarded defendant attorney's fees attributable to defending the contract cause of action because defendant prevailed on that particular cause of action even though he lost the lawsuit.

[California Coastal Commission v. Allen](#) [Docket](#) [Sup.Ct. Docket](#)

167 Cal.App.4th 322 - 2nd Dist. (B197974) 10/1/08 **Petition for review by Cal Supreme Ct. DENIED 1/14/09**

HOMESTEADS:

1. The assignees of a judgment properly established their rights as assignees by filing with the clerk of the court an acknowledgement of assignment of judgment.

2. The subject property was not subject to a homestead exemption because the debtor transferred the property to a corporation of which he was the sole shareholder. The homestead exemption only applies to the interest of a natural person in a dwelling.

3. The debtor could not claim that he was only temporarily absent from a dwelling in order to establish it as his homestead where he leased it for two years. This is true even though the debtor retained the right to occupy a single car section of the garage and the attic.

[In re Marriage of Holtemann](#) [Docket](#) [Sup.Ct. Docket](#)

162 Cal.App.4th 1175 - 2nd Dist. (B203089) 9/15/08 **Petition for review by Cal Supreme Ct. DENIED 12/10/08**

COMMUNITY PROPERTY: Transmutation of separate property to community property requires language which expressly states that the characterization or ownership of the property is being changed. Here, an effective transmutation occurred because the transmutation agreement clearly specified that a transmutation was occurring and was not negated by arguably confusing language in a trust regarding the parties' rights to terminate the trust. The court also stated that it was not aware of any authority for the proposition that a transmutation can be conditional or temporary. However, while questioning whether a transmutation can be conditional or temporary, the court did not specifically make that holding because the language used by the parties was not conditional.

[Mission Shores Association v. Pheil](#) [Docket](#)

166 Cal.App.4th 789 - 4th Dist., Div. 2 (E043932) 9/5/08 **Case complete 11/7/08**

CC&R's: Civil Code Section 1356 allows a court to reduce a super-majority voting requirement to amend CC&R's where the court finds that the amendment is reasonable. Here the court reduced the 2/3 majority requirement to a simple majority for an amendment to limit rentals of homes to 30 days or more.

[Zanelli v. McGrath](#) [Docket](#)

166 Cal.App.4th 615 - 1st Dist. (A117111) 9/2/08 **Case complete 11/4/08**

EASEMENTS:

1. The doctrine of merger codified in Civil Code Sections 805 and 811 applies when "the right to the servitude," and "the right to the servient tenement" are not vested in a single individual, but in the same persons;

2. The doctrine of merger applies regardless of whether the owners held title as joint tenants or tenants in common. Also, the fact that one owner held his interest in one of the properties as trustee for his inter vivos revocable trust does not preclude merger because California law recognizes that when property is held in this type of trust the settlor has the equivalent of full ownership of the property. (If he had held title only in a representative capacity as a trustee for other beneficiaries under the terms of an irrevocable trust, then his ownership might not result in extinguishment by merger because he would only hold the legal title for the benefit of others.) The court cites *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, stating that a revocable inter

vivos trust is recognized as simply a probate avoidance device, but does not prevent creditors of the settlers from reaching trust property.

(3) After being extinguished by merger, an easement is not revived upon severance of the formerly dominant and servient parcels unless it is validly created once again.

[Ritter & Ritter v. The Churchill Condominium Assn.](#) [Docket](#)

166 Cal.App.4th 103 - 2nd Dist. (B187840) 7/22/08 (pub. order 8/21/08) **Case complete 10/21/08**

HOMEOWNERS' ASSOCIATIONS: A member of a condominium homeowners' association can recover damages from the association which result from a dangerous condition negligently maintained by the association in the common area. However, the court found in favor of the individual directors because a greater degree of fault is necessary to hold unpaid individual board members liable, and such greater degree of fault was not present here.

[Kempton v. City of Los Angeles](#) [Docket](#) [Sup.Ct. Docket](#)

165 Cal.App.4th 1344 - 2nd Dist. (B201128) 8/13/08 **Request for Depublication by Cal Supreme Ct. DENIED 11/12/08**

NUISANCE: A private individual may bring an action against a municipality to abate a public nuisance when the individual suffers harm that is specially injurious to himself, or where the nuisance is a public nuisance per se, such as blocking a public sidewalk or road. The court held that plaintiff's assertions that neighbors' fences were erected upon city property, prevent access to plaintiff's sidewalk area, and block the sightlines upon entering and exiting their garage were sufficient to support both a public nuisance per se and specific injury.

[Claudino v. Pereira](#) [Docket](#) [Sup.Ct. Docket](#)

165 Cal.App.4th 1282 - 3rd Dist. (C054808) 8/12/08 **Petition for review by Cal Supreme Ct. DENIED 11/12//08**

SURVEYS: Determining the location of a boundary line shown on a plat recorded pursuant to the 1867 Townsite Acts requires an examination of both the plat and the surveyor's field notes. Here, the plat showed the boundary as a straight line, but the court held that the boundary followed the center line of a gulch because the field notes stated that the boundary was "down said gulch".

[Zack's, Inc. v. City of Sausalito](#) [Docket](#)

165 Cal.App.4th 1163 - 1st Dist. (A118244) 8/11/08 **Case complete 10/14/08**

TIDELANDS / PUBLIC STREETS: A statute authorizing the City's lease of tidelands does not supersede other state laws establishing procedures for the abandonment of public streets. Because the City failed to follow the normal procedure for abandonment of the portion of the street upon which it granted a lease, the leasehold was not authorized and can therefore be deemed a nuisance.

[Gehr v. Baker Hughes Oil Field Operations](#) [Docket](#) [Sup.Ct. Docket](#)

165 Cal.App.4th 660 - 2nd Dist. (B201195) 7/30/08 **Petition for review by Cal Supreme Ct. DENIED 10/16/08**

NUISANCE: Plaintiff purchased from Defendant real property that was contaminated, and Defendant had begun the remediation process. The 3-year statute of limitations for suing under a permanent nuisance theory had expired. So Plaintiff sued for nuisance damages under a continuing nuisance theory, seeking interest rate differential damages based on the difference in the interest rate between an existing loan and a loan that plaintiff could have obtained if not for the contamination.

The court held that plaintiff's claim for interest rate differential damages is actually a claim for diminution in value, which may not be recovered under a continuing nuisance theory. Damages for diminution in value may only be recovered for permanent, not continuing, nuisances. When suing for a continuing nuisance, future or prospective damages are not allowed, such as damages for diminution in the value of the subject property. A nuisance can only be considered "continuing" if it can be abated, and therefore a plaintiff suing under this theory may only recover the costs of abating the nuisance.

If the nuisance has inflicted a permanent injury on the land, the plaintiff generally must bring a single lawsuit for all past, present, and future damages within three years of the creation of the nuisance. But if the nuisance is one which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. Recovery is limited, however, to actual injury suffered prior to commencement of each action.

[Witt Home Ranch v. County of Sonoma](#) [Docket](#) [Sup.Ct. Docket](#)

165 Cal.App.4th 543 - 1st Dist. (A118911) 7/29/08 **Petition for review by Cal Supreme Ct. DENIED 5/28/08**

SUBDIVISION MAP ACT: This case contains a good history of California's Subdivision Map Act statutes. The court held that the laws governing subdivision maps in 1915 did not regulate the "design and improvement of subdivisions," as required by the grandfather clause of Government Code Section 66499.30. The subdivision map in this case was recorded in 1915 and no lots were subsequently conveyed, so the map does not create a valid subdivision.

[T.O. IX v. Superior Court](#) [Docket](#) [Sup.Ct. Docket](#)

165 Cal.App.4th 140 - 2nd Dist. (B203794) 7/24/08 **Petition for review by Cal Supreme Ct. DENIED 9/10/08**

MECHANIC'S LIENS: A mechanic's lien claimant recorded a mechanic's lien against each of the nine parcels in a project, each lien for the full amount due under the contract. The court held that defendant could record a single release bond under Civil Code Section 3143 to release all of the liens.

[Kassir v. Zahabi](#) [Docket](#)

164 Cal.App.4th 1352 - 4th Dist., Div. 3 (G038449) 3/5/08 (Pub. Order 4/3/08, Received 7/16/08) **Case complete 5/9/08**

SPECIFIC PERFORMANCE: The trial court ordered Defendant to specifically perform his contract to sell real property to Plaintiff, and further issued a judgment ordering Defendant to pay Plaintiff for rents accruing during the time Defendant was able to perform the agreement but refused to do so. The court held that because the property was overencumbered, Defendant would have received nothing under the agreement and no offset was required.

The court explained that because execution of the judgment in a specific performance action will occur later than the date of performance provided by the contract, financial adjustments must be made to relate their performance back to the contract date, namely: 1) when a buyer is deprived of possession of the property pending resolution of the dispute and the seller receives rents and profits, the buyer is entitled to a credit against the purchase price for the rents and profits from the time the property should have been conveyed to him, 2) a seller also must be treated as if he had performed in a timely fashion and is entitled to receive the value of his lost use of the purchase money during the period performance was delayed, 3) if any part of the purchase price has been set aside by the buyer with notice to the seller, the seller may not receive credit for his lost use of those funds and 4) any award to the seller representing the value of his lost use of the purchase money cannot exceed the rents and profits awarded to the buyer, for otherwise the breaching seller would profit from his wrong.

[Grant v. Ratliff](#) [Docket](#) [Sup.Ct. Docket](#)

164 Cal.App.4th 1304 - 2nd Dist. (B194368) 7/16/08 **Request for depublication by Cal Supreme Ct. DENIED 10/1/08**

PRESCRIPTIVE EASEMENTS: The plaintiff/owner of Parcel A sought to establish a prescriptive easement to a road over Parcel B. In order to establish the requisite 5-year period of open and notorious possession, the plaintiff needed to include the time that the son of the owner of Parcel B spent living in a mobile home on Parcel A. The court held that the son's use of Parcel A was not adverse but was instead a matter of "family accommodation" and, therefore, a prescriptive easement was not established. The court also discussed: 1) a party seeking to establish a prescriptive easement has the burden of proof by clear and convincing evidence and 2) once the owner of the dominant tenement shows that use of an easement has been continuous over a long period of time, the burden shifts to the owner of the servient tenement to show that the use was permissive, but the servient tenement owner's burden is a burden of producing evidence, and not a burden of proof.

[SBAM Partners v. Wang](#) [Docket](#)

164 Cal.App.4th 903 - 2nd Dist. (B204191) 7/9/08 **Case complete 9/10/08**

HOMESTEADS: Under C.C.P. Section 704.710, a homestead exemption is not allowed on property acquired by the debtor after the judgment has been recorded unless it was purchased with exempt proceeds from the sale, damage or destruction of a homestead within the six-month

safe harbor period.

[Christian v. Flora](#) [Docket](#)

164 Cal.App.4th 539 - 3rd Dist. (C054523) 6/30/08 **Case complete 9/2/08**

EASEMENTS: Where parcels in a subdivision are resubdivided by a subsequent parcel map, the new parcel map amends the provisions of any previously recorded parcel map made in compliance with the Map Act. Here, although the deeds to plaintiffs referred to the original parcel map, since the intent of the parties was that the easement shown on the amended parcel map would be conveyed, the grantees acquired title to the easement shown on the amended map.

[Lange v. Schilling](#) [Docket](#)

163 Cal.App.4th 1412 - 3rd Dist. (C055471) 5/28/08; pub. order 6/16/08 **Case Complete 8/18/08**

REAL ESTATE AGENTS: The clear language of the standard California real estate purchase agreement precludes an award of attorney's fees if a party does not attempt mediation before commencing litigation. Because plaintiff filed his lawsuit before offering mediation, there was no basis to award attorney's fees.

[Talbott v. Hustwit](#) [Docket](#) [Sup.Ct. Docket](#)

164 Cal.App.4th 148 - 4th Dist., Div. 3 (G037424) 6/20/08 **Petition for review and depublication DENIED by Cal Supreme Ct. 9/24/08**

GUARANTEES:

1. C.C.P. 580a, which requires an appraisal of the real property security before the court may issue a deficiency judgment, does not apply to an action against a guarantor.
2. A lender cannot recover under a guaranty where there the debtor and guarantor already have identical liability, such as with general partners or trustees of a revocable trust in which the debtor is the settlor, trustee and primary beneficiary. Here, however, a guarantee signed by the trustees of the debtors' trust is enforceable as a "true guarantee" because, although the debtors were the settlors, they were a) secondary, not primary, beneficiaries and b) were not the trustees.

[Mayer v. L & B Real Estate](#) [Sup.Ct. Docket](#)

43 Cal.4th 1231 - Cal. Supreme Court (S142211) 6/16/08

TAX SALES: The one-year statute of limitations for attacking a tax sale does not begin to run against a property owner who is in "undisturbed possession" of the subject property until that owner has actual notice of the tax sale. Ordinarily, a property owner who has failed to pay property taxes has sufficient knowledge to put him on notice that a tax sale might result. However, in this case the property owners did not have notice because they purchased a single piece of commercial property and received a single yearly tax bill. They had no reason to suspect that due to errors committed by the tax assessor, a small portion of their property was being assessed separately and the tax bills were being sent to a previous owner.

