

**THE REAL PROPERTY SECTION
OF THE CONTRA COSTA COUNTY BAR ASSOCIATION**

Presents

**THE INS-AND-OUTS OF REAL PROPERTY
LIENS AND ENCUMBRANCES**

Speakers

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In his over 20 years of practice, Mr. McReynolds has earned a reputation as a strong client advocate, who is professional, ethical, and knowledgeable. Mr. McReynolds has tried and arbitrated cases through verdict, including such varied matters as real estate bad faith, premises liability, construction defect, discrimination, and product liability claims. Mr. McReynolds represents clients ranging from individuals to national corporations.

Mr. McReynolds is an active member of the California State Bar and the Bar Association of Contra Costa County. He received his undergraduate degree in Economics from the University of California, Los Angeles in 1994 and attended law school at University of Oregon, receiving his Juris Doctor degree in 1997. Mr. McReynolds has been a member of the California Bar since 1997 and previously held a California real estate broker's license. Mr. McReynolds also serves as Director for the Contra Costa County Bar Association and is Chair of the Board for Congress of Neutrals, the mediation provider to Contra Costa Superior Court for small claims, unlawful detainer, restraining orders, and family law contempt matters. Mr. McReynolds volunteers his time as a Discovery Facilitator for Contra Costa County, a Mentor for the De Anza Law Academy, and other volunteer opportunities that help provide access to justice and legal opportunities.

Sean E. Ponist

Sean Ponist is the founder of the Ponist Law Group, a firm specializing in real estate, construction defect and business litigation. Prior to founding his own firm, Mr. Ponist was a prosecutor with the Marin County District Attorney's Office and in-house counsel for Marcus & Millichap Real Estate Investment Brokerage Company. He has successfully tried over 30 cases to verdict. For the past ten years, Mr. Ponist has been, among other things, recognized as a Super Lawyer and has been a fellow of the Litigation Counsel of America, a trial lawyer honorary society whose membership is limited to less than one-half of 1% percent of North American lawyers, judges and scholars.

Mr. Ponist has also published numerous articles on real estate topics, including articles in The Daily Journal ("Recovering Lost Profits in Real Estate Transactions" and "Should Equitable Indemnity Apply Against Negligent Misrepresentation Claims?"), California Lawyer magazine ("The Nonrefundable Deposit – Not!") and Commercial Investment Real Estate ("Going to the Source: Minimize your liability by providing attributions").

He has further lectured on a variety of real estate topics for various bar associations and CLE providers, including such topics as "Deconstructing Commercial Leases," "Commercial Real Estate Brokerage Standard of Care," "Bringing Down the House: Assessing Damages in Real Estate Cases," "Best Use of Experts in Real Estate Cases," "The Rogue Agent: Agency Issues In

Real Estate,” “Private Investigation and the Legal Community,” and “Commercial Real Estate Brokerage Standard of Care,” “Contract Interpretation,” “When Real Estate Deals Go Bad,” “Expert Witnesses at Trial,” “Agent-Principal Relationship” and “Direct and Cross-Examination for Civil Litigators”).

Additionally, Mr. Ponist serves as the Chair of the Civil Litigation Section for the San Diego County Bar Association, was the past chair Real Property Section for the San Diego County Bar Association and serves on the Board of the Real Property Section for the Bar Association of San Francisco. Mr. Ponist graduated from UC Davis School of Law, receiving his Juris Doctor degree in 1999. Prior to law school, Mr. Ponist attended UCLA where he earned a Bachelor of Arts in Philosophy in 1995 and was a Departmental Scholar.

**THE INS-AND-OUTS OF REAL PROPERTY
LIENS AND ENCUMBRANCES**

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LIENS AND ENCUMBRANCES

I. LIS PENDENS

A. Overview

A lis pendens is a notice of a pending action involving real property and serves to put third parties on notice that an action affecting the real property has been filed. (See Code Civ. Proc. §§ 405-405.61.) A lis pendens does not create a present interest in the property nor a lien. Thus, it does not technically stop someone from selling real property or getting a loan secured by the real property, but a lis pendens, nonetheless, has that practical effect. From the time of the recording of the lis pendens, others are on constructive notice of the pendency of an action affecting the real property. Should the party asserting the lis pendens prevail at trial, the judgement and priority relate back to the date of the filing of the lis pendens. (Code Civ. Proc. § 405.24.)

B. Legal Requirements

- A lis pendens may be filed by any party who asserts a real property claim in a lawsuit “which would, if meritorious, affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility.” (Code Civ. Proc. § 405.4.)
- The real property claim must be apparent on the face of the pleadings, otherwise the lis pendens will be subject to expungement. (Code Civ. Proc. § 405.31.)

C. Procedural Requirements and Steps

- May be recorded at any time during the pendency of the action in the county where the property is located. (Code Civ. Proc. § 405.20.) Should be filed promptly as the rights if a judgment is obtained relate back to the date of recording.
- The notice must contain the names of all parties to the action and a description of the property. (Code Civ. Proc. § 405.20.)
- The lis pendens may be signed by an attorney of record in the action. A pro per must get approval of the judge in the matter to record a list pendens. (Code Civ. Proc. § 405.21.)
- “[P]rior to recordation of the notice, [the party recording the lis pendens shall] cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to all known addresses of the parties to whom the real property claim is adverse and to all owners of record of the real property affected by the real property claim as shown by the latest county assessment roll.” (Code Civ. Proc. § 405.22.)
- “Immediately following recordation, a copy of the notice shall also be filed with the court in which the action is pending. Service shall also be made immediately and in the same manner upon each adverse party later joined in the action.” (Code Civ. Proc. § 405.22.)

D. Maintenance of the Lis Pendens

- A lis pendens automatically remains on title until withdrawn, expunged, or a judgment recorded. (Code Civ. Proc. § 405.50.)
- If an expungement is sought (below), the Court may in certain circumstances allow the party who has recorded the lis pendens to post an undertaking in lieu of expungement. (Code Civ. Proc. § 405.34.)

