

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 is a staff draft of the section. A staff draft of a Commission Comment follows the text of the section. We request that the Commission review the section and the Comment.

At the January meeting, the Commission also approved amending Assembly Bill 2779 (Commission recommended urgency bill introduced at current session) to add the substance of this section.

The section set out in Exhibit 1 expands the section considered at the January meeting to cover all obligations secured by a lien on real property, not just the obligation to pay a debt. At the January meeting, the Commission directed that this expansion be made.

The requirement that the affidavit or declaration include the recording reference of the instrument creating the lien has been added. The County Recorders' Association is in agreement with this proposal provided this addition is made to the proposed section. See Exhibit 2 attached.

A sentence has been added to the proposed section to make clear that a transfer under the affidavit procedure of the right to collect the debt or to enforce the other obligation has the same effect as an assignment of that right. At the January meeting, the Commission was of the view that such a provision would avoid the need to include the detail that was contained in the staff draft handed out at the meeting.

We will send a copy of this memorandum to title company representatives and will provide the Commission with copies of any letters we receive as a result of this distribution.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Memo 88-10

Exhibit 1

**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.

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 recording 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.

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.



County Recorders' Association of the State of California

Marsha A. Young • P. O. Box 148 • Ukiah, CA 95482 • (707) 463-4376

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January 13, 1988

CA LAW REV. COMMISSION

JAN 15 1988

RECEIVED

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Dear Mr. DeMouilly:

In response to your request for comment on Memorandum 88-4, the County Recorders' Association is in agreement with this proposal provided one minor change is reflected.

We recommend that the recording reference of the original lien document be included in the affidavit or declaration. This information will provide an easier trail in which to locate the original document. Additionally the recording reference will insure that the affidavit/declaration affects real property.

If you have any questions, please contact me at (916) 440-6334.

Sincerely,

CRAIG A. KRAMER
Chair, Legislative Committee

CAK:lg
CAK:010888C
cc: Legislative Committee

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