Chapter 11

Liens, Foreclosures, & Seizures

Chapter 11 Goals:

- Know what an involuntary lien is
- List the different types of involuntary liens
- How to terminate an involuntary lien
- What are ad volurem taxes and how are they calculated
- What is a homestead and how is one declared
- What is a mechanics lien

Chapter 11: Liens, Foreclosures, & Seizures

This chapter explores the concept of liens, the process of foreclosure, and involuntary property seizures.

Key Terms

abstract of judgment	homestead declaration	request for notification of default
ad valorem tax	homestead exemption	right of redemption
adverse possession	inverse condemnation	right of reinstatement
affirmation	involuntary lien	severance damages
antimerger clause	judgment lien	sheriff's deed
bankruptcy	judicial foreclosure	sheriff's sale
certificate of sale	lien	Soldier and Sailors Civil Relief Act
cessation of work	*lis pendens*	specific lien
deed in lieu of foreclosure	mechanic's lien	stop notice
deficiency judgment	nonjudicial foreclosure	subordination clause
disseisor	notice of cessation	tacking on
dragnet clause	notice of completion	tax lien
eminent domain	notice of default	trust deed foreclosure
equity	notice of nonresponsibility	trustee sale
execution sale	notice of sale	verification
foreclosure	open and notorious use	writ of attachment
foreclosure consultant	police power	writ of execution
general lien	preliminary notice	
government seizure	real property tax assessment	
homestead		

Liens

In the context of mortgages, a **lien** is a provision within a loan contract that grants the lender legal possessory rights over a borrower's property in the event that the borrower defaults on the loan. A lien clouds a property's title/ownership and prevents the sale or refinance of the property until a lender's balance is satisfied.

Equity refers to the monetary difference between a property's market value and all of its combined loans and liens. All property liens require that there is equity in the property, otherwise no interest can be secured.

When a borrower consensually agrees to pay back a debt – for example, in the case of a mortgage – it is called a voluntary lien. The borrower acknowledges the debt by allowing a lender to place a lien on the property as security indicating their interest in the property.

Conversely, a lien placed on real property without the borrower's permission is called an **involuntary lien**. A borrower's failure to make payments on a debt allows a lender to claim a lawsuit against the borrower; if the lender wins, he/she has the ability to place a lien on the borrower's property.

An involuntary lien is typically made at the direction of the courts. It is one of the primary methods lenders use to secure payment from the borrower. It is usually ordered due to a borrower's failure to make payments. If an involuntary lien is placed on the borrower's real property and they fail to make payments or arrange a payment schedule with the lender, the lender may have the right to foreclose on the property.

A **general lien** is a lien placed on all real property owned by the borrower; a **specific lien** is a lien on a specific property.

Subordination Agreement

A subordination agreement establishes the order of lien holders and their superiority/inferiority to each other, designating first, second, and third lien holders. In the event that a property forecloses, lien holders will recoup their debts in the order established in the subordination agreement.

In California, courts typically adhere to the "first in time, first is right" rule. This means that they determine lien holder rights based on which lien was first placed on the property.

A senior lien holder is the first loan, thereby giving it first lien position.

An **antimerger clause** is a provision in a mortgage contract that states that the senior lien holder has priority over other liens, whether personal or secondary mortgages. In the event an antimerger clause is present and the property is foreclosed, the senior lien holder will be paid first. Any remaining proceeds will be used to pay off junior liens.

Traditional lenders typically do not fund loans in which they are not the senior lien holder. It is common for lenders to initiate a subordinate agreement in order to put themselves as the first lien holder of record. Therefore, it may be advantageous for a property owner to subordinate the position of the liens in order to obtain a loan. Junior lien holders must agree to the proposed subordination, however.

A junior lien holder is the second or third loan, therefore they are considered a secondary loan.

Junior lien holders face a precarious situation when trying to recoup their investment from a borrower who defaults on a senior lien. If the senior lien holder decides to foreclose, the sale proceeds go to them first; only if there is leftover money does a junior lien holder get paid.

However, the debt is still owed to these junior lien lenders, who can take other legal actions in an attempt to recover their investment.

The problem junior lien holder's face is that because auction sales can only be paid in cash there are very few capable buyers who purchase the property. This causes the property to be sold at below cost, significantly affecting the junior lien holder's ability to recoup lost investment.

It is common for the junior lien holder, if they have the financial means to do so, to pay down the debt of the defaulted borrower to postpone the foreclosure. This postponement of the mortgage gives the junior lien holder time to initiate their own foreclosure process.

A junior loan can make a request for a notice of default to be provided to them. The terms of the default will help the junior lien holder determine the best route to recoup the lost investment. If the junior lien holder is awarded the property in auction, they become full owner of the property unless there are other senior liens ahead of their junior lien.

It is therefore advantageous for a lien holder to be among the first loans to ensure their financial interests in the event a property is foreclosed and sold.

A subordination agreement may also be used to rearrange the order of lien holders for the purpose of designating loan priority.

A **subordination clause** stipulates that a current claim on any debts will take priority over any claims formed in future agreements. This is commonly used in mortgage contracts.

Conversely, a **dragnet clause** is a clause in a trust deed that permits future liens to take precedence over other liens by attempting to get as much collateral and money as possible for the lender.

The standard order of lien holders in a subordination agreement are as follows:

1. Tax liens
2. Obligatory advances in construction loans
3. Senior lien holder
4. Junior lien holders
5. Unrecorded liens

Case Review: *Southwest Title Ins. Co. v. Northland Bldg. Corp.* (1976)

The case, *Southwest Title Ins. Co. v. Northland Bldg. Corp.* (1976) 542 S.W.2d 436., involved a title insurance company that failed to disclose the presence of a dragnet clause in its preliminary title report.

A lender (Northland Investment) provided a second deed of trust to Dal-Rich Investments based on the belief that there were significant equity in the subject property. A title insurance company (Southwest Title Ins. Co.) provided a clear title report and estoppels letters for the funding of the loan. However, Dal-Rich stopped paying mortgage payments seven months after the start of the loan. Northland Investments subsequently discovered that there was considerably more mortgage debt than previously disclosed to Northland Investment by Southwest Title Ins. Co. Because of this, there was not enough equity to cover Northland Investment's losses and they sued Southwest Title Ins. Co. for damages.

Northland Investment argued that Southwest Title Ins. Co. had provided an inaccurate title report that did not indicate that the first trust deed contained a dragnet clause. The Superior Court determined that it was the duty and responsibility of Southwest Title Ins. Co. to have found and disclosed all prior liens, as well as any dragnet clauses to the mortgagee. It held Southwest Title Ins. Co. liable.

Types of Liens

Lis Pendens

A ***lis pendens*** is a formal notice that a lawsuit concerning real estate has been filed against a property. *Lis pendens* literally translates to "suit pending".

Typically, a lender records a *lis pendens* against a defaulting borrower's property as a means of protecting its financial interests. While a *lis pendens* is technically not a lien, it clouds a property's title and alerts potential buyers and/or lenders that a property's ownership is in question.