E. Expungement of Lis Pendens

- At any time following the recording of a lis pendens, any party or person with interest in the property may seek to expunge the notice. (Code Civ. Proc. § 405.30.)
- Basis for expungement are 1) the claim does not affect the title, right of possession, or an easement concerning the real property, 2) the claimant has not established the probable validity of the real property claim by a preponderance of evidence, or 3) adequate relief can be provided to the claimant by the giving of an undertaking. (Code Civ. Proc. §§ 405.31-405.33.)
- Expungement sought by a motion application to the court which may include evidence or declarations. The Court has the right to receive oral testimony and provide for discovery by any party affected by the motion to expunge. (Code Civ. Proc. § 405.30.)
- The prevailing party on a motion for expungement is entitled to their reasonable attorney's fees and costs unless the court finds otherwise. (Code Civ. Proc. § 405.38.)
- Expungement is effective upon recording, which may not be done until after the period for a writ of mandate has expired. (Code Civ. Proc. § 405.39.)

II. PREJUDGMENT/ATTACHMENT LIENS

A. Overview

Prejudgment attachment can be used for both “real and personal property” and serves as a powerful litigation tool to assure funds are available to satisfy a judgment. (Code Civ. Proc. § 481.95.) A collateral effect of attachment is it often serves to encourage resolution by the defendant whose assets are attached.

Attachment is an entire practice in and of itself and prior to undertaking any attempt at attachment a thorough review of the requirements should be performed. (See Code Civ. Proc. §§ 481.010 et seq; Rutter, Attachment, Cal. Prac. Guide Civ. Pro. Before Trial Ch. 9(II)-D; and Rutter Cal. Prac. Guide Enf. J. & Debt Ch. 4-A.) For purposes of this CLE, we will only be addressing the specific issues relating to obtaining attachment against real property.

B. Legal Requirements

- Actual interest by the defendant in real property, excluding leaseholds with less than one year remaining. (Code Civ. Proc. § 487.010.)

- Residential properties are subject to the homestead exemption. (Code Civ. Proc. §§ 704.710 – 704.850.) The application of the homestead exemption is liberally applied and may be asserted even post-judgment. (Code Civ. Proc. § 487.030.)
- Cannot obtain attachment where the claim is already secured by real property, unless the original claim was secured and the value of the security has decreased to less than the amount owing on the claim. (Code Civ. Proc. § 483.010(b).) Note, seeking attachment against real property does not constitute an action for the one action rule. (Code Civ. Proc. § 483.012.)
- There may be a right to attach real property if the original claim provided for both a secured guaranty and an unsecured guaranty or promise. (See *FNB Financial Co. v. Superior Court* (1978) 80 Cal.App.3d 927, 929.)
- The filing of a mechanic’s lien does not limit a plaintiff’s right to also seek a writ of attachment. (Civ. Code § 8468.)

C. Procedural Steps to Obtaining

- Apply for a Right to Attach Order and Order for Issuance of Writ of Attachment. (See Miller and Starr, Procedures for obtaining right-to-attach order and writ of attachment, 12 Cal. Real Est. §§ 42:28 – 42:39 (4th ed.).)
- While applying it is also prudent to seek in the alternative a Temporary Protective Order. (See Rutter, Attachment, Cal. Prac. Guide Civ. Pro. Before Trial Ch. 9(II)-D, 9:928.) A temporary protective order creates a lien that can be recorded. (Code Civ. Proc. § 486.110.)
- The Judicial Council has optional forms for obtaining attachment (AT-105 through AT-180).
- Upon obtaining the writ of attachment (AT-135) prepare a notice of attachment (AT-165) and tender to county recorder where the property is located for recording. (Code Civ. Proc. § 488.315.)

D. Maintaining the Attachment Lien

- “A levy on property under a writ of attachment creates an attachment lien on the property from the time of levy until the expiration of the time provided by Section 488.510.” (Code Civ. Proc. § 488.500.) Note the Code refers to an attachment lien as a levy.
- Unless otherwise released or discharged, an attachment lien is effective for three years from the date of issuance. (Code Civ. Proc. § 488.510.) A motion to extend this period may be made between 10 and 60 days prior to the expiration of the attachment lien. (Code Civ. Proc. § 488.510.) Allow sufficient time to obtain the signed extension and record it prior to the expiration date. (Note extensions are limited to 1 year each and a maximum of 5 years.)

D. Removal Attachment Lien

- The property may be released by party who sought attachment or court order. Upon receipt of the release, the levying officer shall record or file a written notice of the release in the same office where the attachment was recorded. (Code Civ. Proc. § 488.730.)
- If the defendant prevails at trial, “the court shall order the discharge of any attachment made in the action and the release of any property held thereunder.” (Code Civ. Proc. § 488.740.) If you are representing a party whose property has been attached, make sure to request the Court include the appropriate language in the judgment.

III. HOA LIENS

A. Overview

Homeowners living in a common interest development—condo, townhome, house— usually have a community homeowners association (HOA) and must pay dues and assessments to the HOA. Failure to make payments, allows the HOA to record a lien on the homeowner’s property.

B. Legal Requirements

- An assessment is delinquent 15 days after it is due, unless the Covenants, Conditions, and Restrictions (CC&Rs) provide for a longer amount of time. (Civ. Code § 5650(b).)
- If an assessment is delinquent, the association may recover:
 - Assessments.
 - Reasonable attorneys' fees and costs.
 - Late charges (may not exceed 10% of delinquent assessment).
 - Interest (may not exceed 12%)

(Civ. Code § 5650, § 5675(a).)

