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BID CHILLING: AVOIDING LIABILITY IN THE FORECLOSURE OF REAL ESTATE

By Michael G. Fletcher and Faye C. Rasch

Foreclosure activity in California has been proceeding at a fervent pace, and real estate investors are continuously seeking competitive advantages in acquiring properties. One of the most popular is the approach made by buyers to lenders that are in the process of foreclosing, offering to purchase the real estate from the lender once the foreclosure sale is completed. This, of course, assumes that the lender will be the successful bidder at the sale. The investor attempts to tie up the property before the sale is concluded so that other potential purchasers are shut out of the market unless they buy at the foreclosure sale. The advantage for the lender is that it may be able to quickly liquidate assets that it does not want to keep on its books. However, lenders need to be careful, as entering into such an agreement may subject the lender to criminal or civil liability under California Civil Code Section 2924h(g) - - the statute which prohibits "bid chilling" at a foreclosure sale. This article will discuss the statute and its impact on lenders, as well as an alternative that may enable the lender to sell assets without exposing itself to liability.

Statutory Prohibitions on Bid Chilling

California Civil Code Section 2924h(g) is designed to prevent parties to a foreclosure from entering into agreements which have the effect of "chilling the bidding" at a non-judicial foreclosure sale. That section provides:

(g) It shall be unlawful for any person, acting alone or in concert with others, (1) to offer to accept or accept from another, any consideration of any type not to bid, or (2) to fix or restrain bidding in any manner,

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TITLE INSURANCE COMPANIES NO LONGER ISSUING CREDITORS' RIGHTS COVERAGE

By Carol A. Robertson

Over the past 18 months, as the economy continued a downward trend, creditors' rights coverage in title insurance policies had become increasingly difficult and expensive to obtain. In the last six months, lenders who wished to obtain such coverage experienced requests from title insurers for ever-increasing amounts of financial information on their borrowers, as well significant delays in the underwriting process. In February, most major title companies (including Chicago Title Insurance Company, Fidelity National Title Company, First American Title Company and Lawyers Title Company) announced that such coverage will no longer be available in any form, whether by issuing a 1970 form of policy or by endorsement. The American Land Title Association ("ALTA") decertified its Endorsement 21 or 21-06, and the California Land Title Association ("CLTA") thereafter decertified the California equivalent. However, notwithstanding the decertification by both the ALTA and CLTA, the ALTA announcement stated that individual title companies are not precluded from issuing such coverage in another form. As yet, no concrete alternatives are available in the market place. The impact of this decision by the title companies on real estate lenders and possible solutions will be explored below.

What is creditors' rights coverage?

Creditors' rights coverage provided a lender with insurance that the insured transaction (the loan and the resulting lien) would not be undone or set aside by a creditor of buyer/borrower or the seller of the property on the basis that the transaction was a voidable preference or a fraudulent conveyance under federal bankruptcy, state creditors' rights or similar laws. From a lender's point of view, a significant aspect to this coverage was that it included litigation defense costs (attorneys' fees and costs). (continued on page 6)

PAYMENT OF CLAIMS, DEBTS AND EXPENSES FROM REVOCABLE TRUSTS

By Lawrence S. Grosberg

One of the most frequently asked questions by individuals and financial institutions is when a guarantor of a loan who also has a revocable trust, dies, can the individual, or the financial institution file a claim against the revocable trust? In the past several years, the California Probate Code has been modified to clarify this issue. Probate Code sections 19000 et seq. now allows claimants and creditors to proceed against the deceased trustor's interest in a revocable trust in the same manner as if a claim had been filed in a probate proceeding.

The purpose of these changes to the Probate Code was to establish a uniform regime for creditors' claims regardless of whether the decedent utilized a will or revocable trust as his/her primary estate planning instrument. Property in a revocable trust is now subject to the claims of creditors of a deceased estate to the extent that the estate is inadequate to satisfy those claims. The Probate Code now provides a creditor's claim procedure for trusts that operates in a manner substantially similar to that for a decedent's estate. Under certain sections of the Probate Code, a court proceeding, may, in the discretion of the trustee, be used by the trustee of a revocable trust to compel the decedent's creditors to file claims within a 4-month period.