A property owner may still sell a property with a *lis pendens* attached; however, it dramatically reduces the property's value and appeal to prospective buyers. This is because a lender's claims to the property are not extinguished in the event of a sale;

rather, a new buyer will still be subject to the outcome of the lawsuit.

A *lis pendens* also prevents a property owner from refinancing.

A *lis pendens* must be approved and signed by an attorney, and subsequently recorded in the county land records office.

If a property owner believes that a *lis pendens* claim is invalid, he or she can file a counter lawsuit for its removal. It can be removed in court if a judge finds the claims to be unsubstantiated.

Tax Liens

A **tax lien** is an involuntary lien resulting from the property owner being substantially behind on real property taxes. Put more simply, a tax lien refers to unpaid property taxes.

In the United States, tax liens hold seniority over all other liens, regardless of the loan amount or the date another loan was initiated. In the event that a defaulting borrower's property forecloses, a tax lien will always be satisfied first.

Tax liens must be paid off in order for someone to live on the property. Therefore, a potential buyer of a foreclosed property must pay the unpaid property taxes before he or she may take ownership of the property.

A **real property tax assessment** refers to when the government evaluates a property to determine its base value. A property's value is reassessed whenever a property is sold, or when the value of the property increases significantly. Property taxes are calculated based on the property value and are known as **ad valorem taxes**.

A property is not reassessed for property taxes when:

- It transfers to a spouse
- It transfers to a family member
- It transfers to children through a sale, gift, or inheritance
- Alterations make minor changes to the value

Property owners must make two annual property tax payments: one before April 10th and one before December 10th. Tax guidelines are released before September 1st of every year.

When residential real estate property owners default on property taxes, they have a five-year redemption period. Commercial real estate property owners have three years.

However, their properties will appear on tax-defaulted property rolls. This means that their properties can be purchased by a buyer as a tax debt. This temporarily supplies the government with the defaulting party's property taxes, while allowing the buyer to gain interest in the property. Then, if the property foreclosures after the redemption period, the tax debt buyer can potentially recoup the property and the opportunity to sell it.

As the government wants to maximize its collection of property taxes, it has a strong interest in property owners retaining their homes. Therefore, certain groups of people can defer property taxes on their primary residence in order to avoid foreclosure. Tax-deferred groups include seniors and the disabled.

Judgment Liens

A **judgment lien** is a court-ordered, involuntary lien that grants a lender the ability to take possession of a borrower's property if the borrower fails to meet his or her financial obligations to the lender. Because unsecured debt is difficult to collect after a borrower stops making payments, a judgment lien is the best way for lenders to recoup their losses.

A judgment lien prevents a property owner from refinancing or selling his or her property until a debt has been repaid. If a debtor does not satisfy his or her debt, his or her property may be seized and/or sold.

A lender may only place a judgment lien on a borrower's property if the lender files a lawsuit against the borrower and wins. If the court indicates that a judgment is a proper legal remedy for the damaged party to collect their money, an **abstract of judgment** is issued. This written statement from the court summarizes the terms of a judgment against a borrower and/or places a judgment lien on the borrower's property.

When a borrower does not own real property on which to place a lien, a lender has the right to place a lien on the borrower's future real estate purchases.

The priority of judgment liens is based on the date of judgment. However, judgment liens never take precedence over purchase and refinance-based liens which are mortgages, or tax liens.

Judgment liens can be terminated for the following reasons:

- The borrower pays off the debt
- The borrower declares bankruptcy
- The borrower and lender reach a settlement
- Statute of limitations is reached

If a borrower pays off his or her debts, the county must be informed and remove the judgment lien from the property within 20 business days of the payment.

If both the lender and the borrower consent to a settlement -- which could be a full or partial payment of the original debt -- the judgment lien may be removed. A lender will usually consider settling a debt for pennies on the dollar as a way of recouping some of their losses.

The statute of limitations for a judgment lien is ten years after its recording. If a property with a judgment lien forecloses and the borrower buys a new property within the ten year time frame, the judgment lien shifts to the borrower's new property. If it is more than ten years, however, the lender loses the right to collect the debt.

Writ of Attachment

A **writ of attachment** -- also known simply as an "attachment" -- is a specific, involuntary lien that grants the courts the right to seize (or "attach" to) a property in order to satisfy a judgment against a borrower. A writ of attachment is the next step after a lien has not delivered a satisfying result for the party that is owed money.

To do so, a lender must file a lawsuit against a borrower. Lenders must supply the court with documentation of the amount of debt owed by the borrower, as well as demonstrate the vital facts detailing why an attachment lien is necessary to protect its financial interests.

If the court sides with the lender, it will file a writ of attachment. The borrower must be notified prior to the court's granting of an attachment, however. The ensuing attachment hearing allows a borrower to present his or her side of the facts.

If the lender wins the case and/or a borrower does not respond to the attachment claim, the court will file a writ of attachment. A local sheriff will subsequently seize control of the property and may put it into foreclosure. In order to have the property restored, the borrower must either pay the full debt amount, settle the debt, or establish a repayment plan.

A property owner cannot sell his or her property when an attachment is present. This is to prevent borrowers from transferring a property to a family member, friend, or third party in order to avoid paying a lender. If a lender believes that a borrower is planning to sell his property so he can leave town and avoid paying his debt, the lender may choose to file for a writ of attachment in order to prevent the sale from taking place.

The statute of limitations for a writ of attachment is three years. However, the courts may extend an attachment period, or release it entirely, if they deem it necessary.

Conversely, if the court rules in favor of the borrower, the lender cannot apply for an attachment in the future.

In the past, it was much easier to obtain an attachment from the courts. Many property owners lost their properties for a simple debt that could have been settled. That is why The Supreme Court established a basic attachment process. Nowadays, it is much more difficult to place an attachment lien on a borrower's property.

Homeowners' Association Liens

A homeowners' association (HOA) can place an involuntary lien on a property owner's property for being delinquent on 12 or more months of HOA fees. The minimum unpaid balance must be at least $1,800 in order to place a lien on the property, or to foreclose.

Mechanic's Liens

A **mechanic's lien** -- or construction lien -- is an involuntary lien filed against a property by a contractor who has performed services on behalf of a property owner, but is subsequently not paid for those services.

Any licensed contractor who supplies labor and/or materials may file a mechanic's lien if a property owner defaults on his or her payment obligations. Such liens serve to protect a contractor's financial interests. However, a property owner must have equity in the property in order for a mechanic's lien to have an effect.

A mechanic's lien clouds a property's title, therefore preventing a property owner from refinancing or selling that property. A property owner must pay the full debt amount, settle the debt, or establish a repayment plan in order to terminate a mechanic's lien claim. An owner may also file a surety bond covering up to one and a half times the cost of the lien amount.

If left unpaid, a mechanic's lien will result in the foreclosure of the property. Even in the event of a foreclosure, a mechanic's lien will remain on the property until the full debt has been paid off.

The priority of a mechanic's lien in relation to other liens is based on the date that a project begins. This means the sight of the first employee, or when material is first delivered to the job site.

For example, say Bob begins work on remodeling Mrs. Baker's house in May. In June, Mrs. Baker takes out a loan from the bank in order to fund the project. However, Bob and Mrs. Baker get into a dispute. When Mrs. Baker refuses to pay Bob in October, he files a mechanic's lien. Even though the mechanic's lien was filed in October, the project's start date was in May, therefore granting Bob's mechanic's lien priority over the bank's loan.