- HOA lien priority— An HOA lien is prior to all other liens recorded after the notice of assessment, unless CC&Rs provide for subordination. (Civ. Code § 5680.)
- Limits on HOA foreclosure:
 - The delinquent amount must be \$1,800 or more, not including any accelerated assessments, late charges, fees and costs of collection, attorneys' fees, or interest, or
 - The assessments secured by the lien must be more than 12 months delinquent.

(Civ. Code § 5720.)

C. Procedural Steps

- First step to record an HOA lien—providing proper notice of delinquent assessments, by certified mail, at least 30 days before anything is recorded, containing the following (Civ. Code § 5660):
 - Notice requirements: (1) “the notice must provide a general description of the collection and lien enforcement procedures of the association,” (2) “the method of calculation of the amount,” (3) “a statement that the owner of the separate interest has the right to inspect the association records pursuant to Section 5205,” and the following statement in 14-point boldface type, if printed, or in capital letters, if typed: "IMPORTANT NOTICE: IF YOUR SEPARATE INTEREST IS PLACED IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR ASSESSMENTS, IT MAY BE SOLD WITHOUT COURT ACTION."
 - “An itemized statement of the charges owed by the owner, including ... fees and reasonable costs of collection, reasonable attorney's fees, any late charges, and interest, if any.”
 - “A statement that the owner shall not be liable to pay the charges, interest, and costs of collection, if it is determined the assessment was paid on time to the association.”
 - Advisement of “The right to request a meeting with the board as provided in Section 5665.”
 - Advisement of the “The right to dispute the assessment debt by submitting a written request for dispute resolution to the association pursuant to the association's "meet and confer" program required in Article 2 (commencing with Section 5900) of Chapter 10.
 - Advisement of the “The right to request alternative dispute resolution with a neutral third party pursuant to Article 3 (commencing with Section 5925) of Chapter 10 before the association may initiate foreclosure against the owner's separate interest, except that binding arbitration shall not be available if the association intends to initiate a judicial foreclosure.”
- Second step—HOA Board of Directors must approve recordation of the lien for delinquent assessment in an open meeting and must record the vote in the minutes of that meeting. (Civ. Code § 5673.)
 - At least 30 days passes from time of notice and exhaustion of efforts, if any, to resolve payment dispute. (Civ. Code §§ 5660, 5673.)
 - Notice must be mailed by certified mail to all record owners no later than ten calendar days after recording. (Civ. Code § 5675(e).)
- Third step—recordation of lien after exhaustion of efforts, if any. (*Ibid.*)

- Note: *Diamond v. Superior Court* (2013) 217 Cal. App. 4th 1172—Davis-Stirling Act's pre-lien and pre-foreclosure notice requirements must be strictly construed, so substantial compliance by the association is not sufficient to allow foreclosure of an HOA assessment lien.
- Note: *Mashiri v. Epsten Grinnell & Howell* (9th Cir. 2017) 845 F.3d 984—violation of Fair Debt Collection Practices Act (FDCPA).

D. Right of redemption

- If by nonjudicial, the foreclosure is subject to a 90-day right of redemption after the sale. (Cal. Civ. Code § 5715). To redeem the property, homeowner must pay all assessments, interest, attorneys' fees, and possibly costs of repair. (*See Barry v. OC Residential Properties, LLC* (2011) 194 Cal.App.4th 861.)
- If by judicial foreclosure, the redemption period is 90 days, if the proceeds of the sale are sufficient to satisfy the debt, or one year, if the proceeds from the sale are insufficient to satisfy the delinquency. (Code Civ. Proc. § 729.030(a) and (b).)

E. Selected Text of Relevant Statutes (Civil Code)

- **5658.** (a) If a dispute exists between the owner of a separate interest and the association regarding any disputed charge or sum levied by the association, including, but not limited to, an assessment, fine, penalty, late fee, collection cost, or monetary penalty imposed as a disciplinary measure, and the amount in dispute does not exceed the jurisdictional limits of the small claims court stated in Sections 116.220 and 116.221 of the Code of Civil Procedure, the owner of the separate interest may, in addition to pursuing dispute resolution pursuant to Article 3 (commencing with Section 5925) of Chapter 10, pay under protest the disputed amount and all other amounts levied, including any fees and reasonable costs of collection, reasonable attorney's fees, late charges, and interest, if any, pursuant to subdivision (b) of Section 5650, and commence an action in small claims court pursuant to Chapter 5.5 (commencing with Section 116.110) of Title 1 of the Code of Civil Procedure.

(b) Nothing in this section shall impede an association's ability to collect delinquent assessments as provided in this article or Article 3 (commencing with Section 5700).

- **5660.** At least 30 days prior to recording a lien upon the separate interest of the owner of record to collect a debt that is past due under Section 5650, the association shall notify the owner of record in writing by certified mail of the following:
 - (a) A general description of the collection and lien enforcement procedures of the association and the method of calculation of the amount, a statement that the owner of the separate interest has the right to inspect the association records pursuant to Section 5205, and the following statement in 14-point boldface type, if printed, or in capital letters, if typed:

"IMPORTANT NOTICE: IF YOUR SEPARATE INTEREST IS PLACED IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR ASSESSMENTS, IT MAY BE SOLD WITHOUT COURT ACTION."