Although the trustee is not required to use the notice procedure set forth in the Probate Code, in the event notice is not given to creditors, and a distribution of the trust estate takes place within the first year after the deceased's death, each distributee becomes personally liable for the debts of the decedent (filed within the applicable one-year limitations period) to the extent of the value of the distribution received by that distributee.

If the trustee does in fact give notice to creditors of a revocable trust, and a claim is filed against the trust which is then rejected by the trustee, the creditor must bring an action within 90 days after notice of rejection of the claim. Even if a trustee does not elect to give notice to creditors as provided in the Probate Code, a creditor may still file a claim with the trustee.

The claim must be supported by the affidavit of the claimant or a person filing the claim on behalf of the claimant stating:

(1) The claim is a just claim.

(2) If the claim is due, the facts supporting the claim, the amount of the claim and that all payments on, and offsets to the claim have been credited.

(3) If the claim due or not contingent, or the amount is not yet ascertainable, the facts supporting the claim.

(4) If the affidavit is made by a person other than the claimant, the reason it is not made by the claimant. Under section 4 (b) the trustee may require satisfactory vouchers or proof to be produced to support the claim. An original voucher may be withdrawn after a copy is provided. If a copy is provided, the copy shall be attached to the claim.

We believe that a claim should be filed within four months of the date of death of the deceased to make sure that a creditors claim is not barred.

In addition, a rejected claim is barred as to the part rejected, unless the claimant brings an action on the claim, within 90 days after the notice is given, or if the claim is not due at the time of notice of rejection, 90 days after the claim becomes due. The action may be brought not only in the county where the claim is rejected, but also in the county or city and county wherein the principal place or administration of the trust is located.

It should also be noted that in any action involving a creditor and a trustee, the prevailing party in the action may be awarded court costs and attorney fees if the court determines that the prosecution or the defense of the action against the prevailing party was unreasonable. The prevailing party is the trustee if the creditor recovers an amount equal to or less than the amount of the claim allowed by the trustee, and the prevailing party is the creditor if the creditor recovers an amount greater than the amount of the claim allowed by the trustee.

In summary, almost every section of the Probate Code dealing with creditor claims procedures has a direct counterpart in the Probate Code sections dealing with revocable trust claims. The main distinction between the probate and trust provisions in the Probate Code is that the creditor claim provisions relating to probate of an estate are mandatory, whereas the Probate Code provisions relating to revocable trusts are discretionary. Accordingly, although it would appear that a creditor can give notice of its claim at any time so long as the claim is not barred by the statute of limitations, we believe that a claim should be filed within four months of the date of death of the deceased to make sure that a creditors claim is not barred.

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WILLS AND TRUSTS: Important changes to laws for the year 2010

By Lawrence S. Grosberg and Jesse Giusto

There have been a significant number of changes to federal and California laws relating to wills and trusts for the year 2010: the temporary repeal of the federal estate tax and changes to the application of "no contest" clauses.

Effective only for 2010, there is no federal estate tax for a person passing away this year. However, the federal estate tax will be reinstated in 2011, and it is unclear at this point whether Congress will adopt rules to retroactively apply a federal estate tax to 2010. While ostensibly beneficial to everyone, the temporary elimination of the estate tax can have both positive and negative effects on wills and trusts.

The good news is that the lack of an estate tax for 2010 provides a person with an opportunity to proactively attempt to capture the potential benefits of the temporary repeal in the event that Congress does not retroactively apply a federal estate tax to 2010. The bad news is that these benefits can only be captured if the person dies this year.

The lack of an estate tax for 2010 can have other negative results. Many wills and trusts have been prepared in contemplation of the existence of an estate tax and an estate tax exemption and use techniques designed to minimize the federal estate tax. With the absence of an estate tax (and consequent absence of an exemption), wills and trusts for individuals passing away this year may not achieve the intended result. For example, many of our clients' estate plans provide two trusts upon the passing of a spouse: a marital trust and exemption trust. Most plans allocate assets equal to the amount of the decedent's exemption from estate tax to the exemption trust and allocate the remaining assets to the marital trust. Unfortunately, the law is unclear as to how the absence of the estate tax (and corresponding absence of an exemption) will affect this allocation. A court may interpret the law to allocate all of the assets to the exemption trust (because none of the assets are subject to the estate tax). Alternatively, a court may interpret the law to allocate none of the assets to the exemption trust (because there is no exemption). Unfortunately, many people most likely did not intend either of these two extreme choices.