NOTE: This creates a hazard for title companies insuring after a tax sale in reliance on the one-year statute of limitations in Revenue and Taxation Code Section 3725.

[California Golf v. Cooper](#) [Docket](#) [Sup.Ct. Docket](#)

163 Cal.App.4th 1053 - 2nd Dist. (B195211) 6/9/08 **Petition for review by Cal Supreme Ct. DENIED 9/17/08**

TRUSTEE'S SALES:

1. A bidder at a trustee's sale may not challenge the sale on the basis that the lender previously obtained a decree of judicial foreclosure because the doctrine of election of remedies benefits only the trustor or debtor.
2. A lender's remedies against a bidder who causes a bank to stop payment on cashier's checks based on a false affidavit asserting that the checks were lost is not limited to the remedies set forth in CC Section 2924h, and may pursue a cause of action for fraud against the bidder. (The case contains a good discussion (at pp. 25 - 26) of the procedure for stopping payment on a cashier's check by submitting an affidavit to the issuing bank.)

[Biagini v. Beckham](#) [Docket](#)

163 Cal.App.4th 1000 - 3rd Dist. (C054915) 6/9/08 **Case complete 8/11/08**

DEDICATION:

1. Acceptance of a dedication may be actual or implied. It is actual when formal acceptance is made by the proper authorities, and implied when a use has been made of the property by the public 1) of an intensity that is reasonable for the nature of the road and 2) for such a length of time as will evidence an intention to accept the dedication. BUT the use in this case was not sufficient because the use was by neighbors whose use did not exceed what was permitted pursuant to a private easement over the same area.
2. A statutory offer of dedication can be revoked as to the public at large by use of the area that is inconsistent with the dedication, but the offer remains open for formal acceptance by the public entity to which the offer was made.

[Steiner v. Thexton](#) [Docket](#) [Sup.Ct. Docket](#)

Cal.App. 3rd Dist. (C054605) 5/28/08 **REVERSED by Cal. Supreme Ct.**

OPTIONS: A contract to sell real property where the buyer's performance was entirely conditioned on the buyer obtaining regulatory approval to subdivide the property is an option. An option must be supported by consideration, but was not here, where the buyer could back out at any time. Buyer's promise to deliver to seller copies "of all information, reports, tests, studies and other documentation" was not sufficient consideration to support the option.

[In re Marriage Cases](#) [Docket](#)

43 Cal.4th 757 - Cal. Supreme Court (S147999) 5/15/08

MARRIAGE: The language of Family Code Section 300 limiting the designation of marriage to a

union "between a man and a woman" is unconstitutional and must be stricken from the statute, and the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples.

[Harvey v. The Landing Homeowners Association](#) [Docket](#)

162 Cal.App.4th 809 - 4th Dist., Div. 1 (D050263) 4/4/08 (Cert. for Pub. 4/30/08) **Case complete 6/30/08**

HOMEOWNERS ASSOCIATIONS: The Board of Directors of an HOA has the authority to allow owners to exclusively use common area accessible only to those owners where the following provision of the CC&R's applied: "The Board shall have the right to allow an Owner to exclusively use portions of the otherwise nonexclusive Common Area, provided that such portions . . . are nominal in area and adjacent to the Owner's Exclusive Use Area(s) or Living Unit, and, provided further, that such use does not unreasonably interfere with any other Owner's use . . ." Also, this is allowed under Civil Code Section 1363.07(a)(3)(E).

[Salma v. Capon](#) [Docket](#)

161 Cal.App.4th 1275 - 1st Dist. (A115057) 4/9/08 **Case complete 6/11/08**

HOME EQUITY SALES: A seller claimed he sold his house for far less than it was worth "due to the duress of an impending trustee's sale and the deceit of the purchasers". The case involves procedural issues that are not relevant to this web site. However, it is included here because it demonstrates the kind of mess that can occur when you are dealing with property that is in foreclosure. Be careful, folks.

[Aviel v. Ng](#) [Docket](#)

161 Cal.App.4th 809 - 1st Dist. (A114930) 2/28/08; pub. order 4/1/08 **Case complete 5/6/08**

LEASES / SUBORDINATION: A lease provision subordinating the lease to "mortgages" also applied to deeds of trust because the two instruments are functionally and legally the same. Therefore a foreclosure of a deed of trust wiped out the lease.

[People v. Martinez](#) [Docket](#)

161 Cal.App.4th 754 - 4th Dist., Div. 2 (E042427) 4/1/08 **Case complete 6/2/08**

FORGERY: This criminal case involves a conviction for forgery of a deed of trust. [NOTE: The crime of forgery can occur even if the owner actually signed the deed of trust. The court pointed out that "forgery is committed when a defendant, by fraud or trickery, causes another to execute a document where the signer is unaware, by reason of such trickery, that he is executing a document of that nature."

[Pacific Hills Homeowners Association v. Prun](#) [Docket](#)

160 Cal.App.4th 1557 - 4th Dist., Div. 3 (G038244) 3/20/08 **Case complete 5/27/08**

CC&R's: Defendants built a gate and fence within the setback required by the CC&R's. 1) The

court held that the 5-year statute of limitations of C.C.P. 336(b) applies to unrecorded as well as recorded restrictions, so that the shorter 4-year statute of limitations of C.C.P. 337 is inapplicable. 2) The court upheld the trial court's equitable remedy of requiring the HOA to pay 2/3 of the cost of relocation defendant's gate based upon the HOA's sloppiness in not pursuing its case more promptly.

[Nicoll v. Rudnick](#) [Docket](#)

160 Cal.App.4th 550 - 5th Dist. (F052948) 2/27/08 **Case complete 4/28/08**

WATER RIGHTS: An appropriative water right established in a 1902 judgment applied to the entire 300 acre parcel so that when part of the parcel was foreclosed and subsequently re-sold, the water rights must be apportioned according to the acreage of each parcel, not according to the prior actual water usage attributable to each parcel. NOTE: This case contains a good explanation of California water rights law.

[Real Estate Analytics v. Vallas](#) [Docket](#)

160 Cal.App.4th 463 - 4th Dist., Div. 1 (D049161) 2/26/08 **Case complete 5/29/08**

SPECIFIC PERFORMANCE: Specific performance is appropriate even where the buyer's sole purpose and entire intent in buying the property was to earn money for its investors and turn a profit as quickly as possible. The fact that plaintiff was motivated solely to make a profit from the purchase of the property does not overcome the strong statutory presumption that all land is unique and therefore damages were inadequate to make plaintiff whole for the defendant's breach.

[Fourth La Costa Condominium Owners Assn. v. Seith](#) [Docket](#)

159 Cal.App.4th 563 - 4th Dist., Div. 1 (D049276) 1/30/08 **Case complete 4/1/08**

CC&R's/HOMEOWNER'S ASSOCIATIONS: The court applied CC 1356(c)(2) and Corp. Code 7515, which allow a court to reduce the supermajority vote requirement for amending CC&R's and bylaw because the amendments were reasonable and the balloting requirements of the statutes were met.

[02 Development, LLC v. 607 South Park, LLC](#) [Docket](#)

159 Cal.App.4th 609 - 2nd Dist. (B200226) 1/30/08 **Case complete 4/3/08**

SPECIFIC PERFORMANCE: 1) An assignment of a purchaser's rights under a purchase agreement prior to creation of the assignee as an LLC is valid because an organization can enforce pre-organization contracts if the organization adopts or ratifies them. 2) A purchaser does not need to prove that it already had the necessary funds, or already had binding commitments from third parties to provide the funds, when the other party anticipatorily repudiates the contract. All that plaintiff needed to prove was that it would have been able to obtain the necessary funding (or funding commitments) in order to close the transaction on time.

[Richeson v. Helal](#) [Docket](#) [Sup.Ct. Docket](#)

158 Cal.App.4th 268 - 2nd Dist. (B187273) 11/29/07; Pub. & mod. order 12/21/07 **(see end of**

opinion) Petition for review by Cal Supreme Ct. DENIED 2/20/08

CC&R's / MUNICIPALITIES: An Agreement Imposing Restrictions ("AIR") and CC&R's did not properly lend themselves to an interpretation that would prohibit the City from changing the permitted use or zoning and, were they so construed, the AIR and CC&R's would be invalid as an attempt by the City to surrender its future right to exercise its police power respecting the property. Here, the AIR and CC&R's did not prohibit the City from issuing a new conditional use permit allowing the continued use of the subject property as a neighborhood market.

[Bill Signs Trucking v. Signs Family Ltd. Partnership](#) [Docket](#) [Sup.Ct. Docket](#)

157 Cal.App.4th 1515 - 4th Dist., Div. 1 (D047861) 12/18/07 **Petition for review by Cal Supreme Ct. DENIED 4/9/08**

LEASES / RIGHT OF FIRST REFUSAL: A tenant's right of first refusal under a commercial lease is not triggered by the conveyance of an interest in the property between co-partners in a family limited partnership that owns the property and is the landlord.

[Schweitzer v. Westminster Investments](#) [Docket](#) [Sup.Ct. Docket](#)

157 Cal.App.4th 1195 - 4th Dist., Div. 1 (D049589) 12/13/07 **Petition for review by Cal Supreme Ct. DENIED 3/26/08**

EQUITY PURCHASERS:

- 1) The bonding requirement of the Home Equity Sales Contracts Act (Civil Code Section 1695.17) is void for vagueness under the due process clause and may not be enforced. Section 1695.17 is vague because it provides no guidance on the amount, the obligee, the beneficiaries, the terms or conditions of the bond, the delivery and acceptance requirements, or the enforcement mechanisms of the required bond.
- 2) Although the bond requirement may not be enforced, the remainder of the statutory scheme remains valid because the bond provisions are severable from the balance of the enactment.
- 3) The court refused to set aside the deed in favor of the equity purchaser because, first, the notice requirements of Civil Code Section 1695.5 appear to have been met and, second, the seller's right to rescind applies before the deed is recorded but the statute "does not specify that a violation of section 1695.5 provides grounds for rescinding a transaction after recordation of the deed".

[Crestmar Owners Association v. Stapakis](#) [Docket](#)

157 Cal.App.4th 1223 - 2nd Dist. (B191049) 12/13/07 **Case complete 2/15/07**

CC&R's: Where a developer failed to convey title to two parking spaces as required by the CC&R's, the homeowner's association was able to quiet title even though more than 20 years had passed since the parking spaces should have been conveyed. The statute of limitations does not run against someone, such as the homeowner's association here, who is in exclusive and undisputed possession of the property.

[Washington Mutual Bank v. Blechman](#) [Docket](#) [Sup.Ct. Docket](#)

157 Cal.App.4th 662 - 2nd Dist. (B191125) 12/4/07 **Petition for review by Cal Supreme Ct.**

DENIED 3/19/08

TRUSTEE'S SALES: The foreclosing lender and trustee are indispensable parties to a lawsuit which seeks to set aside a trustee's sale. Therefore, a default judgment against only the purchaser at the trustee's sale is subject to collateral attack.

[Garretson v. Post](#) [Docket](#) [Sup.Ct. Docket](#)

156 Cal.App.4th 1508 - 4th Dist., Div.2 (E041858) 11/20/07 **Petition for review by Cal Supreme Ct. DENIED 2/27/08**

TRUSTEE'S SALES: A cause of action for wrongful foreclosure does not fall within the protection of Code of Civil Procedure section 425.16, commonly referred to as the anti-SLAPP statute (strategic lawsuit against public participation).

[Murphy v. Burch](#) [Docket](#) [Sup.Ct. Docket](#)

Cal.App. 1st Dist. (A117051) 11/19/07

AFFIRMED by Cal Supreme Ct. 4/27/09

EASEMENT BY NECESSITY: An easement by necessity arises by operation of law when 1) there is a strict necessity as when a property is landlocked and 2) the dominant and servient tenements were under the same ownership at the time of the conveyance giving rise to the necessity. However, the second requirement is not met when the properties were owned by the federal government because the Government has the power of eminent domain, rendering it unnecessary to resort to the easement by necessity doctrine in order to acquire easements.

The court attempts to distinguish *Kellogg v. Garcia*, 102 Cal.App.4th 796, by pointing out that in that case the issue of eminent domain did not arise because the dominant tenement was owned by a private party and the servient tenements by the federal government. [*Ed. Note: the court does not adequately address the fact that the government does not always have the power of eminent domain. It only has that power if a public purpose is involved. Also, I do not think the court adequately distinguishes Kellogg, which seems to hold that common ownership by the federal government satisfies the requirement of common ownership.*]

[Elias Real Estate v. Tseng](#) [Docket](#) [Sup.Ct. Docket](#)

156 Cal.App.4th 425 - 2nd Dist. (B192857) 10/25/07 **Petition for review by Cal Supreme Ct. DENIED 2/13/08**

SPECIFIC PERFORMANCE: Acts of a partner falling within Corp. Code 16301(1) (acts in ordinary course of business) are not subject to the statute of frauds. Acts of a partner falling within Corp. Code 16301(2) (acts not in the ordinary course of business) are subject to the statute of frauds. In this case, a sale of the partnership's real property was not in the ordinary course of business, so it fell within Corp. Code 16301(2) and plaintiff could not enforce a contract of sale signed by only one partner.

