

First Supplement to Memorandum 88-10

Subject: Study L-831 - Recording of Personal Property Affidavit in
Office of Recorder

At the January meeting, the Commission approved the substance of a section that will fill in a gap in the provisions relating to the collection of personal property by affidavit. Attached as Exhibit 1 to Memorandum 88-10 is a staff draft of the section. A staff draft of a Commission Comment follows the text of the section.

We distributed a copy of Memorandum 88-10 to title company lawyers for review and comment. We received a letter (attached to this Supplement as Exhibit 1) from John C. Hoag, Vice President and Senior Associate Title Counsel, Ticor Title Insurance Company, Los Angeles.

Mr. Hoag is of the view that the proposed section and Comment "go a long way toward solving a conveyancer's qua title insurer's problem. But it does not go far enough."

Mr. Hoag is concerned that the proposed statute makes no reference to bona fide purchaser or bona fide encumbrancer protection. The Commission decided not to include such a provision and other additional provisions in the statute in order to keep the statute short. The addition of the provision suggested by Mr. Hoag would not greatly increase the length of the proposed statute.

If it is desired to deal with this matter in the statute, the provision attached to Memorandum 88-10 could be revised (changes shown in ~~strike-out~~ and underlining) to read as follows:

**Prob. Code § 13106.5. Recording of affidavit or declaration where
property is obligation secured by lien on real property**

13106.5. (a) If the particular item of property transferred under this chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration described in Section 13101 shall

be recorded in the office of the county recorder of that county and, in addition to the contents required by Section 13101, shall include both of the following:

(1) The recording reference of the instrument creating the lien.

(2) A notary public's certificate of acknowledgment identifying each person executing the affidavit or declaration.

(b) Any duty of the obligor under Section 13105 to pay the successor of the decedent or otherwise to satisfy the obligation does not arise until the obligor has been furnished with a certified copy of the affidavit or declaration recorded under subdivision (a).

(c) The transfer under this chapter of the debt or obligation secured by a lien on real property has the same effect as would be given to an assignment of the right to collect the debt or enforce the obligation. The recording of the affidavit or declaration under subdivision (a) shall be given the same effect as is given under Section 2934 of the Civil Code to recording an assignment of a mortgage and an assignment of the beneficial interest under a deed of trust.

(d) If a trust deed upon the real property was given to secure the debt and the requirements of subdivision (a) and Sections 13100 to 13103, inclusive, are satisfied:

(1) The trustee under the deed of trust may rely in good faith on the statements made in the affidavit or declaration and has no duty to inquire into the truth of any statement in the affidavit or declaration.

(2) A good faith purchaser or lessee of the real property for value from, or a good faith lender to, the obligor on the debt may rely upon a recorded reconveyance of the trustee under the deed of trust.

(e) If a mortgage upon the real property was given to secure the debt and the requirements of subdivision (a) and Sections 13100 to 13103, inclusive, are satisfied, a good faith purchaser or lessee of the real property for value from, or a good faith lender to, the obligor on the debt may rely in good faith upon a recorded discharge of the mortgage executed by the person or persons executing the affidavit or declaration as successor of the decedent or by their successors in interest.

Comment. Section 13106.5 is a new provision that covers the situation where the particular item of property transferred under this

chapter is a debt (including a promissory note) secured by a lien on real property.

Where the instrument (including a mortgage or deed of trust) creating the lien has been recorded, subdivision (a) requires that the affidavit or declaration be recorded in the office of the county recorder of the county where the real property is located instead of being furnished to the holder of the property as required by the introductory clause of subdivision (a) of Section 13101. Recording of the affidavit or declaration in the real property records is mandatory so that the title records will reflect the transfer of the debt and security interest under this chapter to the person or persons executing the affidavit or declaration as successor of the decedent and to establish of record their authority to execute a satisfaction or release of the mortgage where the debt is secured by a mortgage.

The affidavit or declaration must be in the form prescribed by Section 13101 and must also satisfy the requirements of paragraphs (1) and (2) of subdivision (a) of Section 13106.5. The affidavit or declaration must be executed under penalty of perjury under the laws of the State of California. See Section 13101(a)(11). A certified copy of the decedent's death certificate must be attached to the affidavit or declaration. Section 13101(c).

Subdivision (a)(1) requires that the recording reference of the instrument creating the lien be included in the affidavit or declaration. This information will make it easier for the county recorder to locate the recorded lien instrument. Additionally, the recording reference will insure that the affidavit or declaration relates to an obligation secured by a lien on real property.

Subdivision (a)(2) requires that the affidavit or declaration include a notary public's certificate of acknowledgment identifying each person executing the affidavit or declaration. This is required because the affidavit or declaration is to be recorded in the real property records. The requirement also avoids the need to furnish the obligor on the debt with additional proof of the identity of each person executing the affidavit or declaration. See Section 13104(e).