In addition, California law regarding "no contest" clauses (also known as "disinheritance" clauses) has changed significantly since most of our clients last executed their wills and trusts. A "no contest" clause typically provides that if a beneficiary contests or seeks to impair or invalidate an irrevocable instrument (including a will, trust, or any of its provisions) the beneficiary will be "disinherited" and thus will not receive what is otherwise provided for in the will or trust.

The new rules substantially limit the types of acts that constitute a "contest" to a will or trust and thus also limit the reach of the "no contest" clause. Once again, wills and trusts for individuals passing away this year may not achieve the intended result.

It is important that your will or trust implements your intentions. If you are concerned or unsure whether the new rules affect your will or trust in a way in which you did not intend, we recommend that you have your will or trust reviewed and amended if necessary. That is the best way to make sure everything is up to date.

CALIFORNIA'S BUDGETARY CUTBACKS IN JUDICIAL BRANCH HIT HOME IN LOS ANGELES COUNTY

By D. Dennis La

In July 2009, the Judicial Council approved mandatory statewide court closures on the third Wednesday of each month beginning September 2009 to contend with current economic conditions and severe reductions in the judicial branch budget. At a follow up meeting on January 21, 2010, the Judicial Council considered reducing the number of remaining monthly closures but ultimately voted to keep the number intact. Given the severity of California's economic crisis and the judicial branch's budget deficit, however, it remains uncertain how the council's goal will be served – especially for civil litigants in Los Angeles County.

Following the decision to commence monthly closures, the Judicial Council directed 54 Superior Courts, all 6 Appellate Districts of the Courts of Appeal, the Supreme Court, and 275 justice system partners, to evaluate the effect of the economic crisis and closures on the courts and the public. As reported by the participants at the January 21, 2010 meeting, the responses varied; while there were a few courts with minimal impact, many courts reported a substantial effect on court departments' operations and court users.

In Los Angeles County, the

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Budget Cutbacks

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impact of the 2009 budgetary crisis is significant. The Los Angeles County Superior Court currently faces an approximately $80 million budget deficit and the deficit is expected to grow significantly in the next few fiscal years. The court has been forced to downsize its operations to help cope with budgetary restraints in addition to the monthly closures, including a hiring freeze, employee attrition, monthly furlough days, and layoffs. An estimated 1,800 employees ultimately will be laid off as a result of the reduced budgets (i.e. one-third of the court's work force).

The court has acknowledged the widespread effect this will have on the public's access to the court system. "The layoff of 1,800 employees will require the closure of some 180 courtrooms." Los Angeles County Superior Court Newsletter, Volume 2 No. 3 March 2010. To date, the court has closed one small claims department, two limited jurisdiction departments, and one complex litigation courtroom; and it has announced the closure of four long-cause trial departments in 2010. Further court cutbacks are anticipated and will be announced during the year.

Compounding matters, the court has announced that criminal, family law, and juvenile cases will have priority over civil actions and that it will be rearranging cases in over one-half of the civil courtrooms, increasing the inventory of cases in those departments.

It is undeniable that cutbacks in the court's operations in addition to the mandatory closures will cast doubt on a litigant's ability to obtain relief sooner than later. Less judges and support staff to handle the civil cases will result in greater delays in having motions heard and bringing those cases not resolved at the pre-trial phase to trial. At this time, litigants should assume that civil cases will not even be scheduled to be tried within one year of commencement of the action.

Given the extent of California's economic crisis, there are more uncertainties than answers – including how to reconcile court cutbacks with the a litigant's need for swift justice in Los Angeles County. As posed by Chief Justice Ronald George at the January 21, 2010 public meeting, "the question really is, are there alternatives that do not involve a restriction on access to justice?" At least for now, the answer appears there is not.