- (b) An itemized statement of the charges owed by the owner, including items on the statement which indicate the amount of any delinquent assessments, the fees and reasonable costs of collection, reasonable attorney's fees, any late charges, and interest, if any.
 - (c) A statement that the owner shall not be liable to pay the charges, interest, and costs of collection, if it is determined the assessment was paid on time to the association.
 - (d) The right to request a meeting with the board as provided in Section 5665.
 - (e) The right to dispute the assessment debt by submitting a written request for dispute resolution to the association pursuant to the association's "meet and confer" program required in Article 2 (commencing with Section 5900) of Chapter 10.
 - (f) The right to request alternative dispute resolution with a neutral third party pursuant to Article 3 (commencing with Section 5925) of Chapter 10 before the association may initiate foreclosure against the owner's separate interest, except that binding arbitration shall not be available if the association intends to initiate a judicial foreclosure.
- **5665.** (a) An owner, other than an owner of any interest that is described in Section 11212 of the Business and Professions Code that is not otherwise exempt from this section pursuant to subdivision (a) of Section 11211.7 of the Business and Professions Code, may submit a written request to meet with the board to discuss a payment plan for the debt noticed pursuant to Section 5660. The association shall provide the owners the standards for payment plans, if any exists.
 - (b) The board shall meet with the owner in executive session within 45 days of the postmark of the request, if the request is mailed within 15 days of the date of the postmark of the notice, unless there is no regularly scheduled board meeting within that period, in which case the board may designate a committee of one or more directors to meet with the owner.
 - (c) Payment plans may incorporate any assessments that accrue during the payment plan period. Additional late fees shall not accrue during the payment plan period if the owner is in compliance with the terms of the payment plan.
 - (d) Payment plans shall not impede an association's ability to record a lien on the owner's separate interest to secure payment of delinquent assessments.
 - (e) In the event of a default on any payment plan, the association may resume its efforts to collect the delinquent assessments from the time prior to entering into the payment plan.

- **5670.** Prior to recording a lien for delinquent assessments, an association shall offer the owner and, if so requested by the owner, participate in dispute resolution pursuant to the association's "meet and confer" program required in Article 2 (commencing with Section 5900) of Chapter 10.
- **5673.** For liens recorded on or after January 1, 2006, the decision to record a lien for delinquent assessments shall be made only by the board and may not be delegated to an agent of the association. The board shall approve the decision by a majority vote of the directors in an open meeting. The board shall record the vote in the minutes of that meeting.
- **5675.** (a) The amount of the assessment, plus any costs of collection, late charges, and interest assessed in accordance with subdivision (b) of Section 5650, shall be a lien on the owner's separate interest in the common interest development from and after the time the association causes to be recorded with the county recorder of the county in which the separate interest is located, a notice of delinquent assessment, which shall state the amount of the assessment and other sums imposed in accordance with subdivision (b) of Section 5650, a legal description of the owner's separate interest in the common interest development against which the assessment and other sums are levied, and the name of the record owner of the separate interest in the common interest development against which the lien is imposed.
 - (b) The itemized statement of the charges owed by the owner described in subdivision (b) of Section 5660 shall be recorded together with the notice of delinquent assessment.
 - (c) In order for the lien to be enforced by nonjudicial foreclosure as provided in Sections 5700 to 5710, inclusive, the notice of delinquent assessment shall state the name and address of the trustee authorized by the association to enforce the lien by sale.
 - (d) The notice of delinquent assessment shall be signed by the person designated in the declaration or by the association for that purpose, or if no one is designated, by the president of the association.
 - (e) A copy of the recorded notice of delinquent assessment shall be mailed by certified mail to every person whose name is shown as an owner of the separate interest in the association's records, and the notice shall be mailed no later than 10 calendar days after recordation.
- **5680.** A lien created pursuant to Section 5675 shall be prior to all other liens recorded subsequent to the notice of delinquent assessment, except that the declaration may provide for the subordination thereof to any other liens and encumbrances.
- **5685.** (a) Within 21 days of the payment of the sums specified in the notice of delinquent assessment, the association shall record or cause to be recorded in the office of the county recorder in which the notice of delinquent assessment is recorded a lien release or notice of rescission and provide the owner of the separate interest a copy of the lien release or notice that the delinquent assessment has been satisfied.

(b) If it is determined that a lien previously recorded against the separate interest was recorded in error, the party who recorded the lien shall, within 21 calendar days, record or cause to be recorded in the office of the county recorder in which the notice of delinquent assessment is recorded a lien release or notice of rescission and provide the owner of the separate interest with a declaration that the lien filing or recording was in error and a copy of the lien release or notice of rescission.

(c) If it is determined that an association has recorded a lien for a delinquent assessment in error, the association shall promptly reverse all late charges, fees, interest, attorney's fees, costs of collection, costs imposed for the notice prescribed in Section 5660, and costs of recordation and release of the lien authorized under subdivision (b) of Section 5720, and pay all costs related to any related dispute resolution or alternative dispute resolution.

- **5690.** An association that fails to comply with the procedures set forth in this article shall, prior to recording a lien, recommence the required notice process. Any costs associated with recommencing the notice process shall be borne by the association and not by the owner of a separate interest.

IV. LIENS/ENCUMBRANCES RE PURCHASE OF REAL PROPERTY

A. BUYER LIENS

1. Overview

A buyer who enters into a contract to purchase property acquires an **equitable** estate in the property being purchased. When a buyer rescinds, s/he is entitled to a lien on the property to secure repayment of any sums owed on the rescission. (*Montgomery v. Meyerstein* (1921) 186 Cal. 459, 465-466, (1921); *Soderling v. Tomlin* (1959) 170 Cal.App.2d 169, 174.)

2. Legal Requirements

- **Civ. Code 3050**—"One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration."

In effect, Civ. Code § 3050 gives the buyer an equitable interest in the property as security for the reimbursement of any consideration paid, including any downpayment and consequential expenditures for improvements, taxes and insurance. (*McCall v. Sup.Ct.* (1934) 1 Cal.2d 527, 534-535; *Soderling v. Tomlin* (1959) 170 Cal.App.2d 169, 174.)

- A court may enforce a buyer's lien (e.g., by foreclosure sale) against subsequent purchasers or encumbrancers unless, they are BFPs, i.e., a purchaser or encumbrancer in good faith and for value. (Civ. Code § 3048.)
- Note—Buyer's right to enjoin seller's foreclosure. A buyer who has instituted legal action for rescission usually is entitled to an injunction preventing the seller from

foreclosing any purchase-money lien held by the seller. (Civ. Proc. Code, § 526(1); *Kent v. Clark* (1942) 20 Cal. 2d 779, 785; *Soderling v. Tomlin* (1959) 170 Cal. App. 2d 169, 174.)