[Strong v. State Board of Equalization](#) [Docket](#) [Sup.Ct. Docket](#)

155 Cal.App.4th 1182 - 3rd Dist. (C052818) 10/2/07 **Petition for review by Cal Supreme Ct. DENIED 1/3/08**

CHANGE OF OWNERSHIP: The statute that excludes transfers between domestic partners from property tax reassessment is constitutional.

[County of Solano v. Handlery](#) [Docket](#) [Sup.Ct. Docket](#)

155 Cal.App.4th 566 - 1st Dist. (A114120) 9/21/07 **Petition for review by Cal Supreme Ct. DENIED 12/12/07**

DEEDS: The County brought an action against grantors' heirs to invalidate restrictions in a deed limiting the subject property to use as a county fair or similar public purposes. The court refused to apply the Marketable Record Title Act to eliminate the power of termination in favor of the grantors because the restrictions are enforceable under the public trust doctrine.

[Baccouche v. Blankenship](#) [Docket](#)

154 Cal.App.4th 1551 - 2nd Dist (B192291) 9/11/07 **Case complete 11/16/07**

EASEMENTS: An easement that permits a use that is prohibited by a zoning ordinance is not void. It is a valid easement, but cannot be enforced unless the dominant owner obtains a variance. As is true with virtually all land use, whether a grantee can actually use the property for the purposes stated in the easement is subject to compliance with any applicable laws and ordinances, including zoning restrictions.

[WRI Opportunity Loans II LLC v. Cooper](#) [Docket](#)

154 Cal.App.4th 525 - 2nd Dist. (B191590) 8/23/07 **Case complete 10/26/07**

USURY: The trial court improperly granted a motion for summary judgment on the basis that the loan was exempt from the usury law.

1. The common law exception to the usury law known as the "interest contingency rule" provides that interest that exceeds the legal maximum is not usurious when its payment is subject to a contingency so that the lender's profit is wholly or partially put in hazard. The hazard in question must be something over and above the risk which exists with all loans - that the borrower will be unable to pay.
2. The court held that the interest contingency rule did not apply to additional interest based on a percentage of the sale price of completed condominium units because the lender was guaranteed additional interest regardless of whether the project generated rents or profits.
3. The loan did not qualify as a shared appreciation loan, permitted under Civil Code Sections 1917-1917.006, because the note guaranteed the additional interest regardless of whether the property appreciated in value or whether the project generated profits.
4. The usury defense may not be waived by guarantor of a loan. (No other published case has addressed this issue.)

[Archdale v. American International Specialty Lines Ins. Co.](#) [Docket](#)154 Cal.App.4th 449 - 2nd Dist. (B188432) 8/22/07 **Case complete 10/26/07**

INSURANCE: The case contains good discussions of 1) an insurer's liability for a judgment in excess of policy limits where it fails to accept a reasonable settlement offer within policy limits and 2) the applicable statutes of limitation.

[REVERSED by Cal. Supreme Court 12/22/08](#)[Patel v. Liebermensch](#) [Docket](#) [Sup.Ct. Docket](#)

154 Cal.App.4th 373 - 4th, Div. 1 (D048582) 8/21/07

REVERSED: SPECIFIC PERFORMANCE: Specific performance of an option was denied where the parties never reached agreement on the amount of the deposit, the length of time of the escrow or payment of escrow expenses if there were a delay. One judge dissented on the basis that the option contract was sufficiently clear to be specifically enforced and the court should insert reasonable terms in place of the uncertain terms.

[In Re Marriage of Ruelas](#) [Docket](#)154 Cal.App.4th 339 - 2nd Dist. (B191655) 8/20/07 **Case complete 10/26/07**

RESULTING TRUST: A resulting trust was created where a daughter acquired property in her own name and the evidence showed that she was acquiring the property for her parents who had poor credit.

[Stoneridge Parkway Partners v. MW Housing Partners](#) [Docket](#) [Sup.Ct. Docket](#)153 Cal.App.4th 1373 - 3rd Dist. (C052082) 8/3/07 **Petition for review by Cal Supreme Ct. DENIED 11/14/07**

USURY: The exemption to the usury law for loans made or arranged by real estate brokers applies to a loan in which the broker who negotiated the loan was an employee of an affiliate of the lender, but nevertheless acted as a third party intermediary in negotiating the loan.

[Kinney v. Overton](#) [Docket](#) [Sup.Ct. Docket](#)153 Cal.App.4th 482 - 4th Dist., Div. 3 (G037146) 7/18/07 **Petition for review by Cal Supreme Ct. DENIED 10/10/07**

EASEMENTS: Former Civil Code Section 812 provided that

"[t]he vacation . . . of streets and highways shall extinguish all private easements therein claimed by reason of the purchase of any lot by reference to a map or plat upon which such streets or highways are shown, other than a private easement *necessary* for the purpose of ingress and egress to any such lot from or to a public street or highway, except as to any person claiming such easement who, within two years from the effective date of such vacation or abandonment . . . shall have recorded in the office of the recorder of the county in which such vacated or

abandoned streets or highways are located a verified notice of his claim to such easement . . ." *[Emphasis added.]*

The court held that cross-complainant could not maintain an action against the person occupying the disputed abandoned parcel because it was not necessary for access and he did not record the notice required by C.C. Section 812. The court specifically did not address the state of title to the disputed parcel or what interest, if any, cross-defendant may have in the parcel.

[Hartzheim v. Valley Land & Cattle Company](#) [Docket](#) [Sup.Ct. Docket](#)

153 Cal.App.4th 383 - 6th Dist. (H030053) 7/17/07 **Petition for review by Cal Supreme Ct. DENIED 10/10/07**

LEASES / RIGHT OF FIRST REFUSAL: A right of first refusal in a lease was not triggered by a partnership's conveyance of property to the children and grandchildren of its partners for tax and estate planning purposes because it did not constitute a bona fide offer from any third party. The court considered three factors: 1) the contract terms must be reviewed closely to determine the conditions necessary to invoke the right, 2) where a right of first refusal is conditioned upon receipt of a bona fide third party offer to purchase the property, the right is not triggered by the mere conveyance of that property to a third party and 3) the formalities of the transaction must be reviewed to determine its true nature.

[Berryman v. Merit Property Mgmt.](#) [Docket](#) [Sup.Ct. Docket](#)

152 Cal.App.4th 1544 - 4th Dist., Div. 3 (G037156) 5/31/07 **Petition for review by Cal Supreme DENIED 10/10/07**

HOMEOWNER'S ASSOCIATIONS: Fees charged by a homeowner's association upon a transfer of title by a homeowner are limited by Civil Code Section 1368 to the association's actual costs. The court held that this limitation does not apply to fees charged by a management company hired by the association.

[Cal-Western Reconveyance Corp. v. Reed](#) [Docket](#)

152 Cal.App.4th 1308 - 2nd Dist. (B193014) 6/29/07 **Case complete 8/29/07**

TRUSTEE'S SALES: After a trustee's sale, the trustee deposited the surplus proceeds into court under CC 2924j in order to determine who was entitled to the excess proceeds. The court held that:

- (1) The distribution of surplus proceeds to satisfy child and spousal support arrearages was proper because the County had properly recorded an abstract of support judgment,
- (2) The trial court erred in distributing proceeds to the debtor's former wife to satisfy her claims for a community property equalization payment and for attorney fees ordered in the dissolution proceeding, because no recorded lien or encumbrance secured those claims, which in any event were discharged in the debtor's bankruptcy proceeding (because child and spousal support obligations are not dischargeable, but property settlement payments are dischargeable), and
- (3) The trial court erred in distributing proceeds to the debtor's former lawyer, who was retained to assist the debtor in the collection of proceeds from the trustee's sale, because an attorney's lien

on the prospective recovery of a client must be enforced in a separate action.

(4) The debtor failed to produce sufficient evidence to support his claim that he was entitled to the \$150,000 homestead exemption applicable when a debtor is physically disabled and unable to engage in substantial gainful employment (so he was entitled to only the standard \$50,000 homestead exemption).

[Poseidon Development v. Woodland Lane Estates](#) [Order Modifying Opinion](#) [Docket](#)
152 Cal.App.4th 1106 - 3rd Dist. (C052573) 6/28/07 **Case complete 8/31/07**

PROMISSORY NOTES: A penalty that applied to late payments of *installments* did not apply to a late payment of the final balloon payment of principal. The penalty was 10% of the amount due, which made sense for regular installments, but bore no reasonable relationship to actual damages if applied to the balloon payment.

[Carr v. Kamins](#) [Docket](#)

151 Cal.App.4th 929 - 2nd Dist. (B191247) 5/31/07 **Case complete 8/1/07**

QUIET TITLE: A quiet title judgment was set aside by defendant's heir four years after being entered because the heir was not named and served. The plaintiff believed the defendant to be deceased, but made no effort to locate and serve the defendant's heirs. *[Even though this case contains some unique facts, the fact that a default judgment can be set aside four years after being entered demonstrates the danger of relying on default judgments and the need to closely examine the court file and surrounding circumstances before doing so.]*

[Estate of Yool](#) [Docket](#)

151 Cal.App.4th 867 - 1st Dist. (A114787) 5/31/07 **Case complete 7/31/07**

RESULTING TRUST: A decedent held title with her daughter for the purpose of facilitating financing and did not intend to acquire beneficial title. A probate court properly ordered the Special Administrator to convey title to the daughter based on the Resulting Trust Doctrine. It held that the four-year statute of limitations under C.C.P. 343 applied and not C.C.P. 366.2, which limits actions to collect on debts of the decedent to one year after the date of death.

[Kalway v. City of Berkeley](#) [Docket](#)

151 Cal.App.4th 827 - 1st Dist. (A112569) 5/31/07 **Case complete 8/1/07**

SUBDIVISION MAP ACT: Plaintiff husband transferred title of a parcel to his wife in order to avoid merger under the Subdivision Map Act of a substandard parcel into their adjoining lot. The court held that plaintiffs could not evade the Map Act in this manner. It also held that the City had no authority to obtain an order canceling the deed, but that the wife also had no right to further transfer title to the substandard lot except back to her husband.

[Delgado v. Interinsurance Exchange of the Auto Club of So. Cal.](#) [Docket](#) [Sup.Ct. Docket](#)
Cal.App. 2nd Dist. (B191272) 6/25/07

REVERSED BY CALIFORNIA SUPREME COURT

BAD FAITH: An insurance company acted in bad faith as a matter of law where a potential for coverage was apparent from the face of the complaint. The insured allegedly assaulted plaintiff and there was a potential for coverage because the insured may have acted in self defense. The case contains a thorough analysis of the duties of defense and indemnity.

[Blackmore v. Powell](#) [Docket](#) [Sup.Ct. Docket](#)

150 Cal.App.4th 1593 - 2nd Dist. (B185326) 5/22/07 **Request for depublication DENIED 8/29/07**

EASEMENTS: An easement "for parking and garage purposes" includes the exclusive right to build and use a garage. Granting an exclusive easement may constitute a violation under the Subdivision Map act, but here there is no violation because the exclusive use of the garage covers only a small portion of the easement and is restricted to the uses described in the easement deed.

[Amalgamated Bank v. Superior Court](#) [Docket](#) [Sup.Ct. Docket](#)

149 Cal.App.4th 1003 - 3rd Dist. (C052156, C052395) 4/16/07 **Petition for review by Cal Supreme Ct. DENIED 8/8/07**

LIS PENDENS:

1. In deciding a writ petition from an order granting or denying a motion to expunge a lis pendens after judgment and pending appeal, an appellate court must assess whether the underlying real property claim has "probable validity". This is the same test that is used before judgment. "Probable validity" post-judgment means that it is more likely than not the real property claim will prevail at the end of the appellate process.
2. A judicial foreclosure sale to a third party is absolute, subject only to the right of redemption, and may not be set aside, except that under C.C.P. Section 701.680(c)(1) the *judgment debtor* may commence an action to set aside the sale within 90 days only if the purchaser at the sale was the *judgment creditor*. Here, a potential bidder who was stuck in traffic and arrived too late to the sale could not set it aside because only the judgment debtor can do that and because a third party purchased at the sale.

[L&B Real Estate v. Housing Authority of Los Angeles](#) [Docket](#)

149 Cal.App.4th 950 - 2nd Dist. (B189740) 4/13/07 **Case complete 6/13/07**

TAX DEEDS: Because public property is exempt from taxation, tax deeds purporting to convey such property for nonpayment of taxes are void. Two parcels were inadvertently not included in a deed to the State (subsequently conveyed to the Housing Authority of Los Angeles). Accordingly, the tax collector thought that those parcels were still owned by the seller and sold them at a tax sale after real estate taxes were not paid on them. The court also points out that plaintiff was not a good faith purchaser because it had constructive and actual knowledge of the fact that the Housing Authority's low income housing was partially located on the two parcels sold at the tax sale.