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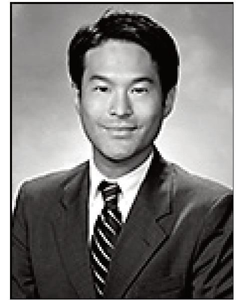

Real Estate Foreclosure

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at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage. However, it shall not be unlawful for any person, including a trustee, to state that a property subject to a recorded notice of default or subject to a sale conducted pursuant to this chapter is being sold in an "as-is" condition.

In addition to any other remedies, any person committing any act declared unlawful by this subdivision or any act which would operate as a fraud or deceit upon any beneficiary, trustor, or junior lienor shall, upon conviction, be fined not more than ten thousand dollars ($10,000) or imprisoned in the county jail for not more than one year, or be punished by both that fine and imprisonment.

Violations of this section can have a variety of consequences, not least of which it is a crime, a misdemeanor, to engage in such activity. On the civil side, the consequences can range from an aggrieved party having the ability to set aside the foreclosure sale, to monetary tort liability and other equitable remedies.

The Case Interpretation of Section 2924h(g)

Appellate Courts that have been called on to interpret Section 2924h(g) have been inclined to give it broad coverage and find any number of activities to be ones that trigger the prohibitions against bid chilling. Section 2924h(g) is intended to stimulate fair and open bidding in the non-judicial foreclosure process so that a defaulting property owner can benefit from competition. Lov. Jensen, 88 Cal. App. 4th 1093,1095-6 (2001). To analyze creditor/prospective buyer communications in the context of a non-judicial foreclosure sale, you need first to start with the concept that a non-judicial foreclosure sale must be lawful and fair. If not, the sale can be set aside. Bank of America Nat'l Trust and Saving and Trust Assoc. v. Reidy, 15 Cal 2d 243,248 (1940). While Section 2924h(g) does not specifically set forth parameters for behavior, the case law is extremely illustrative.

For example, in Lov. Jensen, a condominium owner defaulted on his homeowner's association obligations. As a result, the homeowner's association instituted non-judicial foreclosure proceedings. Two prospective buyers, each believing the property was worth in excess of $100,000, entered into pre-foreclosure agreements that drove the price down and enabled them to obtain the property cheaply. The buyers submitted a joint bid for $5,412 (the exact amount of the lien) and were awarded the property at the sale. The home owner sued alleging a violation of Section 2429h(g). In response, the buyers argued that all they had done was to form a legitimate joint venture to purchase the property. The Court rejected this argument and found that the buyers created the joint venture to limit competition rather than form a collaborative business venture. The Court further found that the buyers' conduct violated Section 2924h(g) and set aside the sale:

"The evidence was that Jensen and Ko [buyers] joined together to eliminate competition and that they benefited by the lack of competition, securing the property for very little money, to respondents' detriment. This is precisely the conduct that section 2924h, subdivision (g) forbids." Id. at 1096-97

In another example, South Bay Building Enterprises, Inc. v. Rivera Lend-Lease, Inc., 72 Cal App. 4th 1111 (1999), a junior lender alleged a violation of Section 2924h(g). The junior lender claimed that the senior lender engineered a scheme to prevent

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Real Estate Foreclosure

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others from bidding on the foreclosed property so that the property could ultimately be returned to the debtor. The junior lender established at trial: (i) that there was an agreement by and between the debtor and the senior lender to delay sales; (ii) that sales were postponed because ready, willing and able purchasers were present; and (iii) that the senior lender intentionally misrepresented amounts owed. In fact, the debtor admitted that he and the senior lender had entered into an agreement that the foreclosure would not result in anyone owning the property other than the senior lender.

The Court found that the senior lender violated Section 2924h(g) and that such violation gave rise to a claim of civil liability by the junior lender since the junior lender was part of the class designed to be protected by Section 2924h(g);

"A tort in essence is the breach of a nonconsensual duty owed another. Violation of a statutory duty to another may therefore be a tort and violation of a statute embodying a public policy that is generally actionable even though no specific civil remedy is provided in the statute itself. Any injured member of the public for whose benefit the statute was enacted may bring the action' (quoting (Laczko v. Jules Meyers, Inc. 276 Cal. App. 2d 293, 295 (1969))." **Id. at 1123.** South Bay clearly establishes that side deals with another that disadvantage a party with an interest in the property, such as the owner or a junior secured creditor, can violate the statute.