In the construction business, various contractors and subcontractors may provide work for the same property owners. The flow of money from a property owner to contractors and subcontractors can oftentimes create payment disputes.

Therefore, it is advisable for parties to sign a release form after each step of a project. A release form should indicate any payments that have already been submitted, the payments that are still owed, and the expected dates on which those payments will be received. Property owners should also include a signature line on which contractors agree not to file any mechanic's liens after full payment has been received.

Business and Professions Code Section 7031 (a) states that an unlicensed contractor cannot sue in order to recover compensation for the performance of services. Only contractors who are licensed throughout the entire contract are able to recover for damages in the event of an owner not paying for services rendered by the contractor. Therefore, an unlicensed contractor cannot file a mechanic's lien against a property owner.

Case Review: *Opp v. St. Paul Fire and Marine Ins. Co.* (2007)

The case, *Opp v. St. Paul Fire and Marine Ins. Co.* (2007) 154 Cal.4th 71., involved a dispute between a bond company and an unlicensed company seeking to recover a bond.

A licensed California contractor (Opp) acquired a construction job for California State University. Opp subcontracted much of the project's work to a general contractor (Mauldin-Dorfmeir). However, the contract was signed with Opp's unlicensed contracting company (Mountain Connection), not Opp personally. A bond company (St. Paul Fire and Marine Insurance Company) provided a bond for Mauldin-Dorfmeir's work.

During the project, Mauldin-Dorfmeir filed for bankruptcy. However, St. Paul Fire and Marine Insurance Company refused to pay Opp, citing that Mountain Connection was not licensed in California. Opp sued the bond company to recover on the payment bond.

St. Paul Fire argued that Opp had "no standing to sue" because he was not a party to the contract. Opp contended that the contract contained his personal signature and licensing information and therefore, he was able to recover the bond. The court cited Business and Professions Code 7031, which states that unlicensed corporations are not entitled to recovery. The actual party listed on the contract was Mountain Connection, not Opp; therefore, the court concluded that Mountain Connection could not recover the bond.

Opp appealed, but the Court of Appeals upheld the lower court's ruling.

Case Review: *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works, Inc.* (2005)

The case, *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works, Inc.* (2005) 36 Cal.4th 412., involved a subcontractor who brought legal suit against a contractor that refused to pay for completed work.

A subcontractor (MW Erectors) performed work for a hotel on behalf of a contractor (Niederhauser Ornamental & Metal Works). The two projects that MW Erectors performed were structural steel ($955,552.89) and ornamental metal ($366,699). MW Erectors was unlicensed when the structural steel contract was formed, but became licensed by the time work began on the ornamental metal project.

After MW Erectors' work was successfully performed, Niederhauser Ornamental & Metal Works refused to pay. It argued that because MW Erectors had been unlicensed at the time of the contract's execution, the subcontractor was not entitled to payment. MW Erectors sued for damages in excess of $1 million.

Citing Business and Professions Code 7031 -- which states that parties can only recover when licensed -- the Superior Court ruled in favor of Niederhauser Ornamental & Metal Works. MW Erectors appealed. The Court of Appeals reversed the lower court's ruling, holding that MW Erectors was entitled to full recovery. Niederhauser Ornamental & Metal Works appealed to the Supreme Court.

The Supreme Court argued that although MW Erectors performed significant work on the structural steel project, the subcontractor had not been licensed at the time. Therefore, the subcontractor was not entitled to recover. However, it did rule that MW Erectors could collect for the ornamental steel project, as the company had been licensed at the time of that project's execution.

This case remains a case of contention. Many critics believe that Niederhauser Ornamental & Metal Works took advantage of MW Erectors and gained over $950,000 in free work. They claim this set the wrong precedent for future cases.

Case Review: *Hydrotech v. Oasis Waterpark* (1991)

The case, *Hydrotech v. Oasis Waterpark* (1991) 52 Cal.3d 988., involved an unlicensed subcontractor who brought action against a waterpark for its failure to pay for services the subcontractor had provided.

An unlicensed subcontractor (Hydrotech) installed a surfing pool at a waterpark (Oasis Waterpark). Oasis Waterpark was aware that Hydrotech was unlicensed at the time of the contract's execution, and did nothing to prevent the subcontractor from performing services. Upon completion of the work, Oasis Waterpark refused to pay Hydrotech for its services. Hydrotech sued.

Hydrotech argued that this was an "exceptional circumstance" because it was the only company that could perform the required task. However, the court ruled in favor of Oasis Waterpark. The Court of Appeals partially affirmed the lower court's ruling. Oasis Waterpark appealed the decision to the California Supreme Court.

The Supreme Court contended that since Hydrotech was not licensed at the time the work was performed, the subcontractor was therefore not entitled to recover damages.

Filing a Mechanic's Lien

Preliminary Notice

A **preliminary notice** is a notice that must be supplied to a property owner by a contractor informing the owner of the contractor's right to file a mechanic's lien. It must be provided prior to filing a mechanic's lien or a contractor's right to a mechanic's lien becomes void.

A preliminary notice is not valid until a property owner defaults on a payment. If this occurs, a contractor must supply a notice within 20 days of first providing labor or materials on a property. If a notice is supplied outside of the 20 day period, a mechanic's lien will only cover the portion prior to at least 20 days of performed work.

A preliminary notice must be given to a property owner in person or through certified mail in order to confirm that it has been received.

A preliminary notice must contain the following:

- Name of contractor
- Name of property owner
- Job site address
- Description of work to be performed
- Description of material, labor, and other vital data required to perform the work
- Cost of service

Cessation of Work

Cessation of work occurs when a contractor stops or postpones work on a project, usually because of a payment dispute with a project owner.

A **notice of cessation** is a written notice provided by a project owner stating that no work has taken place at a project site for a certain period of time. It may be recorded if there has been a cessation of labor for a continuous period of 30 days.

A **notice of completion** is a written notice provided by a project owner that notifies all parties of the completion of work. "Completion" may refer to an actual completion of services, or a cessation of labor for a continuous period of 60 days. It may be recorded on, or up to 15 days after the date of completion.

Both notices are utilized as a means of reducing the time that contractors or subcontractors may record a mechanics lien or serve a stop notice.

California Civil Code Section 3259.5 states that a project owner must provide a contractor with a notice of completion or a notice of cessation within 10 days of its recording. (Residential property owners do not need to serve such notices, however, if the property is only one to four units.) Notices should be served in person, or by registered/certified mail.

A contractor must file a mechanic's lien within 60 days of the recording of a notice of completion or notice of cessation. Subcontractors have up to 30 days to file. Failure to adhere to these proper deadlines may void the contractor's right to a valid claim for a mechanic's lien.

Failure by a project owner to provide a notice of cessation or a notice of completion within 10 days of recording, however, extends the period of time in which a contractor can file a mechanic's lien from 60 days to 90 days.