[Ulloa v. McMillin Real Estate](#) [Docket](#)

149 Cal.App.4th 333 - 4th Dist., Div. 1 (D048066) 3/7/07 (Cert. for pub. 4/4/07) **Case complete 6/4/07**

STATUTE OF FRAUDS: The Statute of Frauds requires the authority of an agent who signs a sales agreement to be in writing if the agent signs on behalf of the party *to be charged*. However, a plaintiff purchaser whose agent signed her name with only verbal authorization is not precluded by the Statute of Frauds from bringing the action because the defendant is the party to be charged.

[Jordan v. Allstate Insurance Company](#) [Docket](#) [Sup.Ct. Docket](#)

148 Cal.App.4th 1062 - 2nd Dist. (B187706) 3/22/07 **Petition for review and depublication DENIED 6/27/07**

BAD FAITH: Where there is a genuine issue as to the insurer's liability under the policy, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute. However, there can be bad faith liability where an insurer denies coverage but a reasonable investigation would have disclosed facts showing the claim was covered under other provisions of the policy. The court clarified that an insurer's failure to investigate can result in bad faith liability only if there is coverage. If there is no coverage, then any failure to properly investigate cannot cause the insured any damage.

[Shah v. McMahan](#) [Docket](#)

148 Cal.App.4th 526 - 2nd Dist. (B188972) 3/12/07 **Case complete 5/16/07**

LIS PENDENS: Plaintiffs could not appeal an order for attorney's fees awarded in a hearing of a motion to expunge a lis pendens. The only remedy is to challenge the award by way of a petition for writ of mandate.

[Sterling v. Taylor](#) [Docket](#)

40 Cal.4th 757 - Cal. Supreme Court (S121676) 3/1/07

STATUTE OF FRAUDS: If a memorandum signed by the seller includes the essential terms of the parties' agreement (i.e. the buyer, seller, price, property and the time and manner of payment), but the meaning of those terms is unclear, the memorandum is sufficient under the statute of frauds if extrinsic evidence clarifies the terms with reasonable certainty. Because the memorandum itself must include the essential contractual terms, extrinsic evidence cannot supply those required terms, however, it can be used to explain essential terms that were understood by the parties but would otherwise be unintelligible to others. In this case, the memorandum did not set forth the price with sufficient clarity because it was uncertain whether it was to be determined by a multiplier applied to the actual rent role or whether the price specified was the agreed price even though it was based on the parties' incorrect estimate of the rent role.

[Jet Source Charter v. Doherty](#) [Docket](#)

148 Cal.App.4th 1 - 4th Dist., Div. 1 (D044779) 1/30/07 **(Pub. order and modification filed 2/28/07 - see end of opinion) Case complete 5/1/07**

PUNITIVE DAMAGES: Parts I, II, III and IV NOT certified for publication: Where the defendant's conduct only involves economic damage to a single plaintiff who is not particularly vulnerable, an award which exceeds the compensatory damages awarded is not consistent with due process.

[Dyer v. Martinez](#) [Docket](#) [Sup.Ct. Docket](#)

147 Cal.App.4th 1240 - 4th Dist., Div. 3 (G037423) 2/23/07 **Petition for review by Cal Supreme Ct. DENIED 6/13/07**

RECORDING: A lis pendens that was recorded but not indexed does not impart constructive notice, so a bona fide purchaser for value takes free of the lis pendens. The party seeking recordation must ensure that all the statutory requirements are met and the recorder is deemed to be an agent of the recording party for this purpose.

[Behniwal v. Mix](#) [Docket](#)

147 Cal.App.4th 621 - 4th Dist., Div. 3 (G037200) 2/7/07 **Case complete 4/13/07**

SPECIFIC PERFORMANCE: In a specific performance action, a judgment for plaintiff's attorneys' fees cannot be offset against the purchase price that the successful plaintiff must pay defendant for the property. A judgment for attorneys' fees is not an incidental cost that can be included as part of the specific performance judgment, and it is not a lien that relates back to the filing of the lis pendens. Instead, it is an ordinary money judgment that does not relate back to the lis pendens. So, while plaintiff's title will be superior to defendant's liens that recorded subsequent to the lis pendens, those liens are nevertheless entitled to be paid to the extent of available proceeds from the full purchase price.

[Castillo v. Express Escrow](#) [Docket](#)

146 Cal.App.4th 1301 - 2nd Dist. (B186306) 1/18/07 **Case complete 3/20/07**

MOBILEHOME ESCROWS:

- 1) Health and Safety Code Section 18035(f) requires the escrow agent for a mobile home sale to hold funds in escrow upon receiving written notice of a dispute between the parties, even though the statute specifically states "*unless otherwise specified in the escrow instructions*" and even though the escrow instructions provided that escrow was to close unless "*a written demand shall have been made upon you not to complete it*".
- 2) Section 18035(f) does not require the written notice of dispute to cite the code section, or to be in any particular form, or that the notice be addressed directly to the escrow holder, or that the notice contain an express request not to close escrow. The subdivision requires nothing more than that the escrow agent receive notice in writing of a dispute between the parties. So receiving a copy of the buyer's attorney's letter to the seller was sufficient to notify the escrow agent that a dispute existed.

[Rappaport-Scott v. Interinsurance Exchange](#) [Docket](#)

146 Cal.App.4th 831 - 2nd Dist (B184917) 1/11/07 **Case complete 3/14/07**

INSURANCE: An insurer's duty to accept reasonable settlement offers within policy limits applies only to third party actions and not to settlement offers from an insured. An insurer has a duty not to unreasonable withhold payments due under a policy. But withholding benefits under a policy is not unreasonable if there is a genuine dispute between the insurer and the insured as to coverage or the amount of payment due, which is what occurred in this case.

[In re: Rabin](#)

BAP 9th Circuit 12/8/06

BANKRUPTCY/HOMESTEADS: Under California law, the homestead exemption rights of registered domestic partners are identical to those of people who are married. Therefore, domestic partners are limited to a single combined exemption, in the same manner as people who are married. In the absence of a domestic partnership or marriage, each cotenant is entitled to the full homestead exemption.

[Wachovia Bank v. Lifetime Industries](#) [Docket](#)

145 Cal.App.4th 1039 - 4th Dist., Div. 2 (E037560) 12/15/06 **Case complete 2/16/07**

OPTIONS:

1. When the holder of an option to purchase real property exercises the option and thereby obtains title to the property, the optionee's title relates back to the date the option was given, as long as the optionee has the right to compel specific performance of the option. But where the optionee acquires title in a transaction unconnected with the option, such as where there has been a breach of the option agreement so that the optionee did not have the right to specific performance, the optionee takes subject to intervening interests just like any other purchaser.
2. Civil Code Section 2906 provides a safe harbor for a lender to avoid the rule against "clogging" the equity of redemption as long as the option is not dependent on the borrower's default. But even if the lender falls outside the safe harbor because the exercise of the option is dependent upon borrower's default, it does not automatically follow that the option is void. Instead, the court will analyze the circumstances surrounding the transaction and the intent of the parties to determine whether the option is either void or a disguised mortgage. Also, even if the transaction is a disguised mortgage the optionee (now mortgagee) has a right to judicially foreclose, which will wipe out intervening interests.

[Wright v. City of Morro Bay](#) [Docket](#) [Sup.Ct. Docket](#)

144 Cal.App.4th 767, 145 Cal.App.4th 309a - 2nd Dist (B176929) 11/7/06 [Modification of Opinion 12/6/06](#) **Petition for review by Cal Supreme Ct. DENIED 2/21/07**

DEDICATION/ABANDONMENT: C.C.P. 771.010, which provides for termination of an offer of dedication if not accepted within 25 years, did not apply because 1) the statute cannot be applied retroactively to the City's acceptance occurring more than 25 years after the offer of dedication and 2) the area covered by the dedicated road has never been used by anyone, so the requirement that the property be "used as if free of the dedication" was not met.

[State Farm General Insurance Co. v. Wells Fargo Bank](#) [Docket](#)143 Cal.App.4th 1098 - 1st Dist. (A111643) 10/10/06 **Case complete 12/11/06**

The "superior equities rule" prevents an insurer, who is subrogated to the rights of the insured after paying a claim, from recovering against a party whose equities are equal or superior to those of the insurer. Thus, an insurer may not recover from an alleged tortfeasor where the tortfeasor's alleged negligence did not directly cause the insured's loss. The court questioned the continued vitality of the superior equities rule in California, but felt compelled to follow a 1938 Supreme Court case that applied the rule. The court suggests that the Supreme Court should re-address the issue in light of modern day fault principles.

[Corona Fruits & Veggies v. Frozsun Foods](#) [Docket](#) [Sup.Ct. Docket](#)143 Cal.App.4th 319 - 2nd Dist. (B184507) 9/25/06 **Petition for review by Cal Supreme Ct. DENIED 12/20/06**

UCC: A UCC-1 financing statement filed in the name of Armando Munoz is not effective where the debtor's true name was Armando Munoz Juarez.

[Warren v. Merrill](#) [Docket](#)143 Cal.App.4th 96 - 2nd Dist. (B186698) 9/21/06 **Case complete 11/21/06**

QUIET TITLE: The Court quieted title in plaintiff where title was taken in the real estate agent's daughter's name as part of a fraudulent scheme perpetrated by the agent. This is not a significant title insurance case, but I posted it for reference since it involves quiet title.

[McKell v. Washington Mutual](#) [Docket](#) [Sup.Ct. Docket](#)142 Cal.App.4th 1457 - 2nd Dist. (B176377) 9/18/06 **Request for depublication DENIED 1/17/07**

RESPA: Washington Mutual (i) charged hundreds of dollars in "underwriting fees" when the underwriting fee charged by Fannie Mae and Freddie Mac to WAMU was only \$20 and (ii) marked up the charges for real estate tax verifications and wire transfer fees. The court followed *Kruse v. Wells Fargo Home Mortgage* (2d Cir. 2004) 383 F.3d 49, holding that marking up costs, for which no additional services are performed, is a violation of RESPA. Such a violation of federal law constitutes an unlawful business practice under California's Unfair Competition Law ("UCL") and a breach of contract. Plaintiffs also stated a cause of action for an unfair business practice under the UCL based on the allegation that WAMU led them to believe they were being charged the actual cost of third-party services.

[Reilly v. City and County of San Francisco](#) [Docket](#) [Sup.Ct. Docket](#)142 Cal.App.4th 480 - 1st Dist. (A109062) 8/29/06 **Request for depublication DENIED 12/13/06**

PROPERTY TAX: A change in ownership of real property held by a testamentary trust occurs when an income beneficiary of the trust dies and is succeeded by another income beneficiary.

Also, for purposes of determining change in ownership, a life estate either in income from the property or in the property itself is an interest equivalent in value to the fee interest.

[Markowitz v. Fidelity](#) [Docket](#) [Sup.Ct. Docket](#)

142 Cal.App.4th 508 - 2nd Dist. (B179923) 5/31/06 **Publication ordered by Cal. Supreme Court 8/30/06**

ESCROW: Civil Code Section 2941, which permits a title insurance company to record a release of a deed of trust if the lender fails to do so, does not impose an obligation on an escrow holder/title company to record the reconveyance on behalf of the trustee. Citing other authority, the Court states that an escrow holder has no general duty to police the affairs of its depositors; rather, an escrow holder's obligations are limited to faithful compliance with the parties' instructions, and absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions. The fact that the borrower had an interest in the loan escrow does not mean that he was a party to the escrow, or to the escrow instructions.

[Cebular v. Cooper Arms Homeowners Association](#) [Docket](#) [Sup.Ct. Docket](#)

142 Cal.App.4th 106 - 2nd Dist. (B182555) 8/21/06 **Request for review by Cal Supreme Ct. DENIED 11/15/06; Request to publish Part III, Sec. B filed 10/24/06**

COVENANTS, CONDITIONS AND RESTRICTIONS: It is not unreasonable for CC&R's to allocate dues obligations differently for each unit, along with the same allocation of voting rights, even though each unit uses the common areas equally. Although the allocation does not make much sense, courts are disinclined to question the wisdom of agreed-to restrictions.

[Bernard v. Foley](#) [Docket](#)

39 Cal.4th 794 - Cal. Supreme Court (S136070) (8/21/06)

TESTAMENTARY TRANSFERS: Under Probate Code Section 21350, "care custodians" are presumptively disqualified from receiving testamentary transfers from dependent adults to whom they provide personal care, including health services. The Court held that the term "care custodian" includes unrelated persons, even where the service relationship arises out of a preexisting personal friendship rather than a professional or occupational connection. Accordingly, the Court set aside amendments to decedent's will that were made shortly before decedent's death, which would have given most of the estate to the care providers.

[Regency Outdoor Advertising v. City of Los Angeles](#) [Docket](#)

39 Cal.4th 507 - Cal. Supreme Court (S132619) 8/7/06 [Modification of Opinion 10/11/06](#)

ABUTTER'S RIGHTS: There is no right to be seen from a public way, so the city is not liable for damages resulting from the view of plaintiff's billboard caused by planting trees along a city street. The court pointed out that a private party who blocks the view of someone's property by obstructing a public way would be liable to someone in plaintiff's position.