In contrast, in Bank of America Nat'l Trust v. Reidy, supra, the evidence showed the bank had valued the property, subject to foreclosure, at approximately $40,000. The bank intended to bid up to $40,000 at the sale and sue the debtor for the deficiency. However, at the request of the debtor, the bank agreed to bid a minimum price of $70,000, in return for an additional $10,000 in security from the debtor. The junior lender sued claiming that the set bid price stifled competition and thus the foreclosure sale was unfair.

The Court found no violation of Section 2924h(g), concluding:

"The sale is not rendered fraudulent by the fact that such bid exceeds the value of the property at the time of sale and was made with the intent of discouraging bidding or redemption by junior encumbrances in the hope of finally securing payment of the debt because of a rise in value of the property in the future. So long as a bid is legitimately made, there is no theory which requires the creditor to bid only a small amount, raising it by degrees only to that required to meet competition." **Id. at 248.**

Some have interpreted Bank of America to mean that it is permissible to enter into agreements with the borrower as to what the Bank will credit bid at the sale, but note that in this case the bank agreed to bid more than it had previously decided to bid for the property. It is unclear whether the Court would have offered the same latitude to a senior lender making a deal with an outside party, particularly if it were for a lower bid price.

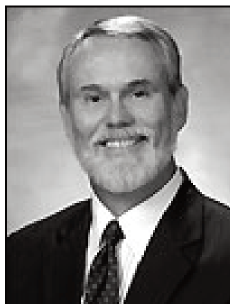
The Practical Problems

Many lenders are tempted to enter into negotiations with a prospective purchaser of the property prior to conducting the foreclosure sale. To the extent the prospective buyer believes it has the "inside track," or has already cut a deal to buy the property from the lender after the foreclosure sale, that investor is not likely to attend the foreclosure sale and bid on the property. This, in turn, may have an impact (at least theoretically) on whether there is competitive bidding, which may then subject the lender to legal action based on Section 2924h(g).

To avoid that pitfall, there is an alternative approach for a lender to take if it is contacted by an investor during the foreclosure proceedings — and that is the loan sale. As the owner of the note, unless prohibited by the loan documents, the lender is fully within its rights to sell the loan. While buying a loan is not the same as buying real estate, if a loan sale is concluded, the buyer is free to proceed forward with and complete the foreclosure sale. At the sale, the buyer will either be the successful bidder and acquire the property or have someone outbid it and pay the buyer the bid price.

During any discussions, though, with a prospective purchaser of real estate, it is important for the lender to make sure that the prospective purchaser understands that there are no assurances that the lender will be the successful bidder at the foreclosure sale and, thus, there is no assurance that the lender will obtain title. Therefore, if the prospective buyer does not want to purchase the loan, the lender should encourage the buyer to go to the foreclosure sale and bid for itself.

Today's environment is a difficult one for lenders in the disposition of assets. While wanting to move nonperforming assets off the books as soon as possible, lenders also must avoid potential additional liabilities, such as Section 2924h(g). By using the loan sale before the lender completes foreclosure, the lender should be able to steer clear of Section 2924h(g), and still pursue the liquidation of assets, creating a potential win win for the lender and the buyer.



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Right's Coverage

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While this coverage should never have been relied upon as a substitute for sound underwriting practices, it had been routinely requested and issued until the downturn in the economy.

Creditors can assert creditors' rights claims based upon two sections of the Bankruptcy Code and similar provisions under state laws. The first theory of attack is that the granting of the lien to the lender was a "preferential transfer". To successfully assert that a transfer was preferential under 11 U.S.C. § 547, an attacking creditor must show that the transfer of an interest by the debtor (via the execution of a deed of trust) was:

- To or for the benefit of a creditor;
- For or on account of antecedent (existing) debt made while the debtor was insolvent;
- Was within 90 days of the filing of the bankruptcy petition (or within one year of the filing if the creditor was an 'insider" of the debtor); and
- Enables the creditor to receive more that the creditor would have otherwise received in a Chapter 7 proceeding.