Verification

A mechanic's lien cannot be placed on a property until it is verified. **Verification** is a sworn statement under oath regarding the validity of a claim. In the case of a mechanic's lien, this occurs when a contractor provides a court with proof of his/her claim to a mechanic's lien, including documentation of the service agreement and the services performed.

If there is no documentation to support a contractor's claim to a mechanic's lien, the contractor must make an affirmation. An **affirmation** is a legal declaration -- similar to an oath -- that verifies information to be true.

In order for a lien to be enforceable the lien must be held as valid, otherwise known as perfected. The following is required for a lien to be held valid:

a. Provide preliminary notice to property owner regarding the claim

b. File notice in public building office

c. File a lawsuit to initiate the foreclosure process

Notice of Nonresponsibility

In the event that a property owner does not authorize work to be performed on his or her property, he or she must provide a contractor with a **notice of nonresponsibility**.

The purpose of such a notice is to make it clear that a contractor does not have the right to continue working on a property, and that his or her work will not result in payment. This protects property owners from unscrupulous contractors who attempt to perform unauthorized work with the intention of collecting money to which they are not entitled.

A notice of nonresponsibility includes:

- Name of the property owner and/or party enforcing the notice
- Name of contractor
- Property address
- Description of situation
- Brief statement indicating that the property owner does not authorize the work being performed

A notice of nonresponsibility must be provided within 10 days of the property owner becoming aware of the activity.

The property owner must post the notice in an easy to find location. The owner should also retain a copy in the event that the posting is removed.

When properly created, a notice of nonresponsibility voids a contractor's right to place a mechanic's lien on the property. However, failure to comply with the aforementioned regulations gives a contractor the legal right to place a mechanic's lien on the property, even if the work was not authorized.

A common situation in which a property owner might utilize a notice of nonresponsibility is when a tenant commissions a contractor's services without the owner's authorization. Even if the work is in the tenant's unit, the property owner is the titleholder and will ultimately be responsible for the work. The property owner should post the notice to alert the contractor that his or her work is not authorized. The ten day period for posting begins as soon as the owner is aware of the work.

If the court determines that a mechanic's lien was wrongly placed on a property and removes the lien, the contractor who filed the lien may be subject to a $2,000 penalty for the cost of the court and attorney fees.

Case Review: *Los Banos Gravel Company v. Freeman* (1976)

The case of *Los Banos Gravel Company v. Freeman* (1976) 58 Cal.3d 785., involved a contractor who sued a property owner over responsibility of construction materials.

A contractor (Los Banos Gravel Company) was hired to construct a service station and restaurant on a leased piece of land. The property owner (Freeman) leased the land to the owner of the service station. Lease payments were based on the gross generated income of the service station and restaurant.

Construction materials delivered by Los Banos Gravel Company were nowhere to be found.

Los Banos Gravel Company alleged that Freeman was responsible for paying for the delivered construction items. Freeman claimed that because he was not the owner of the business, he was not responsible, and therefore, he refused to pay. Los Banos Gravel Company sued.

The Superior Court concluded that since Freeman earned a percentage of the service station's gross generated income through lease payments, he could not claim nonresponsibility. The court also contended that Freeman could be held liable for a lien, even if he was not the sole owner of the service station and restaurant.

Stop Notice

A **stop notice** is a notice that traps, or "stops", funds that have not yet been paid to a contractor on a construction project in an attempt to ensure payment. A contractor must file a preliminary notice prior to serving the stop notice.

A stop notice is typically used instead of, or in addition to, a mechanic's lien. While a mechanic's lien prevents a property from being sold, transferred, or refinanced, a stop notice traps the funds on the project which means the property owner cannot spend any construction money on the project or pay other contractors until they pay the party that files the stop notice. Its purpose is to bring the alleged violating party to the negotiating table.

Unlike a mechanic's lien, a stop notice does not attach to a property or cloud a property's title. Rather, the legal obligation created by the notice is independent of the property on which work is performed and attaches only to money that has not been paid. Such notices are not recorded on property records, and instead sent to a project manager.

A stop notice must include:

- Name of property owner
- Name of contractor
- Description of work completed
- Description of damages and costs to cure

Stop notices are most popular (and legal) in California, Arizona and Mississippi. While they do exist in a few other states, they are rarely used. A contractor cannot serve a stop notice to a party in a state that does not recognize stop notices.

Writ of Execution

A **writ of execution** is a court-ordered judgment whereby a court takes possession of a defaulting borrower's property as a means of collateral for a lender. The seized property may be a physical piece of real estate or a borrower's bank account.

To file for a writ of execution, a lender must file Form EJ-130 with a court. Some courts may also require the lender to submit an affidavit detailing the borrower's debt. Should the court approve a lender's request for a writ of execution, the court will order a sheriff to seize the borrower's property.

The lender may then foreclose on the property as a means of recouping its losses. The property is sold at a public auction known as an **execution sale**, or **sheriff's sale.** The property transfers to the new buyer via a **sheriff's deed**. The purchase of a property from a sheriff's sale is not protected by any warranties; it is the new buyer's responsibility to inspect the property's title history before purchasing.

California courts always attempt to help a property owner avoid foreclosure when it is an option. If a writ of execution has been requested, a borrower is given the option to pay off the debt, get on a payment plan, or settle the debt with the lender. A court may also grant a temporary freeze on the borrower's property title or place a lien on the property, instead of foreclosing.

Some forms of income and assets are exempt from a writ of execution:

- social security income
- retirement accounts (i.e. IRAs)
- unemployment income

A writ of execution is only valid for 180 days. After that period, it must be renewed.

Case Review: *Palmer v. Zaklama* (2003)

The case, *Palmer v. Zaklama* (2003) 109 Cal.4th 1367., involved a dispute that included a mechanic's lien, a sheriff's sale, and a wrongfully recorded *lis pendens*.

The Zaklama family lived on a property that was current on all payments, including mortgage and property taxes. When the family decided to move to Los Angeles, they transferred the property to a property manager (Sykora). Sykora was responsible for taking care of the property and renting it out.

During this period, Sykora had various repairs made to the property. The total cost of the repairs exceeded $9,000. The Zaklamas refused to pay. To recover the outstanding balance, Sykora obtained a mechanic's lien judgment for the amount of $9,000. The court issued a writ of execution against the property and it was sold in a sheriff's sale to a buyer (Palmer).

Upon the sale's execution, the Zaklamas filed multiple lawsuits, including a *lis pendens* and a civil rights lawsuit against Palmer. The civil rights action sought to rescind the sheriff's sale on the grounds that the Palmer was in "cahoots" with Sykora and the sheriff to acquire the property's title. In response, Palmer filed a counter lawsuit against the Zaklamas, alleging malicious prosecution, slander of title, and abuse of process.

The Superior Court concluded that the Zaklamas were liable for damages due to the wrongful recordation of a *lis pendens*. The court awarded Palmer compensatory and punitive damages totaling $230,000 to recover losses as a result of the *lis pendens*, including the inability to sell the property or retain financing. The Zaklamas appealed. The Court of Appeals affirmed the lower court's ruling.

Foreclosure

Foreclosure is the process of terminating a property owner's right to possess and use a particular property.

This is typically due to an inability or refusal to uphold mortgage payments, property taxes, or H.O.A. fees for a sustained period of time.