[Kleveland v. Chicago Title Insurance Company](#) [Docket](#) [Sup.Ct. Docket](#)

141 Cal.App.4th 761 - 2nd Dist. (B187427) 7/24/06 **Case complete 10/5/06 Request for depublication DENIED 10/25/06**

TITLE INSURANCE: An arbitration clause in a title policy is not enforceable where the preliminary report did not contain an arbitration clause and did not incorporate by reference the arbitration clause in the CLTA policy actually issued. (The preliminary report incorporated by reference the provisions of a Homeowner's Policy of Title Insurance with a somewhat different arbitration clause, but a CLTA policy was actually issued.)

[Essex Insurance Company v. Five Star Dye House](#) [Docket](#)

38 Cal.4th 1252 - Cal. Supreme Court (S131992) 7/6/06

INSURANCE: When an insured assigns a claim for bad faith against the insurer, the assignee may recover *Brandt* (attorney) fees. Although purely personal causes of action are not assignable, such as claims for emotional distress or punitive damages, *Brandt* fees constitute an economic loss and are not personal in nature.

[Peak Investments v. South Peak Homeowners Association](#) [Docket](#)

140 Cal.App.4th 1363 - 4th Dist., Div. 3 (G035851) 6/28/06 **Case complete 8/31/06**

HOMEOWNER'S ASSOCIATIONS: Where CC&R's require approval by more than 50 percent of owners in order to amend the Declaration, Civil Code Section 1356(a) allows a court, if certain conditions are met, to reduce the percentage of votes required, if it was approved by "owners having more than 50 percent of the votes in the association". The Court held that the quoted phrase means a majority of the total votes in the HOA, not merely a majority of those votes that are cast.

[CTC Real Estate Services v. Lepe](#) [Docket](#)

140 Cal.App.4th 856 - 2nd Dist. (B185320) 6/21/06 **Case complete 8/23/06**

TRUSTEE'S SALES: The victim of an identity theft, whose name was used to obtain a loan secured by a purchase money deed of trust to acquire real property, may, as the only claimant, recover undistributed surplus proceeds that remained after a trustee sale of the property and the satisfaction of creditors. The Court pointed out that a victim of theft is entitled to recover the assets stolen or anything acquired with the stolen assets, even if the value of those assets exceeds the value of that which was stolen.

[Slintak v. Buckeye Retirement Co.](#) [Docket](#) [Sup.Ct. Docket](#)

139 Cal.App.4th 575 - 2nd Dist. (B182875) 5/16/06 **Request for review by Cal Supreme Ct. DENIED 9/13/06**

MARKETABLE RECORD TITLE ACT

1) Under Civil Code Section 882.020(a)(1), a deed of trust expires after 10 years where "the final maturity date or the last date fixed for payment of the debt or performance of the obligation is

ascertainable from the record". Here, the October 1992 Notice of Default was recorded and contained the due date of the subject note; thus, the due date is "ascertainable from the record" and the 10-year limitations period of section 882.020(a)(1) applies.

2) Under C.C. Section 880.260, if an action is commenced and a lis pendens filed by the owner to quiet or clear title, the running of the 10-year limitations period is reset and a new 10-year limitations period commences on the date of the recording of the lis pendens. After the expiration of the recommenced 10-year period, the power of sale in the trust deed expires.

[Preciado v. Wilde](#) [Docket](#) [Sup.Ct. Docket](#)

139 Cal.App.4th 321 - 2nd Dist. (B182257) 5/9/06 **Request for review by Cal Supreme Ct. DENIED 8/16/06**

ADVERSE POSSESSION: Plaintiffs failed to establish adverse possession against defendant, with whom they held title as tenants in common. Before title may be acquired by adverse possession as between cotenants, the occupying tenant must impart notice to the tenant out of possession, by acts of ownership of the most open, notorious and unequivocal character, that he intends to oust the latter of his interest in the common property. Such evidence must be stronger than that which would be required to establish title by adverse possession in a stranger.

UNPUBLISHED [Harbor Pipe v. Stevens](#)

Cal.App. 4th Dist., Div. 3 (G035530) 4/4/06 **Case complete 6/6/06**

JUDGMENTS: A judgment lien against the settlor of a revocable trust attached to trust property where the identity of the settlor is reflected in the chain of title, so a purchaser takes subject to the judgment lien. NOTE: In other words, title companies need to check the names of the settlors in the General Index when title is held in trust.

[Aaron v. Dunham](#) [Docket](#) [Sup.Ct. Docket](#)

137 Cal.App.4th 1244 - 1st Dist. (A109488) 3/15/06 **Request for review by Cal Supreme Ct. DENIED 6/21/06**

PRESCRIPTIVE EASEMENTS: 1) Permission granted to an owner does not constitute permission to a successor. 2) Under Civil Code Section 1008, signs preventing prescriptive rights must be posted by an owner or his agent, so signs posted by a lessee without the knowledge of the owner, do not qualify.

*****DECERTIFIED*****

[Newmyer v. Parklands Ranch](#) [Docket](#) [Sup.Ct. Docket](#)

Cal.App. 2nd Dist. (B180461) 3/23/06 **Request for review by Cal Supreme Ct. DENIED; CA opinion DECERTIFIED 6/14/06**

EASEMENTS: The owner of the dominant tenement possessing over the servient tenement an access easement that includes the right to grant other easements for "like purposes" may convey to an owner of property adjoining the dominant tenement an enforceable easement for access over

the servient tenement.

[Marion Drive LLC v. Saladino](#) [Docket](#) [Sup.Ct. Docket](#)

136 Cal.App.4th 1432 - 2nd Dist. (B182727) 2/27/06 **Request for review by Cal Supreme Ct. DENIED 5/24/06**

ASSESSMENT LIEN: After a tax sale, the holder of a bond secured by a 1911 Act assessment lien has priority as to surplus tax sale proceeds over a subsequently recorded deed of trust. This is true even though the bond holder purchased the property from the tax sale purchaser. The Court rejected defendant's argument that fee title had merged with the assessment lien.

[Barnes v. Hussa](#) [Docket](#)

136 Cal.App.4th 1358 - 3rd Dist. (C049163) 2/24/06 **Case complete 4/26/06**

LICENSES / WATER RIGHTS: The Plaintiff did not overburden a license to run water in a pipeline across defendant's property where he extended the pipeline to other property he owned because there was no increase in the burden on the servient tenement and no harm to defendants. A couple of interesting things pointed out by the Court are: 1) A person entitled to use water may use it elsewhere as long as others are not injured by the change, and 2) "An irrevocable license . . . is for all intents and purposes the equivalent of an easement."

*****REVERSED*****

[Mayer v. L & B Real Estate](#) [Docket](#) [Sup.Ct. Docket](#)

Cal.App. 2nd Dist. (B180540) 2/14/06 **[REVERSED by Cal Supreme Ct. 6/16/08](#)**

TAX SALES: The one-year statute of limitations for attacking a tax sale applies to preclude an action by a property owner who had actual notice of the tax sale, even where the tax collector's conduct was egregious. The Court did not reach the question of whether the tax collector satisfied its due process obligations, but refers to a Supreme Court case which held that the limitations period is enforceable even if the defect is constitutional in nature. That case recognized a limited exception where an owner is in "undisturbed possession" such that the owner lacked any reasonable means of alerting himself to the tax sale proceedings.

[Wright Construction Co. v. BBIC Investors](#) [Docket](#) [Sup.Ct. Docket](#)

136 Cal.App.4th 228 - 1st Dist. (A109876) 1/31/06 **Request for review by Cal Supreme Ct. DENIED 4/26/06**

MECHANICS' LIENS: A mechanic's lien is premature and invalid under Civil Code Section 3115 if it is recorded before the contractor "completes his contract". A contract is complete for purposes of commencing the recordation period under section 3115 when all work under the contract has been performed, excused, or otherwise discharged. Here, because of the tenant's anticipatory breach of the contract, plaintiff had "complete[d] [its] contract" within the meaning of section 3115 the day before the claim of lien was recorded, so the claim of lien was not premature. In a previous [writ proceeding](#), the Court held that the landlord's notice of nonresponsibility was invalid under the "participating owner doctrine" because the landlord

caused the work of improvement to be performed by requiring the lessee to make improvements.

[Torres v. Torres](#) [Docket](#) [Sup.Ct. Docket](#)

135 Cal.App.4th 870 - 2nd Dist. (B179146) 1/17/06 **Request for review by Cal Supreme Ct. DENIED 4/12/06**

POWER OF ATTORNEY: 1) A statutory form power of attorney is not properly completed where the principal marks the lines specifying the powers with an "X" instead of initials, as required by the form. However, the form is not the exclusive means of creating a power of attorney, so even though it is not valid as a statutory form, it is valid as regular power of attorney. 2) Under Probate Code Section 4264, an attorney in fact may not make a gift of the principal's property unless specifically authorized to do so in the power of attorney. Here, the principal quitclaimed the property to himself, the other attorney in fact and the principal as joint tenants. However, the court refused to invalidate the conveyance because the plaintiff failed to produce any evidence that the conveyance was not supported by consideration.

[Ung v. Koehler](#) [Order Modifying Opinion](#) [Docket](#) [Sup.Ct. Docket](#)

135 Cal.App.4th 186 - 1st Dist. (A109532) 12/28/05 **Request for review by Cal Supreme Ct. DENIED 4/12/06**

TRUSTEE'S SALES:

1. Expiration of the underlying obligation does not preclude enforcement of the power of sale under a deed of trust.
2. A power of sale expires after 60 years or, if the last date fixed for payment of the debt is ascertainable from the record, 10 years after that date.
3. In order to avoid a statutory absurdity, a notice of default that is recorded more than 10 years after "the last date fixed for payment of the debt" does not constitute a part of the "record" for purposes of Civil Code Section 882.020(a).

[Trust One Mortgage v. Invest America Mortgage](#) [Docket](#)

134 Cal.App.4th 1302 - 4th Dist., Div. 3 (G035111) 12/15/05 **Case complete 2/21/06**

TRUSTEE'S SALES/ANTI-DEFICIENCY: An indemnification agreement is enforceable after a non-judicial foreclosure where the indemnitor is not the same person as the obligor. If the indemnitor and obligor were the same, the indemnity would be void as an attempt to circumvent antideficiency protections.

UNPUBLISHED OPINION

[Citifinancial Mortgage Company v. Missionary Foundation](#) [Docket](#)

Cal.App. 2nd (B178664) 12/14/05 **Case complete 2/16/06**

MARKETABLE RECORD TITLE ACT: (**UNPUBLISHED OPINION**) Under Civil Code Section 882.020(a)(1), a deed of trust becomes unenforceable 10 years after the final maturity date, or the last date fixed for payment of the debt or performance of the obligation, if that date is ascertainable from the record. Here, the record showed via an Order Confirming Sale of Real

Property that the obligation was due five years after close of escrow. The Court held that since "close of escrow" is an event, and not a date certain, Section 882.020(a)(1) did not apply in spite of the fact that escrow must have closed in order for the deed of trust to have been recorded.

[McElroy v. Chase Manhattan Mortgage Corp.](#) [Docket](#)

134 Cal.App.4th 388 - 4th Dist., Div. 3 (G034588) 11/1/05 **Case complete 2/1/06**

TRUSTEE'S SALES: The Court refused to set aside a trustee's sale where the lender foreclosed after the trustors tendered payment in the form of a "Bonded Bill of Exchange Order". The Court determined that "the Bill is a worthless piece of paper, consisting of nothing more than a string of words that sound as though they belong in a legal document, but which, in reality, are incomprehensible, signifying nothing."

DECERTIFIED

[The Santa Anita Companies v. Westfield Corporation](#) [Docket](#) [Sup.Ct. Docket](#)

134 Cal.App.4th 77 - 2nd Dist. (B175820) 11/17/05 **Request for review by Cal Supreme Ct. DENIED and DECERTIFIED 01/25/06**

DEEDS: The 3-year statute of limitations under C.C.P. 338(d) to seek relief on the ground of mistake does not begin to run until discovery of the mistake or receiving facts that would put a reasonable person on notice of the mistake. The fact that carefully reading the deed would have revealed the mistake is not sufficient to charge the plaintiff with notice, so the statute of limitations did not begin to run until plaintiff actually became aware of the error, and this action was therefore timely.

[Big Valley Band of Pomo Indians v. Superior Court](#) [Docket](#)

133 Cal.App.4th 1185 - 1st Dist. (A108615) 11/1/05 **Case complete 1/4/06**

INDIANS: An employment agreement with an Indian tribe contained the following clause: "Any claim or controversy arising out of or relating to any provisions of this Agreement, or breach thereof, shall . . . be resolved by arbitration under the rules of the American Arbitration Association in San Francisco, California, and judgment on any award by the arbitrators may be entered in any court having such jurisdiction". The court held that the effect of the arbitration clause as limited to a consent to arbitrate and enforce any award in state court. But this clause was insufficient to waive the tribe's immunity from a breach of contract action brought in state court. So plaintiffs are apparently free to bring the same breach of contract claims in an arbitration proceeding.