If all of these elements are established, a bankruptcy trustee can avoid the transfer, with the result that the lender's lien is set aside and the asset is returned to the bankruptcy estate for the benefit of all creditors. There are defenses available to such a claim, the most common of which are that (i) the transfer was made in a contemporaneous exchange for new value, or (ii) the transfer was in the ordinary course of business. In addition, under 11 U.S.C. § 550, a trustee in bankruptcy cannot recover from a transferee who takes in good faith and without knowledge of the voidability of the transfer.

The second theory of attack is that the granting of the lien was a "fraudulent transfer" under 11 U.S.C. § 548. A transfer will be deemed to be fraudulent under this section of the Bankruptcy Code if the transfer was within one year of the date the bankruptcy petition is filed, if the debtor:

- Made the transfer with the actual intent to hinder, delay or defraud creditors; or;
- The debtor received less than reasonably equivalent value; and
- Was insolvent on the date the transfer was made, or became insolvent as a result of the transfer, or was engaged in a business/transaction that was undercapitalized; or incurred debts beyond its ability to pay.

Under 11 U.S.C. § 550(b), a bankruptcy trustee cannot recover from a transferee (or an immediate transferee thereof) on the basis of fraudulent transfer if the transferee takes for value (including the satisfaction or securing of existing debt), in good faith, and without knowledge of the voidability of the transfer.

A (very) brief history of title insurance in California

For many years, it has been standard practice for lenders to request the issuance of a 1970 lender's policy form. This form of policy was silent on the subject of creditors' rights coverage, and was thus requested for that very reason, but some title insurers have questioned whether such silence ever equated to coverage.

In 1992, changes to policy forms were made by the title insurance companies, and lenders could obtain creditors' rights coverage by endorsement. As the result of competition in the insurance market, lenders benefitted from a new form of policy made available in 2006. The 2006 form of policy has been generally accepted by most financial institutions. The ALTA 2006 loan policy included, as a "Covered Risk", the invalidity, or lack of priority of the lien resulting from the avoidance, in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or part of the title or any interest in the property prior to the insured lien because the transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency or similar creditors' rights law. However, under the exclusions to the 2006 policy form, the lien that was being created by the deed of trust was excluded from coverage, but that exclusion could be removed by endorsement (Endorsement 21 or 21-06).

The ALTA 2006 loan policy, coupled with Endorsement 21 or 21-06, provided lenders with effective creditors' rights coverage. However, the ALTA 21-06 endorsement provided that it did not insure against loss or damage if the insured knew that the mortgage was intended to hinder, delay or defraud any creditor or the creditor was found by a court not to be a transferee in good faith.

So what is a lender to do?

In these tumultuous times, the three most common scenarios where the unavailability of creditors' rights coverage could have a significant impact on a lender's rights under a deed of trust are as follows:

1. A lender takes a deed in lieu of foreclosure;
2. A lender takes additional collateral to shore up existing debt; or
3. A lender finances the acquisition of real property at a discount.

In the first scenario, where a lender takes a deed-in-lieu of foreclosure, the lender already knows its borrower is in financial trouble. Lenders who are considering taking a deed-in-lieu of foreclosure should take care to ensure that the amount of debt forgiven as the result of the deed-in-lieu bears a reasonable relationship to the fair market value of the property.

In the second situation, a lender with an existing loan finds itself underwater, due to declining property values, and seeks additional collateral from the borrower to bring the loan-to-value ratio back into balance. A problem arises when the borrower, who gave the underwater lender a new deed of trust to shore up

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Right's Coverage

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existing debt, then files for bankruptcy protection within 90 days of executing the new deed of trust. It is safe to assume that in such a situation, the creditors of the borrower/debtor and/or the trustee in bankruptcy will attack the lien granted by such a deed of trust as a preferential transfer and demand that the lien be set aside. A lender should carefully scrutinize the borrower's overall financial condition to avoid having to sweat out the 90 day preference period and should give some consideration (perhaps in the form of a restructure or forbearance) in exchange for the new lien.

In the third scenario, a lender finances the acquisition of distressed real estate. The good news is that the buyer/borrower is acquiring the property at a deep discount. The (potential) bad news is that creditors of the seller of the distressed asset may attack the sale and seek to have it set aside as not being for "reasonably equivalent value". Given the turmoil in the market and wide ranges in appraised values, it may be difficult to determine the value of an asset and thus whether "reasonably equivalent value" was given. Lenders should protect themselves by obtaining third party appraisals with solid and supportable reasons for the conclusion of value given.