- After payment of part of the purchase price to the seller, the buyer is entitled to a return of the portion of the price paid when there is a failure of consideration to the buyer, or the seller is unable to perform the contract according to its terms, or because of the seller's fraud. (Civ. Code, § 3050; *Benson v. Shotwell* (1890) 87 Cal. 49, 54-55; *Montgomery v. Meyerstein* (1921) 186 Cal. 459, 464-465; *Harder v. Lang Realty Co.* (1923) 61 Cal. App. 394, 398.)

3. Priority of the lien.

- The lien arises on the date of the contract of sale and has priority over the liens or interests of third parties who acquired their lien or interest with knowledge of the contract, but is junior to the title, liens, or interests of subsequent BFPs and encumbrancers. It is also junior to any liens that attached prior to the date of the buyer's contract to purchase.

4. Enforcement of the lien.

- The lien can be enforced by a foreclosure action against the property upon rescinding the agreement for nonperformance by the seller, or the purchaser can sue to recover the purchase price paid as well as to enforce the lien by foreclosure. (*Moresco v. Foppiano* (1936) 7 Cal.2d 242, 246-247 (refusing to deny right of foreclosure based on purchaser's delay in seeking rescission; *Lockie v. Co-operative Land Co.* (1929) 207 Cal. 624, 629 (buyer not required to sue for rescission and restitution, although decree enforcing lien was impliedly a termination or rescission).)

5. Amount of buyer's lien

- The buyer's lien secures the amounts paid on the purchase price, including principal and interest, and the amounts paid for taxes and insurance, but the seller is entitled to an offset for the value of the buyer's use and possession. (*Lockie v. Co-operative Land Co.* (1929) 207 Cal. 624, 628-629; *Montgomery v. Meyerstein* (1921) 186 Cal. 459, 464-465; *Garcia v. Atmajian* (1980) 113 Cal. App. 3d 516, 521.)

6. No lien for a buyere in default

- A defaulting buyer under an installment contract of sale may be entitled to recover all or a portion of the amounts paid on account of the purchase price, but only where the buyer is not in default. (Civ. Code, § 3050; *California Delta Farms v. Chinese Am. Farms* (1929) 207 Cal. 298, 311.)

B. DEEDS OF TRUST

1. Overview

- In California, a deed of trust is most commonly used to secure a promissory note given for a real property loan. It effectively gives the lender a lien on the secured property (collateral) to satisfy the obligation under the note if it is not paid. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1235.)
- Parties to deed of trust—A deed of trust creates a triparty relationship between the trustor, trustee and beneficiary. (See e.g., *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 926.)
 - The “trustor” is the owner of the real property estate that is pledged.
 - The “trustee” holds legal title to the secured real property interest, but only so far as necessary to carry out the trustee's duties—i.e., to the extent necessary to conduct a nonjudicial foreclosure sale, convey title to the successful bidder in the event of the borrower's default, etc. (See e.g., *Shuster v. BAC Home Loans Servicing, LP* (2012) 211 CA4th 505, 511.) The trustee under a deed of trust is not a true “trustee” and owes no fiduciary obligations. The trustee has no functions other than those set forth in the deed of trust and by statute. (See e.g., *Citrus El Dorado, LLC v. Chicago Title Co.* (2019) 32 Cal.App.5th 943, 948.)
 - The beneficiary is the obligee of the obligation secured by the deed of trust—i.e., the lender.

2. Legal Requirements for a Deed of Trust

- Recordation: a deed of trust may be created, renewed or extended only by a writing “executed with the formalities required in the case of a grant of real property.” (Civ. Code § 2922; see *Granadino v. Wells Fargo Bank, N.A.* (2015) 236 CA4th 411, 416.)

The deed of trust also must be recorded in order to perfect the priority of the beneficiary's lien, etc. (See *RNT Holdings, LLC v. United Gen. Title Ins. Co.* (2014) 230 Cal.App.4th 1289, 1296.)

- Description—the instrument must adequately describe the parties and the encumbered property. (See *MTC Fin'l Inc. v. California Dept. of Tax & Fee Admin.* (2019) 41 Cal.App.5th 742, 745, 747, 751-752 [trust deed that excluded property's city and county and contained inaccurate lot and page book numbers did not describe encumbered land sufficiently to enforce lien priority].)

Grant—the deed of trust must contain a grant to the trustee, in trust, with a power of sale (i.e., right to conduct a nonjudicial foreclosure sale).

There must be a clear description of the obligations secured by the deed of trust.

- Thus, the trustor must execute the trust deed instrument and deliver it to the beneficiary.

3. Enforcement of Deed of Trust

- Remedies available upon default—the deed of trust will set forth the beneficiary's various remedies available upon the borrower's default. Principally, (1) the right to collect rents, income and profits from the secured property and (2) the right to proceed with a nonjudicial (“private power of sale”) foreclosure.
 - Nonjudicial foreclosure: Nonjudicial foreclosure is not an inherent remedy under a deed of trust. The deed of trust must expressly grant a “private power of sale.” (See e.g., *Ung v. Koehler* (2005) 135 CA4th 186, 192.)
 - Judicial foreclosure: Judicial foreclosure involves a lawsuit where the court supervises the foreclosure sale. Consequently, the deed of trust need not address the procedures for a judicial foreclosure.