[Behniwal v. Mix](#) [Docket](#)

133 Cal.App.4th 1027 - 4th Dist., Div. 3 (G034074) 9/30/05 **Case complete 1/3/06**

STATUTE OF FRAUDS: A sales contract signed on the sellers' behalf by their real estate agent did not satisfy the Statute of Frauds because the agent did not have written authority to sign for the sellers. However, a contract which must be in writing can be ratified if the ratification is also in writing. Here the sellers ratified the contract by a sufficient written ratification where they

subsequently signed disclosure documents that specifically referred to the contract signed by the real estate agent.

[Behniwal v. Superior Court](#) [Docket](#)

133 Cal.App.4th 1048 - 4th Dist., Div. 3 (G035299) 9/30/05 **Case complete 1/3/06**

LIS PENDENS: (Related to [Mix v. Superior Court](#), several cases below.) Having determined that the plaintiffs have at least a "probably valid" real property claim, the Court issued a peremptory writ of mandate directing the Superior Court to vacate its order expunging the lis pendens. The lis pendens will therefore protect plaintiff's claim until the time for appeal to the Supreme Court expires or unless the Supreme Court issues its own writ directing that the lis pendens be expunged.

[Zipperer v. County of Santa Clara](#) [Docket](#)

133 Cal.App.4th 1013 - 6th Dist. (H028455) 9/30/05 (Mod. 10/28/05) **Case complete 12/28/05**

EASEMENTS:

PUBLISHED PORTION: The Solar Shade Control Act provides that ". . . no person owning, or in control of a property shall allow a tree or shrub to be placed, or, if placed, to grow on such property, subsequent to the installation of a solar collector on the property of another so as to cast a shadow greater than 10 percent of the collector absorption area". The County is exempt from the Act because it adopted an ordinance pursuant to a statute allowing cities and counties to exempt themselves from the Act. The Court did not address the issue of whether the act applies where a tree is not "placed" by a property owner.

UNPUBLISHED PORTION: A common law easement for light and air generally may be created only by express written instrument. A statutory "solar easement" under Civil Code Section 801.5 may be created only by an instrument containing specified terms. The Court held that the County did not have an obligation to trim trees to avoid shading plaintiff's solar panels, rejecting several theories asserted by plaintiff.

[Fishback v. County of Ventura](#) [Docket](#)

133 Cal.App.4th 896 - 2nd Dist. (B177462) 10/26/05 **Case complete 1/9/06**

SUBDIVISION MAP ACT: Under the 1937 and 1943 Subdivision Map Acts, "subdivision" was defined as "any land or portion thereof shown on the last preceding tax roll as a unit or as contiguous units which is divided for the purpose of sale . . . into five or more parcels within any one year period." The Court makes numerous points interpreting those statutes, some of the most significant being: 1) Once the fifth parcel is created within a one-year period, all the parcels created within that year constitute a subdivision; 2) Even though a unit of land is defined as a unit as shown on the last tax roll preceding the division, that does not mean the unit shown on the last preceding tax roll is a legal parcel, and legal parcels cannot be created by dividing that illegal parcel; and 3) If land is divided for the purpose of sale, it is irrelevant that the retained parcel is not held for the purpose of sale. Thus, for example, if the owner of a unit of land divides it in half, the unit is divided for the purpose of sale even if the owner intends to sell only one half and keep

the other.

[Attorney General Opinion No. 04-1105](#)

10/3/05

ASSESSOR'S RECORDS: County Assessors maintain parcel boundary map data, which is detailed geographic information used to describe and define the precise geographic boundaries of assessor's parcels. When maintained in electronic format, Assessors must make copies in electronic format available to the public. The fee charged for producing the copy is limited to the direct cost of producing the copy in electronic format, and may not include expenses associated with the county's initial gathering of the information, with initial conversion of the information into electronic format, or with maintaining the information.

[Villacreses v. Molinari](#) [Docket](#) [Sup.Ct. Docket](#)

132 Cal.App.4th 1223 - 4th Dist., Div. 3 (G034719) 9/26/05 **Request for review by Cal Supreme Ct. DENIED 12/14/05**

ARBITRATION: Section 1298 requires that an arbitration provision in a real estate contract be accompanied by a statutory notice and that the parties indicate their assent by placing their initials on an adjacent space or line. The arbitration notice, standing alone, does not constitute an arbitration provision. So the Defendants could not compel arbitration where the contract contained only the notice, but did not contain a separate arbitration provision.

The Court has a good sense of humor. The opinion contains the following memorable quotes:

1. "If the first rule of medicine is 'Do no harm,' the first rule of contracting should be 'Read the documents'."
2. ". . . to paraphrase the immortal words of a former President of the United States, the applicability of this purported arbitration agreement to the instant dispute 'depends upon what the meaning of the word "it" is.'"

[Campbell v. Superior Court \(La Barrie\)](#) [Docket](#) [Sup.Ct. Docket](#)

132 Cal.App.4th 904 - 4th Dist., Div. 1 (D046064) 9/14/05 **Request for review by Cal Supreme Ct. DENIED 12/14/05**

LIS PENDENS: A cause of action for a constructive trust or an equitable lien does not support a lis pendens where it is merely for the purpose of securing a judgment for money damages. *[Ed. Note: The Court in this and similar cases make the absolute statement that "an equitable lien does not support a lis pendens", and explain that the lien is sought merely to secure a money judgment. But it is unclear whether the Court would reach the same conclusion in a pure equitable lien case. For example, where a loan is paid off with the proceeds of a new loan, but the new mortgage accidentally fails to be recorded, an action to impose an equitable lien seeks more than a mere money judgment. It seeks to allow the new lender to step into the shoes of the old lender and, in my opinion, a lis pendens should be allowed.]*

[Fripp v. Walters Docket](#) [Docket](#) [Sup.Ct. Docket](#)

132 Cal.App.4th 656 - 3rd Dist. (C046733) 9/7/05 (**ONLY PART I CERTIFIED FOR PUBLICATION**) **Request for review by Cal Supreme Ct. DENIED 11/16/05**

BOUNDARIES / SURVEYS: A conveyance referring to a parcel map cannot convey more property than the creator of the parcel map owned. The Court rejected Defendant's claim that the recorded parcel map was a "government sanctioned survey" which precludes a showing that the boundaries established by the parcel map are erroneous. The court explained that the rule cited by Defendants applies only to official survey maps that create boundaries. Boundary lines cannot be questioned after the conveyance of public land to a private party, even if they are inaccurate.

[Title Trust Deed Service Co. v. Pearson](#) [Docket](#)

132 Cal.App.4th 168 - 2nd Dist (B175067) 8/25/05 **Case complete 10/28/05**

HOMESTEADS: A declared homestead exemption applies to surplus proceeds from a trustee's sale. [Comment: Applying the declared homestead exemption to trustee's sales is fine. But the Court also seems to want to pay surplus proceeds to the debtor up to the amount of the exemption before paying the holder of a junior trust deed. This should be wrong since the homestead exemption does not apply to voluntary liens. I think the Court does not adequately address what appears to me to be a circuitry of priority problem: The homestead exemption is senior to the judgment lien, which in this case happens to be senior to a junior TD, which is senior to the homestead exemption.]

[In re Marriage of Benson](#) [Docket](#)

36 Cal.4th 1096 - Cal. Supreme Court (S122254) 8/11/05

COMMUNITY PROPERTY: The doctrine of partial performance, which is an exception to the Statute of Frauds, is not an exception to the requirement of Family Code Section 852 that an agreement to transmute property be in writing. The concurring opinion points out that the Court does not decide what statutory or equitable remedy would be available to make whole a spouse who has been disadvantaged by an illusory oral promise to transmute property, or what sanction may be employed against a spouse who has used section 852(a) as a means of breaching his or her fiduciary duty and gaining unjust enrichment.

[First Federal Bank v. Fegen](#) [Docket](#)

131 Cal.App.4th 798 - 2nd Dist. (B174252) 7/29/05 **Case complete 9/29/05**

JUDGMENTS: The Court dismissed an appeal as being moot where the debtor did not post a bond after a sheriff's sale of real property. C.C.P. Section 917.4 provides that an appeal of an order directing the sale of real property does not stay enforcement of the order. A sheriff's sale is final, except that the debtor can commence an action within 90 days to set aside the sale if the judgment creditor is the successful bidder. Here, the debtor failed to file an action within 90 days so the sale is final.

[Bear Creek Master Association v. Edwards](#) [Docket](#) [Sup.Ct. Docket](#)

130 Cal.App.4th 1470 - 4th Dist. Div. 2 (E034859) 7/13/05 **Request for review by Cal Supreme Ct. DENIED 10/19/05**

CONDOMINIUMS: The definition of "condominium" in Civil Code Section 1351(f) does not require that an actual structure has been built; rather it only requires that it be described in a recorded condominium plan. (Note, however, that under CC 1352 the condominium does not come into existence until a condominium unit has been conveyed.) The case also contains an extensive discussion of the procedural requirements for foreclosing on an assessment lien recorded by the homeowner's association.

[Woodridge Escondido Property Owners Assn. v. Nielsen](#) [Docket](#) [Sup.Ct. Docket](#)

130 Cal.App.4th 559 - 4th Dist. Div. 1 (D044294) 5/25/05 (pub. order 6/16/05) **Request for review by Cal Supreme Ct. DENIED 8/31/05**

CC&R's: A provision in CC&R's that prohibited construction of a permanent structure in an easement area applied to a deck because it was attached to the house and had supporting posts that were buried in the ground, such that it was designed to continue indefinitely without change and was constructed to last or endure.

[Beyer v. Tahoe Sands Resort](#) [Docket](#)

129 Cal.App.4th 1458 - 3rd Dist. (C045691) 6/8/05 **Case complete 8/8/05**

EASEMENTS: California Civil Code Section 805 provides that a servitude cannot be held by the owner of the servient tenement. The Court held that the term "owner" under Section 805 means the owner of the full fee title, both legal and equitable, such that a property owner who owns less than full title may validly create easements in his own favor on his land. Here, the Court held that the grantor could reserve an easement over property conveyed to a time-share trustee where the grantor held all beneficial interest in the trust and the grantee held just bare legal title.

[Bank of America v. La Jolla Group](#) [Docket](#) [Sup.Ct. Docket](#)

129 Cal.App.4th 706 - 5th Dist. (F045318) 5/19/05 **Request for review by Cal Supreme Ct. DENIED 9/7/05**

TRUSTEE'S SALES: A trustee's sale, which was accidentally held after the owner and lender agreed to reinstate the loan, is invalid. The conclusive presumptions in Civil Code Section 2924 pertain only to notice requirements, not to every defect or inadequacy. The Court points out that the advantages of being a bona fide purchaser are not limited to the presumptions set forth in Section 2924, but does not discuss it further because the defendant did not argue that its bona fide purchaser status supports its position in any way other than the statutory presumptions.

[Zabrucky v. McAdams](#) [Docket](#)

129 Cal.App.4th 618 - 2nd Dist. (B167590) 5/18/05 **Case complete 7/20/05**

COVENANTS, CONDITIONS & RESTRICTIONS: The Court interpreted a provision in

CC&R's to prohibit an addition to a house which would unreasonably obstruct a neighbor's view. The Court painstakingly nit-picked through the provisions of the CC&R's and compared the provisions and the facts to other cases where courts have done the same. The main conclusion I draw is that these cases are each unique and it is very difficult to determine in advance what a court will do. In fact, one judge dissented in this case. This means it can be very dangerous to issue endorsements such as CLTA Endorsement No. 100.6 or 100.28, insuring against this kind of provision in CC&R's.

[Anolik v. EMC Mortgage Corp.](#) [Docket](#) [Sup.Ct. Docket](#)

Cal.App. 3rd Dist. (C044201) 4/29/05 (Mod. 5/26/05) **Request for review by Cal Supreme Ct. DENIED and DECERTIFIED 8/10/05**

*****DECERTIFIED*****

TRUSTEE'S SALES:

1. To be valid, a notice of default must contain at least one correct statement of a breach, and it must be substantial enough to authorize use of the drastic remedy of nonjudicial foreclosure.
2. An assertion in a notice of default of one or more breaches qualified with the words "if any" does not satisfy the requirements of section 2924 because it indicates that the lender has no clue as to the truth or falsity of the assertion.
3. It is not proper to declare a payment in default when the time for imposing a late fee on that payment has not expired because the default is not sufficiently substantial at that point.
4. Under Civil Code Section 2954, a lender cannot force impound payments for property taxes until the borrower has failed to pay two consecutive tax installments.

[Kangarlou v. Progressive Title Company](#) [Docket](#)

128 Cal.App.4th 1174 - 2nd Dist. (B177400) 4/28/05 **Case complete 6/29/05**

ESCROW: 1. Under Civil Code Section 1717, plaintiff can recover attorney's fees after prevailing in an action against the escrow holder, even though the escrow instructions limited attorney's fees to actions to collect escrow fees.

2. Under Business and Professions Code Section 10138, an escrow holder has a duty to obtain evidence that a real estate broker was regularly licensed before delivering compensation.

[Paul v. Schoellkopf](#) [Docket](#) [Sup.Ct. Docket](#)

128 Cal.App.4th 147 - 2nd Dist. (B170379) 4/5/05 **Request for review by Cal Supreme Ct. DENIED 6/15/05**

ESCROW: A provision for attorneys' fees in escrow instructions limited to fees incurred by the escrow company in collecting for escrow services does not apply to other disputes between the buyer and seller.