Foreclosure Process

Foreclosure can take anywhere from six months to more than a year. However, the length of the foreclosure process depends on state law and other factors, such as if a borrower is attempting to save a property from foreclosure.

There are three steps in the foreclosure process:

- Notice of default
- Notice of sale
- Trustee sale

Notice of Default

A **notice of default** is a notification supplied by a lender to a borrower which indicates that the borrower is behind on mortgage payments and in violation of his or her loan obligations.

A notice of default is typically issued after the fourth missed payment. It states how much the borrower owes, including the balance, interest, fees, penalties, and any other costs required to bring the loan current.

A lender must provide a borrower with a notice of default within 10 days of recording the default. The notice must be sent through certified mail.

The primary lien holder is responsible for providing a notice of default to parties with an interest in the property, including the borrower and junior lien holders.

Notice of Sale

A **notice of sale** is an acceleration of a notice of default. At this point, a borrower must pay back the lender for defaulted debt obligations in order to keep his or her property. The notice includes the borrower's name and property address, as well as a statement that the property will be sold in auction and the auction date.

In order for a notice of sale to be valid, a lender must post it on the property in question, as well as in a public place (such as the courthouse or DMV) for over 30 consecutive days.

Trustee Sale

When a borrower defaults on payments to a lender, and the lender has followed the aforementioned steps, the lender has the right to sell the property in a trustee sale. A **trustee sale** is a public auction in which a defaulted borrower's property is sold.

The trustee sale is published in local newspapers to inform the public of the sale.

Trustee sales are managed by a trustee. As the possessor of the foreclosed property, a trustee has the authority to create, postpone, and/or cancel sale dates. Sale dates may change as the lender generally gives the borrower some time to catch up on mortgage payments. A trustee also has the ability to reject or accept any offer prior to that time. However, a trustee may not postpone the sale of a property beyond one year.

It is common for the trustee to start the initial bidding price at the outstanding balance of the senior lien. This ensures that the lender will get all of its investment back. The trustee may also base the bidding on the condition of the property, the value of nearby real estate, and the fact that the property must be bought in cash.

When a buyer purchases a property through a trustee sale, he or she is awarded immediate possessory rights.

Case Review: *Melendrez v. D & I Investment, Inc.* (2005)

The case, *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.4th 1238., involved a dispute over an oral agreement made between a borrower and a lender to schedule a payment plan.

A borrower (Melendrez) fell eight months past due on his mortgage payments. He subsequently received a notice of default from his lender. In response, the two parties had an oral agreement to schedule a payment plan to stop foreclosure proceedings. However, the lender proceeded with the foreclosure sale. It sold the property to a buyer (D & I Investment) for $197,100, even though the value of the property was above $350,000.

Melendrez initiated a lawsuit against D & I Investment, claiming that the sale violated the oral agreement to schedule a payment plan that he had made with the lender.

The Superior Court argued that there was no proof of the oral agreement. Therefore, the foreclosure sale was legal and D & I Investment was not liable. Melendrez appealed. The Court of Appeals upheld the lower court's ruling.

Case Review: *Lo v. Jensen* (2001)

The case, *Lo v. Jensen* (2001) 88 Cal.4th 1093., involved a dispute over a foreclosed condominium that was bought at a public auction.

A condominium owner (Lo) owned a condo valued at $150,000. However, Lo fell behind on his H.O.A. fees by $5,412. A homeowners' association lien was filed and Lo's property went into foreclosure.

An experienced foreclosure buyer (Jensen) planned to purchase the property at a public auction. Another buyer (Ko) approached Jensen and suggested that they bid together. By doing so, they could prevent the open and fair bidding of the auction process and acquire the property for far less than its true value. Jensen agreed. The two buyers were able to purchase the property for the amount of the H.O.A. lien ($5,412). As the property did not have any additional liens, this meant that they were the sole owners of the property.

Lo sued alleging Jensen and Ko conspired together to purchase the property in an illegal manner. The Superior Court concluded that Jensen and Ko had illegally joined together to eliminate competition, helping them secure the property for only 3% of its market value. It held them liable. Jensen appealed. The Court of Appeals affirmed the lower court's ruling. It cited the Civil Code Section 2924, which makes it illegal to "fix or restrain bidding at a foreclosure sale".

Foreclosure Consultants

When a property owner defaults on a mortgage, he or she may hire a foreclosure consultant. A **foreclosure consultant** -- or loss litigator -- is a specialist who is hired to stop or postpone a foreclosure sale.

California's legislature has determined that foreclosure consultants can be held liable for damages resulting from the foreclosure of a borrower's property. Civil Code Section 2945 states that any agreement between a borrower and a foreclosure consultant must be in writing. This prevents potential fraud or deceit by consultants who might use their position to purposefully force a property's foreclosure so as to purchase the property for themselves or sell it at a discounted price to a buyer in exchange for a fee.

Types of Foreclosure

There are two categories of foreclosures: nonjudicial and judicial foreclosures. A **nonjudicial foreclosure** is negotiated between the lender and borrower, whereas a **judicial foreclosure** goes before the court. The foreclosure process varies significantly based on whether the foreclosure is judicial or nonjudicial.

Nonjudicial Foreclosures

Most loans in California are funded for residential real estate and are nonjudicial.

Mortgage Foreclosure

In California, a lender who extends a mortgage loan to a borrower has the right to foreclose on a property if the borrower fails to make multiple monthly mortgage payments.

The mortgage foreclosure process begins with the lender initiating a lawsuit against the mortgagor for nonpayment. The lender will provide the court with a summons and issue a formal complaint against the property owner. Most lenders have attorneys or third party organizations that issue notices to the borrower and other lien holders.

Depending on the state and the amount of months the borrower is behind, the borrower has about 30 days to respond to the lawsuit. Should the borrower disagree with the contents of the lawsuit, the lender must respond. Generally the matter is very easy to figure out. This is because if a borrower is behind on the mortgage, there is very little to discuss or dispute. The foreclosure proceeding will continue until the borrower comes current with the loan or agrees to a repayment plan.

A junior lien holder may make a request to be informed when a trustor is given a notice of default. This is called a **request for notification of default.**

Once a borrower responds to the lender's lawsuit, the lender must counter or provide factual evidence on what the situation is and why a foreclosure proceeding may result. Each correspondence must follow standard court procedures. Failure to adhere to standard court rules will prevent the foreclosure from taking place. There is no specific timeframe for how long a foreclosure takes, however it must be noted that because the lender and borrower have to formally respond to each other through the court system, the foreclosure process is usually lengthy.

After reviewing the contents of the borrower's delinquency, if the court determines the foreclosure valid, the property will be sold at public auction by the county sheriff where bidders can offer cash for the purchase of the property. In auction, the highest bidder gets the property. The foreclosure of a property would wipe out all junior lien holders if the sold price is less than the first mortgage.

In the event the sale price of the property is higher than the first mortgage, any remaining proceeds will be used to pay junior lien holders. Lien holders are based on priority, amount funded, and the date the lien was placed on the property.