C. OPTIONS TO PURCHASE

1. Overview

An option to purchase is a unilateral contract in which the prospective buyer (the optionee) pays a certain sum to the property owner in return for exclusive right to purchase the property within the term of the option agreement. If the optionee elects to purchase the property, the agreement is effectively converted into a binding purchase and sale agreement. (*Wachovia Bank v. Lifetime Indus., Inc.* (2006) 145 Cal.App.4th 1039, 1049-1050.) Option agreements are generally recorded (or a memorandum thereof) and thus cloud title. (See Greenberg, Cal. Practice Guide: Real Property Transactions (TRG 2021) ¶¶ 8:156-161.)

2. Legal Requirements

- Contents of recorded document—the optionee's priority rights are perfected by properly recording either the option agreement or a memorandum thereof. The document should include:
 - The name of the grantor;
 - Legal description of the property;
 - An affirmative indication of a “grant” to the optionee;
 - Specification of the option term;
 - Subsequent recordation of extensions (any agreement to extend the option term should be reduced to a signed writing and itself be recorded before expiration of the initial term)
- Note—other/nonessential terms need not be included (e.g., price, financing, etc.).

- Note—recording entire option v. memorandum thereof (memo allows just essential terms to become public record and other terms remain private)

3. Priority Rights

- Any purchaser or encumbrancer who takes its interest without actual knowledge of the option and who records its conveyancing instrument prior to the optionee's recordation of the option, is a BFP/encumbrancer who takes free and clear of the option. (Civ. Code § 1214—“Every conveyance of real property ... is void as against any subsequent purchaser or mortgagee of the same property ... in good faith and for a valuable consideration, whose conveyance is first duly recorded.”)

No priority, however, where actual notice of prior option. (*Anthony v. Enzler* (1976) 61 Cal.App.3d 872, 876.)

V. MECHANIC'S LIENS

A. Overview

Mechanic's liens provide a means for trade professionals, material suppliers, and laborers to ensure they receive payment. As creatures of statute, the procedural requirements must be carefully followed, or the lien is worthless, and in fact a potential liability. Any review of a lien should always start with a review of compliance with the pre-recording, recording, service, and time requirements.

B. Legal Requirements

- What can a mechanic's lien be filed against?
 - Only against real private property. (Civ. Code § 8160.)
 - A “mechanic's lien” against a public works project is a stop payment notice and governed by Civ. Code §§ 9000 et seq.
- Who can file a mechanic's lien?
 - “A person that provides work authorized for a work of improvement, including, but not limited to, the following persons, has a lien right under this chapter:
 - (a) Direct contractor.
 - (b) Subcontractor.
 - (c) Material supplier.
 - (d) Equipment lessor.
 - (e) Laborer.
 - (f) Design professional.” (Civ. Code §8400.)

Note the term “work of improvement”. Section 8400 applies to the improvements to the property as defined by Civ. Code § 8050.

A person that provides work authorized for a “site improvement” has a lien right under this chapter. (Civ. Code §8402.)

- A “site improvement” refers to work done in preparation for a “work of improvement” and is defined by Civ. Code § 8042. This really is a distinction without a difference.
- For both a “work of improvement” and a “site improvement” the work must have been authorized by the owner, direct contractor, subcontractor or other person in charge. (Civ. Code § 8404.) Translation, if a contractor just shows up and decides to help with the project without being asked, the contractor does not have a right to file a mechanic’s lien.
- Preliminary Notices
 - Who Must Give a Preliminary Notice?
 - “Every person who furnishes labor, service, equipment, or material for which a lien or payment bond may be claimed, or for which a notice to withhold (stop payment notice) can be given must, as a necessary prerequisite to the validity of any claim of lien, payment bond, or notice to withhold, give a written preliminary notice to the owner or reputed owner, to the direct contractor or reputed contractor, and to the construction lender or reputed construction lender, if any.” (Miller and Starr, Cal. Civ. Prac. Real Property Litigation § 10:12.)
 - A contractor must give preliminary notice to:
 1. The owner;
 2. The direct contractor; and
 3. The construction lender (if any). (Civ. Code § 8200.)
 - The exceptions to a preliminary notice are for laborers and direct contractors. (Civ. Code §8200(e).)
 - When must the preliminary notice be provided:
 - Not more than 20 days after starting work. (Civ. Code § 8204.)
 - If more than 20 days, but still working on the project, notice can still be provided. Section 8204 allows for late filing, but the lien only relates back to work performed within the 20 days prior to the filing of the notice and any work after the filing.
- Mechanic’s Liens

- Time to file.
 - Direct Contractor
 - The **earlier** of (1) 90 days after the completion of the work of improvement, or (2) 60 days after an owner files a notice of completion or cessation. (Civ. Code § 8412.)
 - Others
 - **Within** the period following the claimant ceasing its work and **before either** 1) 90 days after the completion of the work of improvement, or 2) 30 days after the owner records a notice of completion or cessation.
- What constitutes completion?
 - “(a) For the purpose of this title, completion of a work of improvement occurs upon the occurrence of any of the following events:
 - Actual completion of the work of improvement.
 - Occupation or use by the owner accompanied by cessation of labor.
 - Cessation of labor for a continuous period of 60 days.
 - Recordation of a notice of cessation after cessation of labor for a continuous period of 30 days.
 - (b) Notwithstanding subdivision (a), if a work of improvement is subject to acceptance by a public entity, completion occurs on acceptance.” (Civ. Code § 8180.)
- Note that if a work ceases for more than 60 days and then starts again, it does not restart the above times.
- Beware, clients often miss these deadlines.
- Note that if there are multiple direct contractors with separate contracts, each contract may be treated as distinct projects and trigger different times for the required filings.

C. Procedural Requirements and Steps

- Preliminary Notices
 - What to file for a preliminary notice:
 - The form of the notice is governed by Civ. Code § 8202.
 - This is the one mechanic’s lien form the CLSB does not have on its website, but can be found on the Sacramento County Public Law Library website.