[Knight v. Superior Court](#) [Docket](#) [Sup.Ct. Docket](#)

128 Cal.App.4th 14 - 3rd Dist. (C048378) 4/4/05 **Request for review by Cal Supreme Ct. DENIED 6/29/05**

DOMESTIC PARTNERSHIPS: Family Code Section 308.5, enacted by Proposition 22, 3/7/00, states: "Only marriage between a man and a woman is valid or recognized in California." This statute did not prohibit the legislature from enacting California's Domestic Partnership Law, Family Code Section 297, et seq., because Section 308.5 pertains only to marriages, not to other relationships.

[Estate of Seifert](#) [Docket](#) [Sup.Ct. Docket](#)

128 Cal.App.4th 64 - 3rd Dist. (C046456) 4/4/05 **Request for review by Cal Supreme Ct. DENIED 6/22/05**

ADVERSE POSSESSION: A fiduciary, including an executor, may not acquire title by adverse possession against the heirs. Once the executor was appointed, the statutory period for his adverse possession of the subject property ceased to run.

[Melendrez v. D & I Investment](#) [Docket](#) [Sup.Ct. Docket](#)

127 Cal.App.4th 1238 - 6th Dist. (H027098) 3/29/05 **Request for review by Cal Supreme Ct. DENIED 6/22/05**

TRUSTEE'S SALES: A trustee's sale cannot be set aside where the purchaser at the sale is a bona fide purchaser ("BFP"). The elements of being a BFP are that the buyer 1) purchase the property in good faith for value, and 2) have no knowledge or notice of the asserted rights of another. The value paid may be substantially below fair market value. Also, the buyer's sophistication and experience in purchasing at trustee's sales does not disqualify him from being a BFP, although in evaluating whether the buyer is a BFP, the buyer's foreclosure sale experience may be considered in making the factual determination of whether he had knowledge or notice of the conflicting claim.

[Radian Guaranty v. Garamendi](#) [Docket](#) [Sup.Ct. Docket](#)

127 Cal.App.4th 1280 - 1st Dist. (A105789) 3/29/05 **Request for review by Cal Supreme Ct. DENIED 7/20/05**

TITLE INSURANCE: Radian's Lien Protection Policy constitutes title insurance pursuant to Insurance Code Section 12340.1. Because Radian does not possess a certificate of authority to transact title insurance, it is not authorized to sell the policy in California or anywhere else in the United States, pursuant to California's monoline statutes: Ins. Code Section 12360 (title insurance) and Ins. Code Section 12640.10 (mortgage guaranty insurance).

[Gardenhire v. Superior Court](#) [Docket](#) [Sup.Ct. Docket](#)

128 Cal.App.4th 426a - 6th Dist. (H026601) 3/22/05 **Request for review by Cal Supreme Ct. DENIED 6/8/05**

TRUSTS: A trust can be revoked by a will where the trust provided for revocation by "any writing" and the will expressed a present intent to revoke the trust. The Court pointed out that a will, which is inoperative during the testator's life, can nevertheless have a present and immediate

effect upon delivery, such as notice of intent to revoke.

[Jones v. Union Bank of California](#) [Docket](#) [Sup.Ct. Docket](#)

127 Cal.App.4th 542 - 2nd Dist. (B173302) 3/11/05 **Request for review by Cal Supreme Ct. DENIED 6/8/05**

When a lender successfully defends an action to set aside or enjoin a foreclosure sale, the antideficiency provisions of C.C.P. Section 580d do not prohibit an award of attorney fees. In addition, Civil Code sections 2924c and 2924d do not limit the amount of fees the court may award.

[O'Toole Company v. Kingsbury Court HOA](#) [Docket](#)

126 Cal.App.4th 549 - 2nd Dist. (B172607) 2/3/05 **Case complete 4/8/05**

HOMEOWNER'S ASSOCIATIONS: In a suit to enforce a judgment, the trial court properly appointed a receiver and levied a special emergency assessment when defendant-homeowners association failed to pay. The Court pointed out that regular assessments are exempt from execution, but not special assessments.

[State of California ex rel. Bowen v. Bank of America](#) [Docket](#) [Sup.Ct. Docket](#)

126 Cal.App.4th 225 - 2nd Dist. (B172190) 1/31/05 **Request for review by Cal Supreme Ct. DENIED 5/18/05**

ESCHEAT: This is a qui tam action filed on behalf of the State Controller. The court held that unused reconveyance fees do not need to be escheated because the obligation to return a specific sum of money is neither certain nor liquidated under Civil Code Section 2941 or under the provisions of the deeds of trust. This case was against lenders and I believe it would not apply in the context of escrow and title insurance.

[Van Klompenburg v. Berghold](#) [Docket](#) [Sup.Ct. Docket](#)

126 Cal.App.4th 345 - 3rd Dist. (C045417) 1/31/05 **Request for review by Cal Supreme Ct. DENIED 5/11/05**

EASEMENTS: Where the grant of easement states that the right of way shall be "kept open" and "wholly unobstructed", the normal rule does not apply, which would otherwise allow the owner of the servient estate to erect a locked gate as long as the owner of the dominant estate is given a key and the gate does not unreasonably interfere with the use of the easement.

[State of California v. Old Republic Title Company](#) [Docket](#) [Sup.Ct. Docket](#)

125 Cal.App.4th 1219 - 1st Dist. (A095918) 1/20/05 **NOTE: request for order directing republication of court of appeal opinion DENIED 8/16/06.**

Overruled in part on issue not significant to title insurance - SEE BELOW.

TITLE INSURANCE: Old Republic was found liable for 1) failing to escheat unclaimed funds in escrow accounts, 2) failing to return fees collected for reconveyances which were not used and 3)

failing to pay interest collected on escrow funds to the depositing party.

Of particular interest, the Court stated:

"Insurance Code Section 12413.5 provides that interest on escrow funds must be paid to the depositing party 'unless the escrow is otherwise instructed by the depositing party' Any title company is free to draft escrow instructions that, with full disclosure to and agreement from the depositing party, direct that the arbitrage interest differential be paid to the company. It is a matter of disclosing the pertinent costs and benefits to the customer."

[State of California v. PriceWaterhouseCoopers](#)

39 Cal.4th 1220 - Cal. Supreme Court (S131807) 8/31/06

FALSE CLAIMS ACT: A political subdivision may not bring an action under Government Code section 12652, subdivision (c), to recover funds on behalf of the state or another political subdivision.

[Frei v. Davey](#) [Docket](#)

124 Cal.App.4th 1506 - 4th Dist., Div. 3 (G033682) 12/17/04 **Case complete 2/22/05**

CONTRACTS: Under the most recent version of the CAR purchase contract, the prevailing party is barred from recovering attorney fees if he refused a request to mediate.

[Mix v. Superior Court](#) [Docket](#) [Sup.Ct. Docket](#)

124 Cal.App.4th 987 - 4th Dist., Div. 3 12/7/04 (G033875) **Request for review by Cal Supreme Ct. DENIED 2/16/05**

LIS PENDENS: (Related to [Behniwal v. Superior Court](#), several cases above.) After the claimant loses at trial, the trial court must expunge a lis pendens pending appeal unless claimant can establish by a preponderance of the evidence the probable validity of the real property claim. Claimants will rarely be able to do this because it requires a trial court to determine that its own decision will probably be reversed on appeal. The court points out that this strict result is tempered by claimant's ability to petition the appellate court for a writ of mandate, so that the appellate court can make its own determination of the probability of the trial court's decision being reversed on appeal.

[D'Orsay International Partners v. Superior Court](#) [Docket](#) [Sup.Ct. Docket](#)

123 Cal.App.4th 836 - 2nd Dist. 10/29/04 (B174411) **Request for review by Cal Supreme Ct. DENIED 1/26/05**

MECHANIC'S LIENS: The court ordered the release of a mechanic's lien because there was no actual visible work on the land or the delivery of construction materials. The criteria applicable to a design professional's lien do not apply where the claimant filed a mechanic's lien. The court specifically did not address the question of whether a contractor performing design services or employing design professionals may assert a design professionals' lien.

[Gibbo v. Berger](#) [Docket](#) [Sup.Ct. Docket](#)

123 Cal.App.4th 396 - 4th Dist., Div. 2 10/22/04 (E035201) **Case complete 12/27/04 Req. for Depublication by Cal. Supreme Ct. DENIED 2/16/05**

USURY: The usury exemption for loans arranged by real estate brokers does not apply where the broker functioned as an escrow whose involvement was limited to preparing loan documents on the terms provided by the parties, ordering title insurance, and dispersing funds, all in accordance with the parties' instructions. In order to "arrange a loan" the broker must act as a third party intermediary who causes a loan to be obtained or procured. Such conduct includes structuring the loan as the agent for the lender, setting the interest rate and points to be paid, drafting the terms of the loan, reviewing the loan documents, or conducting a title search.

[Knapp v. Doherty](#) [Docket](#)

123 Cal.App.4th 76 - 6th Dist. 9/20/04 (H026670) **Case complete 12/21/04**

TRUSTEE'S SALES:

1. Civil Code Section 2924 requires the trustee to give notice of sale only "after the lapse of the three months" following recordation of the notice of default. The Notice of Sale technically violated this requirement because it was served by mail on the property owner several days prior to the end of three months. However, this did not invalidate the sale because the owner did not suffer prejudice from the early notice.
2. Incorrectly stating the date of the default in the Notice of Default did not invalidate the sale because the discrepancy was not material.

[Royal Thrift and Loan v. County Escrow](#) [Docket](#)

123 Cal.App.4th 24 - 2nd Dist. 10/15/04 (B165006) **Case complete 12/16/04**

TRUSTEE'S SALES:

1. Postponements of a trustee's sale during an appeal were reasonable, so they do not count toward the 3-postponement limit of Civil Code Section 2924g(c)(1). The postponements fall under the "stayed by operation of law" exception. However, the Court recognized that the better course would have been to re-notice the trustee's sale after the appeal.
2. The court indicated that an appeal from an action to quiet title against a deed of trust should stay the trustee's sale proceedings under Code of Civil Procedure Section 916 pending the appeal. However, the court did not formally make that holding because the owner did not appeal and the issues involving the appellants (escrow holder and bonding company) did not require a holding on that issue.

[Tesco Controls v. Monterey Mechanical Co.](#) [Docket](#)

124 Cal.App.4th 780 - 3rd Dist. 12/6/04 (C042184) (Opinion on rehearing) **Case complete 2/7/05**

MECHANIC'S LIENS: A mechanic's lien release that waives lien rights up to the date stated in the release is effective to waive lien rights up to that date, even if the progress payments did not fully compensate the lien claimant.

[Gale v. Superior Court](#) [Docket](#)

122 Cal.App.4th 1388 - 4th Dist., Div. 3 10/6/04 (G033968) (Mod. 10/22/04) **Rehearing Denied 10/22/04; Case Complete 12/10/04**

LIS PENDENS / DIVORCE

1. The automatic stay contained in a divorce summons does not apply to the sale by the husband, as managing member of a family-owned management company, of real property vested in the management company.
2. A petition for dissolution of marriage which does not allege a community interest in specific real property does not support the filing of a lis pendens.

[Nwosu v. Uba](#) [Docket](#)

122 Cal.App.4th 1229 - 6th Dist. 10/1/04 (H026182) **Case complete 12/01/04**

The court held that a transaction was a bona fide sale and not an equitable mortgage. The complicated facts provide little of interest to the title insurance business, other than to note the fact that a deed can be held to be a mortgage if the deed was given to secure a debt. The case contains a good discussion of the distinction between legal claims, for which there is a right to a jury trial, and equitable claims, for which there is no right to a jury trial.

[Moores v. County of Mendocino](#) [Docket](#)

122 Cal.App.4th 883 - 1st Dist. 9/24/04 (A105446) **Case complete 11/24/04**

SUBDIVISION MAP ACT: The enactment of an ordinance requiring the County to record notices of merger did not result in the unmerger of parcels that had previously merged under the County's previous automatic merger ordinance. The County properly sent a subsequent notice under Gov. Code Section 66451.302 notifying property owners of the possibility of a merger. Accordingly, plaintiff's parcels remain merged.

[Larsson v. Grabach](#) [Docket](#) [Sup.Ct. Docket](#)

121 Cal.App.4th 1147 - 5th Dist. 8/25/04 (F042675) **Request for review by Cal Supreme Ct. DENIED 12/15/04**

EASEMENTS: An easement by implication can be created when an owner of real property dies intestate and the property is then divided and distributed to the intestate's heirs by court decree.

[Felgenhauer v. Soni](#) [Docket](#)

121 Cal.App.4th 445 - 2nd Dist. 8/5/04 (B157490) **Case complete 10/8/04**

PRESCRIPTIVE EASEMENTS: To establish a claim of right, which is one of the elements necessary to establish a prescriptive easement, the claimant does not need to believe he is entitled to use of the easement. The phrase "claim of right" has caused confusion because it suggests the need for an intent or state of mind. But it does not require a belief that the use is legally justified; it simply means that the property was used without permission of the owner of the land.