Gazing in the Crystal Ball

As noted above, the decertification of the specific forms of endorsements does not prohibit title insurers from offering some sort of creditors' rights coverage. It is possible that an enterprising title insurer will do just that, but may reduce the scope of coverage by, for example, eliminating legal fees and costs from the coverage. It remains to be seen as to whether such coverage will be available, and if so, whether it will be cost-effective for a lender to require such coverage.

It has been suggested that one alternative is to revert back to asking for the issuance of a prior form of policy and request a deletion of the creditors' rights exclusion. However, the simple solution of requesting the 1970 form of policy will not work as the title companies have already indicated that going forward the 1970 form will now expressly exclude creditors' rights coverage.

Another possible approach is for law firms to issue solvency opinions in conjunction with real estate transactions. These types of opinions were used in the years when leveraged buyouts were in vogue, but well drafted solvency opinions were both expensive and of questionable value, given the voluminous qualifications that eviscerated such opinions.

While strengthening the financial representations and warranties in loan agreements may seem to be a simple but attractive solution, as a practical matter, well drafted loan agreements already contain representations and warranties and will be of little comfort if the borrower becomes insolvent. However, the exercise of bolstering financial representations and warranties, if met with resistance, may be a warning sign of potential trouble ahead.

Regardless of how the current uncertainty shakes out, it is apparent that lenders should increase their scrutiny of transactions and understand the financial condition of the parties (both before and after the proposed transaction closes) when financing the acquisition of real property. Due diligence performed by lenders should extend beyond analysis of the basics of cash flow and appraised value. In addition to normal underwriting of the real property involved, lenders should pay attention to the impact of a particular transaction going forward on the buyer, seller and their related entities. In addition to performing the normal and customary lien and judgment searches, a closer examination of a borrower's creditors (even though creditors have not obtained a lien on the real property in question) would be in order.

In conclusion, by eliminating creditors' rights coverage from title insurance policies, the risk of insolvency has been shifted from the title insurer to the lender. Unless and until the market offers a viable alternative (and at this writing there are none on the horizon), in addition to the increased levels of due diligence discussed above, lenders should consider pricing transactions to reflect their increased risks.

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of Quarterly Prophets.

Mr. Goldflam's practice emphasizes business and commercial litigation at the trial and appellate levels. Mr. Goldflam represents court-appointed receivers in many large scale fraud cases brought by the Federal Trade Commission and the Securities and Exchange Commission. Mr. Goldflam also has extensive experience in handling environmental litigation and compliance matters, public and private construction contracts disputes, real property disputes, bad faith claims, and product liability and other tort-related matters. He routinely advises clients regarding insurance coverage issues.

Mr. Goldflarm received his B.A. at the University of California at Irvine and his J.D. summa cum laude at Southwestern University School of Law.

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NAMES IN THE NEWS

Craig A. Welin spoke on receiverships (both real property and equity receiverships) at the California Banker's Association Lenders Annual Conference.

Steven N. Bloom was a featured speaker at the 2010 First Quarter Business and Investment Breakfast presented by Citizens Business Bank.

Michael G. Fletcher was a featured speaker at the Special Assets Manager's Association (SAMA) conference, on use of outside legal counsel. He also was a featured speaker at a meeting of the National Association of Chinese American Bankers, on loan modifications and problem credits in a recessionary environment.

Bruce D. Poltrock was a panelist and speaker with Judge Greenberg of the Los Angeles County Superior Court at the Receivership Forum's program on "How to Appoint Business and Rents and Profits Receivers / Benefits of Pre-judgment Litigation."

Andrew K. Alper was a featured speaker at the Equipment Leasing and Finance Association's Credit and Collections Conference.

Peter Csato and **Kenneth N. Russak** have again been selected as Superlawyers in Los Angeles Magazine.

Loren R. Gordon has again been selected as a Young Superlawyer in Los Angeles Magazine.

Albert Moon has been selected for inclusion on the 2010 Southern California Rising Stars list.

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