Subdivision (b) makes clear that the obligor on the debt has no duty to make payment to the person or persons executing the affidavit or declaration until the obligor has been furnished with a certified copy of the recorded affidavit or declaration. This is consistent with Civil Code Section 2935 (recording of assignment of a mortgage or of the beneficial interest under a deed of trust is not of itself notice to the debtor so as to invalidate any payments made by the debtor to the person holding the note). See also Section 13102 (evidence of ownership).

Under subdivision (c), the transfer of the debt under this chapter is given the same effect as the assignment of the debt. It is a well established principle of law that the assignment of a debt carries with it the security for the payment of the debt. Thus, the assignment of a debt secured by a mortgage carries the mortgage with it (Civil Code § 2936); and, when a power to sell is given to a mortgagee or other encumbrancer in an instrument intended to secure the payment of money, the power is deemed a part of the security and vests in the person who by assignment becomes entitled to the money, and the power of sale may be executed by that person if the assignment is acknowledged and recorded (Civil Code § 858).

The person or persons executing the affidavit or declaration as successor of the decedent have the same rights and duties they would have if they were an assignee of the mortgage or an assignee of the beneficial interest under the deed of trust. See Civil Code § 2941. Giving these persons these rights would, for example, permit a title insurer to rely upon the affidavit or declaration in case of a ~~reording of a certificate of discharge of a mortgage or~~ the recording of a notice of default in a non-judicial foreclosure of the deed of trust or the mortgage (with a power of sale). The duties include, for example, the duty to execute a certificate of discharge of the mortgage if the lien is secured by a mortgage. ~~A good faith purchaser, lessee, or lender may rely in good faith upon a recorded discharge of the mortgage executed by the person or persons executing the affidavit or declaration as successor of the decedent (or by the successor in interest of such a person). The trustee under the deed of trust can execute a reconveyance in reliance upon the statements made in the affidavit or declaration, and a good faith purchaser, lessee, or lender who relies upon the recorded reconveyance is protected. See Sections 13105 and 13106.~~ Under subdivision (c), the recording of the affidavit or declaration operates as constructive notice of its contents to all persons. See Civil Code § 2934.

Subdivision (d) makes clear that the trustee under the deed of trust can execute a reconveyance in reliance upon the statements made in the affidavit or declaration and protects a good faith purchaser, lessee, or lender who relies upon the recorded reconveyance. Subdivision (e) makes clear that a good faith purchaser, lessee, or lender may rely in good faith upon a recorded discharge of the mortgage executed by the person or persons executing the affidavit or declaration as successor of the decedent (or by the successor in interest of such a person). These protections are consistent with the protection given the holder of the decedent's property under Section 13106. They are necessary to protect the obligor on the debt who has paid the debt to the person or persons executing the affidavit or declaration and needs to have the property title records reflect the fact that the debt has been paid and the security released.

Except as specifically provided in Section 13106.5, the provisions of this chapter—including but not limited to Sections 13109-13113 (liability of persons to whom payment, delivery, or transfer of property is made under this chapter)—apply to money collected pursuant to Section 13106.5.

Section 13106.5 covers not only the right to payment of a debt secured by a lien on real property, but also the right to enforce an obligation the performance of which is secured by a lien on real property.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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RECEIVED

February 8, 1988

John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Dear Mr. DeMouilly:

The new Probate Code section (13106.5) discussed in Memorandum 88-10 (exhibit 1) and the Comment which follows the new statute go a long way toward solving a conveyancer's qua title insurer's problem.

But it does not go far enough. My reasons follow.

In the proposed statute proper (13106.5), no reference is made to bona fide purchaser or bona fide encumbrancer protection. The Comment does make a reference to existing Probate Code section 13106 which concerns bona fide purchaser protection. Inclusion of a reference to section 13106 in the statute itself solves this problem. I cannot understand why there is such resistance to inclusion of bona fide purchaser protection as provided under section 13106.

Let me illustrate.

There is a distinction - a fairly fundamental one - between constructive notice doctrines and bona fide purchaser protection. A document can be - in a most mechanical sense - in the chain of title and thus provide constructive notice. A document void ab initio, however, is not validated by it's place in a chain of title.

Suppose a false affidavit is presented. On that basis title insurer executes a full reconveyance and deletes reference to the deed of trust from an evidence of title. Deed of trust, however, has not been fully paid-off.

Title company insures new purchaser from bidder at foreclosure sale and new lender. Foreclosure then commences. Is title company's insured purchaser and lender protected?

John H. DeMouilly
California Law Revision Commission
February 8, 1988

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Naturally enough, too, without the reference to 13106 a signature under penalty of perjury is fairly meaningless.

One other notion. The making of a record transfer by affidavit is a good idea in the reconveyance situation in which the debt has been paid. Suppose, however, debt is unpaid and the unpaid balance is in excess of \$60,000. Affidavit is made out - not in compliance with section section 13100.

Will title insurer be protected insuring later on based upon affidavit?

Nonetheless, with the addition of a reference to section 13106, reliance upon the affidavit by title insurers, generally, is indicated.

Sincerely,



John C. Hoag
Vice President and
Senior Associate Title Counsel

JCH/ts