[Jonathan Neil & Assoc. v. Jones](#) [Docket](#)

33 Cal.4th 917 - Cal. Supreme Court (S107855) 8/5/04 (Mod. 10/20/04)

INSURANCE: A tort action for breach of the duty of good faith and fair dealing exists only in regard to the issues of bad faith payment of claims and unreasonable failure to settle. It does not pertain to the general administration of an insurance policy or to other contract settings. In this case, a tort cause of action does not lie for the insurer's bad faith conduct in setting an unfairly high insurance premium.

[Bello v. ABA Energy Corporation](#) [Docket](#)

121 Cal.App.4th 301 - 1st Dist. 8/2/04 (A102287) **Case complete 10/6/04**

RIGHTS OF WAY: A grant of a public right of way includes uses made possible by future development or technology, which are not in existence at the time of the grant. Here, the Court held that a right of way included the right to install a pipeline to transport natural gas.

[California National Bank v. Havis](#) [Docket](#)

120 Cal.App.4th 1122 - 2nd Dist. 7/23/04 (B167152) **Case complete 9/22/04**

DEEDS OF TRUST: A bank holding a deed of trust holder was paid outside of escrow with a check. The bank sent a letter to escrow stating that it had "received payoff funds . . . it is our policy to issue the Full Reconveyance 10 days after receipt of the payoff check. Therefore, a Full Reconveyance will be sent to the County Recorder on or about August 5, 2002". The escrow relied on the letter and closed escrow without paying off the lender. The check bounced and the lender began foreclosure.

The Court reversed a summary judgment in favor of defendants, holding that the letter did not constitute a payoff demand statement binding on the bank under CC 2943. The Court determined that there was a triable issue of fact as to whether the parties could reasonably have relied on the letter. *[Ed. note: The Court exhibited a scary lack of understanding of real estate transactions, and could not come to grips with the fact that reconveyances from institutional lenders never record at close of escrow.]*

[Kirkeby v. Sup. Ct. \(Fascenelli\)](#) [Docket](#)

33 Cal.4th 642 - Cal. Supreme Court 7/22/04 (S117640)

LIS PENDENS: An action to set aside a fraudulent conveyance supports the recording of a lis pendens. The court stated that "[b]y definition, the voiding of a transfer of real property will affect title to or possession of real property". *(Ed. note: Several appellate court decisions have held that actions to impose equitable liens and constructive trusts do not support a lis pendens. The Supreme Court did not deal with those issues but it seems that, using the court's language, it could similarly be said that "by definition imposing an equitable lien or constructive trust will affect title to or possession of real property.")*

[Tom v. City and County of San Francisco](#) [Docket](#) [Sup.Ct. Docket](#)
120 Cal.App.4th 674 - 1st Dist. 6/22/04 (A101950) **Request for review by Cal Supreme Ct.**
DENIED 10/13/04

TENANCY IN COMMON AGREEMENTS: In order to evade burdensome regulations for converting apartments to condominiums, it has become a common practice in San Francisco for a group of people to acquire a multi-unit residential building and enter into a tenancy in common agreement establishing an exclusive right of occupancy for each dwelling unit. Seeking to end this practice, the People's Republic of San Francisco enacted an ordinance prohibiting exclusive right of occupancy agreements. The Court held that the ordinance is unconstitutional because it violates the right of privacy set forth in Article I, section I of the California Constitution.

[California Attorney General Opinion No. 03-1108](#)
6/9/04

RECORDING: A memorandum of lease is a recordable instrument.

[Yeung v. Soos](#) [Docket](#)
119 Cal.App.4th 576 - 2nd Dist. 6/16/04 (B165939) (Mod. 7/2/04) **Case complete 9/10/04**

QUIET TITLE: A default judgment after service by publication is permissible in a quiet title action. However, the judgment may not be entered by the normal default prove-up methods; the court must require evidence of the plaintiff's title, including live witnesses and complete authentication of the underlying real property records. Nevertheless, the judgment is not rendered void because the default prove-up method was used rather than an evidentiary hearing.

[Villa de Las Palmas HOA v. Terifaj](#) [Docket](#)
33 Cal.4th 73 - Cal. Supreme Court 6/14/04 (S109123)

RESTRICTIONS: Use restrictions in amended declarations are binding on owners who purchased prior to recordation of the amendment. They are also subject to the same presumption of validity as the original declaration.

[In re Marriage of Gioia](#) [Docket](#)
119 Cal.App.4th 272 - 2nd Dist. 6/9/04 (B166803) **Case complete 8/11/04**

BANKRUPTCY: A bankruptcy trustee's notice of abandonment of property was effective even though it was ambiguous because it did not specifically state that the trustee will be deemed to have abandoned the property 15 days from the date of mailing of the notice. The court also states that an abandonment is irrevocable even if the property later becomes more valuable.

[Dieckmeyer v. Redevelopment Agency of Huntington Beach](#) [Docket](#) [Sup.Ct. Docket](#)
127 Cal.App.4th 248 - 4th Dist., Div. 3 2/28/05 (G031869) (2nd Opinion) **Case complete 5/5/05**

DEEDS OF TRUST: Where a deed of trust secures both payment of a promissory note and performance of contractual obligations (CC&R's in this case), the trustor is not entitled to reconveyance of the deed of trust after the note is paid off, but before the contractual obligations are satisfied.

[Textron Financial v. National Union Fire Insurance Co.](#) [Docket](#) [Sup.Ct. Docket](#)
118 Cal.App.4th 1061 - 4th Dist., Div. 3 5/20/04 (G020323) (Mod. 6/18/04) **Req. for rev. and depub. by Cal Supreme Ct. DENIED 9/15/04**

INSURANCE / PUNITIVE DAMAGES:

1. The amount of attorney's fees incurred by an insured in obtaining policy benefits and recoverable under Brandt v. Sup. Ct. are limited to the fees under the contingency fee agreement between the insured and its counsel, and not a higher figure based on the reasonable value of the attorney's services.
2. Punitive damages must be based on compensatory damages awarded for tortious conduct, including breach of the implied covenant of good faith and fair dealing, excluding the sum recovered on the breach of contract claim.
3. When compensatory damages are neither exceptionally high nor low, and the defendant's conduct is neither exceptionally extreme nor trivial, the outer constitutional limit on the amount of punitive damages is approximately four times the amount of compensatory damages.
4. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.

[Blackburn v. Charnley](#) [Docket](#) [Sup.Ct. Docket](#)
117 Cal.App.4th 758 - 2nd Dist. 4/8/04 (B166080) **Request for review by Cal Supreme Ct. DENIED 7/21/04**

SPECIFIC PERFORMANCE: Specific performance is available even though the contract referred to lots which had not yet been subdivided. This violation of the Subdivision Map Act made the contract voidable at the option of the buyer, who chose to enforce the contract instead. The requirement in the standard CAR contract to mediate in order to collect attorney's fees does not apply where an action is filed in order to record a lis pendens and where mediation was conducted pursuant to the court's own practices.

[Hedges v. Carrigan](#) [Docket](#)
117 Cal.App.4th 578 - 2nd Dist. 4/6/04 (B166248) **Case complete 6/11/04**

ARBITRATION: The Federal Arbitration Act preempts C.C.P. Section 1298, which requires that an arbitration clause in a real estate contract contain a specified notice and be in a specified type size. Preemption requires that the transaction affect interstate commerce, which the court found existed because the anticipated financing involved an FHA loan, and the purchase agreement was on a copyrighted form that stated it could only be used by members of the National Association of Realtors. [*Ed. note: the form does not say that!*] However, in the unpublished portion of the opinion, the court held that the arbitration clause could not be enforced because it required that

the parties initial it in order to acknowledge their agreement to arbitration, and they did not all do so. [*Ed. note: the concurring opinion makes much more sense than the majority opinion!*]

[Kapner v. Meadowlark Ranch Assn.](#) [Docket](#)

116 Cal.App.4th 1182 - 2nd Dist. 3/17/04 (B163525) **Case complete 5/25/04**

ADVERSE POSSESSION / PRESCRIPTIVE EASEMENTS: A prescriptive easement cannot be established where the encroacher's use is exclusive. The Court affirmed the trial court's order requiring the property owner to sign an encroachment agreement or remove the encroachment.

[Harrison v. Welch](#) [Docket](#) [Sup.Ct. Docket](#)

116 Cal.App.4th 1084 - 3rd Dist. 3/12/04 (C044320) **Request for depublication DENIED 6/23/04**

ADVERSE POSSESSION / PRESCRIPTIVE EASEMENTS:

- 1) In the uncertified Part I of the opinion, the court rejected Defendant's claim of adverse possession because real property taxes were not paid on any area outside of Defendant's lot. The court rejected defendant's creative argument that real property taxes were paid on all land within the setback area where defendant's house was 3-1/2 feet from the property line, and a zoning ordinance required a 5-foot setback.
- 2) A prescriptive easement cannot be established where the encroacher's use is exclusive. The opinion contains an excellent discussion of the case law on this issue.
- 3) The 5-year statute of limitations in C.C.P. Sections 318 and 321, within which a plaintiff must bring an action to recover real property, does not commence until the encroacher's use of the property has ripened into adverse possession.

[Brizuela v. CalFarm Insurance Company](#) [Docket](#) [Sup.Ct. Docket](#)

116 Cal.App.4th 578 - 2nd Dist. 3/3/04 (B160875) **Review by Cal Supreme Ct. DENIED 6/9/04**

INSURANCE: Where an insurance policy requires an insured who has filed a claim to submit to an examination under oath, that obligation is a condition precedent to obtaining benefits under the policy. The insurer is entitled to deny the claim without showing it was prejudiced by the insured's refusal.

[Hanshaw v. Long Valley Road Assn.](#) [Docket](#) [Sup.Ct. Docket](#)

116 Cal.App.4th 471 - 3rd Dist. 3/2/04 (C041796) **Review by Cal Supreme Ct. DENIED 5/19/04**

PUBLIC STREETS: An offer of dedication of a public street that is not formally accepted may, nevertheless, be accepted by subsequent public use. This is known as common law dedication. However, counties have a duty to maintain only those roads that are "county roads", and a public road does not become a county road unless specifically accepted as such by the appropriate resolution of the Board of Supervisors.

[Miner v. Tustin Avenue Investors](#) [Docket](#)

116 Cal.App.4th 264 - 4th Dist., Div.3 2/27/04 (G031703) **Case complete 5/4/04**

LEASES / ESTOPPEL CERTIFICATES: A lease contained an option to renew for 5 years, but the tenant signed an estoppel certificate stating that the lease was in full force and effect, and that the tenant had no options except the following: (blank lines that followed were left blank). The Court held that the tenant was not bound by the estoppel certificate because it was ambiguous as to whether it referred only to options outside of the lease or whether the tenant had somehow given up his option rights.

[Tremper v. Quinones](#) [Docket](#)

115 Cal.App.4th 944 - 2nd Dist. 2/17/04 (B165218) **Case complete 5/3/04**

GOOD FAITH IMPROVER: Attorney's fees and costs may be included in the calculation of damages awarded against a person bringing an action as a good faith improver under C.C.P. Section 871.3, regardless of whether the costs and fees were incurred in prosecuting a complaint or defending against a cross complaint, and even where the good faith improver issues are part of a quiet title action which would not ordinarily support an award of attorney's fees and costs.

[Kertesz v. Ostrovsky](#) [Docket](#)

115 Cal.App.4th 369 - 4th Dist., Div.3 1/28/04 (G030640) **Case complete 4/2/04**

JUDGMENTS / BANKRUPTCY: The time for renewing a judgment was 10 years from entry of the judgment, plus the amount of time between the debtor's filing of a bankruptcy petition and the date of the Bankruptcy Court's order of nondischargeability, plus an additional 30 days under Bankruptcy Code Section 108(c). The court reached this conclusion even though the judgment was entered before the bankruptcy petition was filed, and the 10-year period for renewing the judgment expired long after the bankruptcy was closed.

NOTE: I believe the judge misunderstood the automatic stay and Bankruptcy Code Section 108(c). I do not believe the automatic stay applies when a period of time for taking an action commences prior to bankruptcy, and expires after the bankruptcy case is closed.

[Rancho Santa Fe Association v. Dolan-King](#) [Docket](#) [Sup.Ct. Docket](#)

115 Cal.App.4th 28 - 4th Dist., Div.1 1/7/04 (D040637/D041486) **Pet. for Review by Cal Supreme Ct. DENIED 4/28/04**

HOMEOWNER'S ASSOCIATIONS: Regulations adopted and interpreted by a Homeowner's Association must be reasonable from the perspective of the entire development, not by determining on a case-by-case basis the effect on individual homeowners.

[Gray Cary Ware & Freidenrich v. Vigilant Insurance Co.](#) [Docket](#)

114 Cal.App.4th 1185 - 4th Dist., Div.1 1/12/04 (D041811) **Case complete 3/15/04**

INSURANCE: Civil Code Section 2860(c) provides for the arbitration of disputes over the

amount of legal fees or the hourly billing rate of *Cumis* counsel, but does not apply to other defense expenses.