The borrower has the ability to prevent foreclosure up until the day of the foreclosure proceedings. Before a formal foreclosure, the court will determine what the borrower needs to do to prevent the sale of the property. If the borrower meets the demands of the lender and the directions of the court, the borrower can take their property out of pre-foreclosure. If the borrower comes current on mortgage payments, the lender does not have the right to proceed with the foreclosure, even if they have to spend a significant amount of time and money recovering for damages.

Trust Deed Foreclosure

Should the borrower fail to meet their obligations, the lender has the right to foreclose on the property. Foreclosure may occur because of a borrower's failure to make mortgage payments, pay property taxes, HOA fees, or pay insurance fees.

Case Review: *Webber v. Inland Empire Investments, Inc.* (1999)

The case of *Webber v. Inland Empire Investments, Inc.* (1999) 74 Cal.4th 884., involved a dispute regarding fraud between a senior and junior lien holder.

Four parcels of land were sold to a corporation (Forecast Mortgage Corporation) for $4.5 million. Forecast Mortgage executed a promissory note with a lender (Hyatt) for $754,000. Webber was the assignee of both the Hyatt note and the deed of trust for one of the four parcels of land.

Sanwa Bank lent Forecast Mortgage Corporation the remaining $3.6 million. As security, Forecast Mortgage gave Sanwa Bank a deed of trust on all four parcels of property. The Sanwa deed of trust was recorded before the Hyatt deed of trust and was therefore senior to the Hyatt deed of trust.

During this time, the title to the property was transferred from Forecast Mortgage to Forecast Corporation, and then to All Cities Storage. (All of these companies were subsidiaries of Inland Empire Investments.) Forecast Mortgage also stopped making payments on the Hyatt note. Inland's owner (Previti) then purchased the promissory note and deed of trust from Sanwa Bank and allowed Forecast Mortgage to default on the note. At this point, Inland Investments -- the senior lien holder -- foreclosed on the property. This extinguished Webber's junior lien, resulting in a loss of $754,000 plus interest.

Webber sued Inland Empire Investments for declaratory relief and conspiracy to defraud. Webber alleged that the defendants had "joined together" to eliminate his junior lien through planned transactions which resulted in a "sham foreclosure" on the senior lien. The Superior Court agreed with Webber and ruled that Inland Empire Investment's actions were illegal. Inland appealed. The Court of Appeals affirmed the lower court's ruling.

Judicial Foreclosures

As stated, judicial foreclosures involve the foreclosure process going to a court.

If the loan was a trust deed and did not include the power of sale provision, the lender could foreclose using a judicial foreclosure. This occurs when the borrower defaults on debt obligations and the lender sues for the amount owed. The purpose of the lender going to court to foreclose on a borrower's property is to get a deficiency judgment against the borrower.

In California, a borrower cannot appeal a court's decision to foreclosure unless the borrower has evidence indicating the lender made errors producing or servicing the loan or if the lender made errors during the foreclosure process.

Common errors that the borrower could cite are:

- Foreclosure took place based on factually incorrect information
- Foreclosing party didn't follow the required legal steps to foreclose
- The lender engaged in unfair lending and/or servicing practices that violate state or federal law
- Foreclosing party is the junior lien holder and does hold senior interest in the property

Deficiency Judgment

A **deficiency judgment** is an unsecured financial judgment filed against a defaulting borrower when a judicial foreclosure does not produce sufficient funds to pay back the lender.

Should a lender decide to pursue the deficiency judgment, the lender must file an application for judgment with the court within 3 months of the foreclosure. The judge will review the specifics of the case and determine the market value of the property. According to California Code of Civil Procedure Section 726(b), if awarded, the judgment amount will be limited to either the debt amount that exceeds the foreclosure sale price or the debt amount that exceeds the sale price of the property at the time of the foreclosure sale.

However, it is rare in California for a court to award a deficiency judgment against the borrower in a judicial foreclosure. If awarded by the court, the deficiency may garnish wages or levy the borrower's bank account to recover for losses.

Nonjudicial loans/foreclosures are not subject to deficiency judgments (California Code of Civil Procedure Section 580(d)). This means that most Californian borrowers are not subject to pay additional costs even if the proceeds from a foreclosure do not cover the full debt amount.

Other situations in which a deficiency judgment is not allowed include:

- When the loan was used to purchase a 1-4 unit owner-occupied property
- When the loan was a seller-financed loan, also known as a seller carry back loan
- A refinanced purchase loan that was originated after January 1, 2013

Case Review: *Bank of America v. Daily* (1984)

The case, *Bank of America v. Daily* (1984) 152 Cal.3d 767, involved a lender that attempted to collect two forms of payment from a defaulting borrower.

A borrower (Daily) defaulted on a loan to his lender (Bank of America). In response, Bank of America manually deducted payments from Daily's checking account without his authorization. Shortly thereafter, Bank of America also initiated foreclosure proceedings. Daily sued.

The Superior Court ruled in favor of Bank of America and entered a judgment to foreclose on the property. Daily appealed. The Court of Appeals reversed the lower court's ruling. It reasoned that a lender may only take one type of action to collect money from a defaulting borrower; by taking payments from Daily's checking account as accrued interest, Bank of America had exhausted its one action. Therefore, it ruled that Bank of America had waived its rights to judicially foreclose on Daily's deed of trust.

Case Review: *First Commercial Mortgage Co. v. Reece* (2001)

The case, *First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.4th 731., involved a lender who purchased a mortgage note based on inaccurate information.

A lender (First Commercial) provided a $207,593 loan for a property to a borrower. The loan amount was based on the appraisal report prepared by the borrower's loan broker (Reece). Later, First Commercial sold the loan to First Nationwide Mortgage. The sale of the mortgage note included a contractual clause which indicated that bad loans would be repurchased by First Commercial in exchange for the property rights.

Soon after the loan's origination, the borrowers fell behind on mortgage payments. Subsequently, First Nationwide foreclosed and made a successful bid at the trustee's sale. At this point, it was discovered that Reece had grossly inflated the property's value to $215,000, when in fact the property was worth less than $100,000. First Commercial was required to repurchase the loan from First Nationwide. It did so and sold the property at a loss. First Commercial Mortgage brought legal suit against Reece for fraud, negligent misrepresentation, and breach of contract.

The Superior Court ruled in favor of Reece on the basis that the full credit rule barred First Commercial from recovering because the resulting foreclosure covered the loan's debt. First Commercial appealed. The Court of Appeals reversed the lower court's ruling. It contended that First Commercial "did not make the full credit but, rather, sustained damages from a compelled repurchase of the loan from the secondary lender, and that it relied upon borrower's false representations extending the loan and then selling to secondary lender."

Avoiding Foreclosure

Right of Redemption

In California, the **right of redemption** gives a borrower the ability to reclaim his or her foreclosed property within a specific period of time. The purpose of redemption is to help borrowers avoid foreclosure on their primary residence.

A borrower may execute the right of redemption in one of two ways:

1. By paying off the total mortgage debt, including the principal, interest, taxes, late fees, title insurance, and applicable fees
2. By paying for the purchase price of the property

The first option occurs prior to foreclosure. A borrower can avoid foreclosure by paying off unpaid mortgage payments or other liens. Typically, lenders will only write off a foreclosure if a borrower has made a full re-payment, or paid at least 3 consecutive months of payments on a repayment program.