- How preliminary notice is given:
 - May be done by personal delivery, trackable type of mail, or in same manner as service of a complaint. (Civ. Code §§ 8106 & 8110.)
 - “Recording” of the preliminary notice is optional and it is not actually recorded. If a copy is “filed” with the recorder, they will simply mail to the property owner, but will not enter it in the records. (Civ. Code § 8214.) For this reason, preliminary notices are virtually never “recorded.”
- Mechanic’s liens
 - What to file?
 - The contents of a mechanic’s lien are governed by Civ. Code § 8416. The CLSB keeps updated forms on their website.
 - The lien must be served on the owner. It is generally wise to also serve on the prime contractor and the construction lender if known. It will sometimes light a fire to get the client paid.
 - The lien must be recorded with the recorder’s office within the times set forth above to be effective.
 - Note, minor errors in the mechanic’s lien does not make it invalid. If there is an error, check Civ. Code § 8422 to see if it is one explicitly excused.
 - Amount of lien?
 - Lien is limited to the lesser of 1) the contract value adjusted by written change orders, or 2) the reasonable value of the work and materials. (Civ. Code § 8430.)
 - The amount of the lien needs to include credits for payments made and may not include attorney’s fees.
 - A direct contractor may include in its lien amounts owed to its subcontractors, even though those subcontractors may file their own separate liens.

D. Maintenance and Enforcement of Lien

- Time limit to enforce the lien:
 - An action to foreclose the lien must be commenced within 90 days from the date of the filing of the lien or else the lien is expires and unenforceable. (Civ. Code § 8460.)
 - The 90 day period is strict and there is no tolling. The sole exception is if the owner and lien claimant agree to an extension of credit which must be recorded. (Civ. Code § 8460.)
- Enforcement of the lien:

- Enforcement is accomplished by filing a timely complaint with a cause of action to foreclose a mechanic's lien. Usually there will also be causes of action for breach of contract, quantum meruit, book account, account stated, and in some cases violation of pay-when-paid legislation.
- A lis pendens **must** be recorded within 20 days of the commencement of the action. (Civ. Code § 8461). Notice against subsequent purchasers or lenders does not relate back, so it is generally best practice to file the lis pendens the same day as the complaint.

E. Removal of Lien Not Timely Foreclosed

- If a lien is not foreclosed within 90 days owner of the property is required to give 10 days notice of demand that the lien claimant remove the lien. (Civ. Code § 8482.) The contents and the service of the notice are set forth in Civ. Code §§ 8100-8118.
- If the lien is not removed by the lienholder following the Section 8482 notice, the owner may then file a petition to expunge the lien. (Civ. Code § 8484.) If it is necessary for the owner to file a petition and the owner prevails, they are entitled to their reasonable attorney's fees. (Civ. Code § 8488.)
- If the client has not timely foreclosed, it is usually best they withdraw the lien. They still can bring a lawsuit to collect, subject to the statute of limitations, and have only lost the right to foreclose, which realistically rarely happens.

F. Miscellaneous Mechanic's Lien Issues

- Notice of nonresponsibility. An owner (typically in a lease situation) can record and post a notice of nonresponsibility pursuant to Civ. Code § 8444. If this has been done timely and properly, the owner is not liable for mechanic's lien claims.
- Priority of Liens—mechanic's liens relate back to the date of the commencement of the project. As such, they take priority over any subsequent loans, excepting those recorded prior with mandatory distributions occurring commencement of the project. All mechanic's lien holders are treated equally and if there is a foreclosure sale and insufficient proceeds, the lien holders take in proportion to their liens.
- License Bonds—be aware that all licensed contractors have a contractor's bond. While small (generally \$15,000) it may be an additional avenue to recovery. Check the CLSB website for license and bond information of the contractor.
- Public Works—projects for public entities are subject to stop notices, not bonds. However, contractors are usually required to post a performance bond which can be recovered against under the stop notice statutes.
- Large Private Projects—some large private projects will have a performance bond. Look at the prime contract, it may reference it.

G. Note re: Design Professional Liens

- Design professionals are entitled to a lien prior to the commencement of construction. These liens do not take priority over a construction lender’s loan, even if the loan is recorded after the lien and upon the commencement of construction, the lien automatically expires and the design professional must file a mechanic’s lien within 30 days of the commencement of construction. (See Civil Code §§ 8300-8319.)
- “A design professional is a person licensed as an architect, landscape architect, professional engineer, or land surveyor who provides services pursuant to a written contract for a work of improvement.” (Miller and Starr, Design professionals liens; rights to mechanics liens, 9 Cal. Real Est. § 32:15 (4th ed.).)
- If representing a design professional, pay close attention to the timing requirements and the need to monitor the start of construction.

H. Note re: Stop Payment Notices

- For public works projects, mechanic’s liens are not permitted. The equivalent vehicle is a stop notice. Stop notices may be asserted by the same claimants as a mechanic’s lien with an important exclusion, direct contractors may not file a stop notice or assert claims against a payment bond on public works projects. (Civ. Code § 9100.)

VI. JUDGMENT LIENS

A. Overview

- In General—a judgment lien is a general lien which attaches to judgment debtor's real property interests in the county where an abstract or certified copy of the judgment.
 - Generally, an abstract of judgment required. (Code of Civ. Proc. § 697.310(a).)
 - Certified copy of judgment, notice of support judgment or 42 USC §652(a)(11) interstate line form recorded to create a judgment lien on installment orders for child, spousal or family support. (Code of Civ. Proc. 697.320(a).)
- Advantages
 - Fast and inexpensive (don’t have to specifically name property).
 - It attaches to real property interests presently held by the judgment debtor as well as any real property interest acquired in the future, assuring the judgment creditor priority as to after-acquired interests. (Code of Civ. Proc. § 697.340(b); *SBAM Partners v. Wang* (2008) 164 Cal.App.4th 903, 907.)
 - Lien cannot be “expunged”—continues until expired, satisfied or released. (*Federal Deposit Ins. Corp. v. Charlton* (1993) 17 Cal.App.4th 1066, 1067.)

B. Legal Requirements

- Property subject to lien

- In general—it attaches to all real property interests in county where lien created, with very limited exception (e.g., receipt of rental payments, homestead exemption, etc.).
- Effect on different types of common property—
 - Community property—attaches to interests of both spouses. (Code of Civ. Proc. §§ 695.020, 697.310.)
 - Joint tenancy—attaches only to the interest of the debtor joint tenant subject to the lien. (*Dang v. Smith* (2010) 190 CA4th 646, 659-660.)
 - Tenancy in common—attaches only to the interest of the debtor tenant. (*In re Miller* (9th Cir. 2017) 853 F3d 508, 514.)

C. Procedural Requirements and Steps

- In general— A judgment lien on real property is created under a money judgment by recording an abstract of the judgment or certified copy of the judgment or a 42 USC § 652(a)(11) interstate lien form, in the office of the county recorder of the county where the real property is located (mere entry of judgment does not create lien).
- Judicial Council Form— Use Abstract of Judgment—Civil and Small Claims (EJ-001).
- Notice—must be provided to judgment debtor. (Gov. Code § 27297.5(b).)
- Enforcement— A judgment lien on real property is enforced by levy and sale of the real property interest under writ of execution. (Code of Civ. Proc. § 697.020(b).)
- Sister state judgments—must first obtain California judgment and then record abstract of California judgment. (See e.g., *Dang v. Smith* (2010) 190 Cal.App.4th 646, 651, 118.)
- Tip
 - Depending on the amount of judgment, record broadly—county of where property owned, county of residence, county of business and surrounding counties.
 - Do subsequent title search to ensure properly recorded.
 - If title search shows any deeds of trust, record a statutory request for notice of default and notice of sale—ensures that creditor client gets notice, so that s/he can protect lien interest and also receive any surplus funds from foreclosure sale. (See *Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090, 1104-1105.)

D. Duration of Judgment Lien

- 10 years—Unless the judgment is earlier satisfied or the lien released, a real property judgment lien generally remains in effect until 10 years from the date of entry of the judgment (not the date of recordation of the abstract). (See Code of Civ. Proc. § 697.310(b); *Federal Deposit Ins. Corp. v. Charlton* (1993) 17 Cal.App.4th 1066, 1069.)

- Extension—A judgment can be renewed by filing an application for renewal with the court clerk. (Code of Civ. Proc. § 683.120.)

E. Priority of Liens

- General rule—first in time.
- Unrecorded trust deeds—subordinate to unrecorded trust deed until abstract of judgment recorded. (*Livingston v. Rice* (1955) 131 Cal.App.2d 1, 2-4.)
- Later-acquired property—all outstanding judgment liens attach at the same time to a later-acquired real property interest. Among the judgment lien holders, first in time controls. (Code of Civ. Proc. § 697.340; 697.380(g).)
- “Relation back” to attachment liens— judgment liens “relate back” to prejudgment writs of attachment (attachment liens merged). (Code of Civ. Proc. § 697.020(a).)
- “Relation back” to lis pendens—same. (*Mira Overseas Consulting Ltd. v. Muse Family Enterprises, Ltd.* (2015) 237 Cal.App.4th 378, 384-386.)

F. Removal of Judgment Liens

- Voiding—Defects in Abstract
 - A judgment debtor cannot void defective abstract. (Code of Civ. Proc. § 674(b).) A bankruptcy trustee, however, in debtor bankruptcy may be able to do so. (11 USC § 544(a)(3); see also, *In re Varner* (9th Cir. BAP 1998) 219 BR 867, 870-873.)
 - BPFV—a “purchaser, encumbrancer or lessee” who obtained an interest in the debtor's property without actual notice of the original abstract may assert the defective abstract as a defense against its enforcement. (Code of Civ. Proc § 674(b).)
- Release—voluntary release, satisfaction of judgment, or expiration of judgment lien.

VII. BANKRUPTCY ISSUES (Contributed by Corrine Bielejeski, East Bay Bankruptcy Law & Financial Planning)

A. Overview

Always be alert to the filing of bankruptcy by any party that is subject to any of these liens or encumbrances. The filing bankruptcy invokes the 11 U.S.C. §362 automatic stay provisions, which are extremely broad and apply to all creditors who have been served with the notice of bankruptcy or otherwise have constructive notice of the bankruptcy. There are exceptions to the automatic stay, but it is always best to assume that the automatic stay is in effect, unless 1) there is a specific exception in the Bankruptcy Code, or 2) the creditor has sought and obtained relief from stay from the Bankruptcy Court.

B. Specific Lien Issues

- 11 U.S.C. §522(f) avoids judgment liens to the extent they impair a debtor's exemption. The order is effective immediately, even if Debtor has not yet completed the bankruptcy. The debt is divided into the secured portion (often \$0) and the unsecured portion (the rest). Creditors faced with a §522(f) motion can challenge Debtor's valuations and exemptions.
- 11 U.S.C. §506 values liens. The lien only goes away upon discharge or payment of all plan payments. Creditors faced with a §506 motion can challenge Debtor's valuations and watch the case to see whether Debtor completes his/her plan. If Debtor does not complete the plan, the lien remains in effect. Section 506 motions are used to value real and personal property and can strip consensual liens like 2nd mortgages.
- Plan avoidance/valuation/surrender – some Chapter 13 plans may attempt to value a creditor's security interest without filing a separate motion. Look on the top of the first page to see whether the appropriate box was checked and then read through the sections dealing with secured debt to find Creditor. It will tell you whether Debtor is attempting to change the lien.
- For more information on valuing collateral in Bay Area bankruptcy cases, see the court's guidelines at <https://www.canb.uscourts.gov/procedure/guidelines-valuing-collateral>.



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