However, most right of redemption cases occur after a property has been foreclosed and sold at a foreclosure sale. In this case, a borrower must pay back the amount for which the property was purchased.

If a borrower's foreclosed property is sold in an auction, the highest bidder will be awarded a **certificate of sale**. However, a certificate of sale is subject to the borrower's right of redemption. If the borrower produces the funds to purchase back the property within a given time period, the other party's certificate of sale is void.

The time a borrower has to pay back a lender -- known as the redemption period -- varies. If the proceeds from a foreclosure sale are less than the mortgage debt, the borrower has up to 12 months to pay the amount back. If the proceeds are more than the mortgage debt, the borrower has 3 months.

If a borrower pays back the debt within the redemption period, he or she is once again the legal owner of the property. A lender cannot prevent a borrower from paying back a loan in an attempt to take over the property.

A borrower can reassign his or her right to redemption to a third party. Only the borrower or the third party have the ability to utilize the right of redemption for the purpose of reclaiming the property.

During the redemption period, a borrower has the right to use the property in exchange for rental payments made to the lender.

Deed in Lieu of Foreclosure

A **deed in lieu of foreclosure** -- also known as a mortgage release -- is a foreclosure alternative that allows a defaulting borrower to transfer a property title to a lender.

By voluntarily transferring a property to a lender, a borrower is spared from having a foreclosure on his or her credit. (A foreclosure prevents a borrower from buying another property for at least 5 years.) Conversely, a lender is able to avoid the expensive and time-consuming foreclosure process.

A deed in lieu of foreclosure should be used if:

- The borrower is behind on mortgage payments
- The borrower cannot refinance or modify the terms of the mortgage
- The borrower faces a long-term hardship
- The value of the property is less than the mortgage amount

- The owner cannot sell the home

When a lender and a borrower agree to implement a deed in lieu of foreclosure, a borrower is usually given up to three months to vacate the property.

Typically, lenders will not agree to a deed in lieu of foreclosure if there are other liens on the property. This is because a lender would then take on liability for those additional mortgages or liens.

Homestead

California has strict foreclosure laws that make it difficult for lenders to foreclose on a borrower's property. A **homestead** is a legal tool that protects a certain amount of equity in a property owner's principal residence from judgment liens that could lead to seizure or a forced sale.

Because foreclosures negatively impact the economy and place an undue burden on families, the homestead program was created to promote home ownership maintenance.

A homestead prevents a lender from using a property owner's equity to recoup a debt. A homestead does not protect property owners against property-related liens (i.e. tax liens, trust deeds, homeowners' association liens, mechanic's liens). Rather, it protects borrowers against lenders such as credit card companies, collection agencies, medical bills, and student debt.

A homestead applies strictly to primary residences, not investment properties. Investment properties are subject to more lenient foreclosure laws than primary residences. Any primary residence can qualify for a homestead, including single family residences, apartments, condominiums, or mobile homes.

There are two types of homestead programs:

- Homestead Exemption (Automatic)
- Homestead Declaration

Homestead Exemption

A **homestead exemption** is an automatic protection provided in California to everyone who owns, and lives in, a home. The amount of the exemption varies depending on the age, marital status, and income of the property owner:

- $50,000-$75,000 for singles
- $75,000-$100,000 for households

- up to $175,000 for senior citizens, the disabled, and low income residents (less than $15,000 annual income)

Homestead Declaration

Some property owners may choose to file a homestead declaration in addition to an automatic homestead exemption. A **homestead declaration** -- or declaration of homestead -- is a written statement asserting that a particular dwelling is a property owner's principal residence.

A homestead declaration offers additional protections to homeowners. Unlike with an automatic homestead exemption, a homestead declaration benefit is not automatically canceled if a home is seized or sold. Additionally, if a homestead goes into foreclosure, the proceeds of a foreclosure sale are protected from lenders for up to six months. (If there is enough money left over after the sale, however, the remaining equity may be required to go to the lender.)

A homestead declaration must be signed by the property owner, notarized, and recorded in the county recorder's office where the property is located.

Case Review: *Little v. Community Bank* (1992)

The case, *Little v. Community Bank* (1992) 234 Cal.3d 355., involved the sale of a homestead property.

A buyer (Little) purchased a home in a sheriff's sale through a judgment lender (Community Bank). Afterwards, Little discovered that the property had three previously undisclosed liens from the IRS that had not been paid off from the proceeds of the sale. The liens -- which totaled $103,465 -- were not listed on the title report. Therefore, Little was not the sole owner of the property. Little brought action against Community Bank for its failure to disclose the liens.

The Superior Court argued that Community Bank was guilty of negligence. It had violated Code of Civil Procedure Section 704.760, which requires "any liens and encumbrances to be listed by the enforcing lender". Furthermore, all lien holders are expected to be paid off prior to the close of the transaction in a homestead exemption sale. Therefore, the court ruled in favor of Little and awarded him damages.

Repossession of Mobile Homes

Lenders can repossess mobile homes, but the standard foreclosure process does not apply.

During the foreclosure process of mobile homes, a borrower has until the end of the mobile home sale to come current on payments. This is called the **right of reinstatement**. Borrowers can utilize the right of reinstatement only once every twelve months, and no more than two times during the duration of a loan contract.

A borrower loses the right of reinstatement if:

- her or she was approved for a loan by using false financial information
- the mobile home owner moved the mobile home in an attempt to avoid payment or repossession
- the borrower wasted the use of the mobile home.

Soldiers and Sailors Civil Relief Act

The **Soldier and Sailors Civil Relief Act** was enacted in 1940 to protect military men and women's properties from foreclosure during periods of active duty.

The Act makes it illegal for a lender to foreclosure on a military personnel's property due to defaulted mortgage payments, or to foreclose within three months of military personnel leaving the service. It also stipulates that a lender can charge military personnel a maximum interest rate of 6% per year.

The one exception to this Act is foreclosure by court order.

Bankruptcy

Bankruptcy is utilized by borrowers to delay and/or prevent the foreclosure process in order to retain a property. Chapter 7 and Chapter 13 bankruptcies bar a lender from foreclosing on a property.

When a borrower files for bankruptcy, a court issues an order for relief that directs lenders to stop all collection activities. However, as bankruptcy damages a borrower's credit for a long period of time, it is seen as a last resort.

Involuntary Real Estate Transfers

There are three ways in which property can be involuntarily transferred from a property owner to another title holder:

- Adverse Possession
- Eminent Domain
- Government Seizure

Adverse Possession

Adverse possession is a situation in which a party who does not have legal ownership to a property occupies the property without the permission of the legal owner, and has the property title involuntarily transferred from the owner to them.

The party who uses the property without permission is called a **disseisor**. Adverse possession can be claimed when a disseisor uses a property against the will of the legal owner for a continuous period of time without interruption from that owner. If a disseisor wins an adverse possession claim, he or she has the right to take legal possession of the property and its title without paying any money or exchanging any interest.

A disseisor cannot claim title through adverse possession of a government or publicly owned building. A property title belonging to a minor, a mentally-incapacitated party, or legally incompetent party cannot be claimed through adverse possession.

For example, imagine Fred whom is an elderly man owns multiple properties some of which he rarely visits or uses. Ted whom is a young guy realizes that no one ever uses the property Fred owns decides to make use of the property. One day Fred visits his property and realizes Ted is using the property however does nothing to prevent his use because he is intimidated by Ted and does not want to approach him. While Fred wants to remove Ted from the property, he has many other things to worry about including his health so Fred does nothing to forcibly remove Ted. Years later Ted claims Fred's property and takes over title through adverse possession laws.

There are certain requirements for a disseisor to claim a property title through adverse possession:

- *Possession of the Property:* A disseisor must occupy a property as if he or she was the owner. This includes engaging in activities that alter a property's landscape, such as planting crops, mowing the fields, clearing brush, or constructing a shed. It also includes paying property taxes. A disseisor cannot legally claim a right to a property's title without paying for the property's taxes.

- *Open and Notorious Use:* A disseisor's use of the property cannot be hidden. He or she must openly use a property against the wishes of the legal owner, and prevent others from using the property as well.

- *Continuous Use:* A disseisor must possess a property for five consecutive years without interruption. Interruption in possession ends the original five year period and begins a new one. In the event that a disseisor dies, or discontinues use of the property for the five year period, a successor of the disseisor may take over and complete the five year period. This is called **tacking on**. In order for tacking on to be considered valid in an adverse possession claim, the disseisor and the successor must have a relationship with one another.

- *Exclusive Use:* Title can only be claimed over the parts of the property that are physically used by the disseisor and are not consistently used by the legal property owner. The property must be used exclusively by the disseisor and no one else (unless the disseisor is renting the land). If the legal property owner uses the property, a disseisor's legal ability to claim ownership through adverse possession is no longer valid.

- *Hostile, Non-Permissive:* To claim title, a disseisor must use the property without the consent of the legal owner. If the legal owner consents to the disseisor's use of the property, an adverse possession claim is not valid.

- *Illegal Activity:* As a disseisor must use a property owner's land without his/her permission in order to make an adverse possession claim, a disseisor engages in illegal behavior. A disseisor actively violates a property owner's right to quiet enjoyment. Such actions may result in lawsuit against the disseisor. However, if the property's legal owner does not remove the disseisor from the property for a period of five years, the title will be transferred and the disseisor will take over the property through adverse possession.

Adverse possession is a hotly contested method of involuntary transfer. Critics claim that involuntarily transferring an owner's property is unjust and illegal, while proponents claim adverse possession is justified as it allows more efficient use of land for those who need it.

Case Review: *Preciado v. Wilde* (2006)

The case, *Preciado v. Wilde* (2006) 139 Cal.4th 321, involved a land user's claim to adverse possession.

A land user (Preciado) lived on a property owned by Wilde. He grew crops, paid property taxes, and even erected fences and made repairs to the property during the period of time he lived there. Preciado brought legal action against Wilde in an attempt to quiet title and claim the property through adverse possession.

The Superior Court contended that Wilde had continued to live on the property without interruption by Preciado; therefore, Preciado had not established open and notorious use of the land in violation of Wilde's rights. The court concluded that Preciado did not establish an adverse possession claim and denied his request to quiet title.

Eminent Domain

The Fifth Amendment of the United States grants the government the power to confiscate private property and divert it to public use through **eminent domain**.

The purpose of eminent domain is to convert private property for such purposes as the construction of roads, highways, schools, and public utilities.

Although the federal government holds the ultimate claim to eminent domain, power is dispersed to the state and local levels. Confiscated properties may then be diverted to third parties tasked with managing the property's development.

Police power is the government's right to create and enforce laws that promote the wellbeing of the public. Police power is used to take the title to a property through eminent domain.

A property owner who is subject to eminent domain is entitled to compensation for his or her loss. Compensation must be just and fair, and adhere to the property's current market value. It is advised that a property owner use recently sold comparables to negotiate a fair price. Should a property value increase at a future date, the property owner is not entitled to the difference in price.

If a property owner objects to the determined fair market value of his or her property, the owner has the right to have his or her case heard in court. As real estate values are difficult to calculate -- especially in the absence of recently sold comparables -- eminent domain acquisitions often go to court.

A jury determines the fair market property value to which a property owner is entitled. The final compensation amount includes the reasonable costs of relocation and moving. If the owner owns a rental property, he or she must be compensated for the lost rental income.

Certain private parties may have the right to claim eminent domain over a portion of a property owner's property in the form of an easement. For this to occur, there must be the following:

- A great need for an easement (i.e. power, electrical, driveway)

- The hardship of a private party outweighs the hardship of the property owner (Civil Code Section 1001(c))
- The portion of a property where an easement is implemented is the least intrusive and least damaging location on the property

In 2006, President George Bush issued an executive order affirming that in the event of eminent domain, the government must confiscate land only for public use and must include just payment to the property owner.

Case Review: *People ex Rel. Caltrans v. Woodson* (2002)

The case, *People ex Rel. Caltrans v. Woodson* (2002) 93 Cal.4th 954., involved an eminent domain case.

The Department of Transportation (Caltrans) wished to widen a freeway entrance. In order to do so, it had to confiscate a nearby mobile home park. It offered the property owner (Woodson) \$1.3 million for the acquisition, even though an appraiser valued the property at well over \$2 million. Woodson brought legal action against Caltrans over the below fair market value offer. He also wanted attorney and court costs included in the offer.

The Superior Court ruled partially in favor of both parties. It held that the government's proposed purchase price of \$1.3 million was far below the fair market value. However, it contended that Woodson was responsible for paying attorney and court costs. It awarded Woodson an increase in the government's purchase price, requiring the government to pay \$1.876 million.

Woodson appealed the Superior Court's decision regarding the lack of refund on legal fees. In the Court of Appeals, the court reversed the lower court's ruling. It contended that because Caltrans' first offer for Woodson's property was clearly unfair and below market value, Woodson had been forced to bring Caltrans to court and to incur legal fees. The court concluded that if Caltrans' initial offer for the property was fair, Woodson would have had no reason to go to court or incur legal fees. Therefore, Caltrans was responsible for refunding Woodson's legal fees.

Case Review: *City of San Diego v. Sobke* (1998)

In the case, *City of San Diego v. Sobke* (1998) 65 Cal.4th 379., involves a dispute over eminent domain.

The City of San Diego notified a property owner (Sobke) of its plans to acquire Sobke's business property through eminent domain. Sobke sued the City for a loss of goodwill. His claim was based on the notion that his business would have decreased viability after being forced to move to a less desirable area.

The Superior Court reasoned that there was no way to measure a loss of goodwill. Therefore, Sobke was not to be compensated for loss of goodwill, pursuant to California Civil Procedural Code, Section 1263.510. The Court of Appeals affirmed the lower court's ruling, and Sobke was forced to vacate his property after receiving payment.

Inverse Condemnation

If eminent domain causes unforeseen circumstances to a property owner, he or she can bring a lawsuit against the government for **inverse condemnation**. Inverse condemnation is a legal recourse process that allows property owners to sue the government for damages which prevent the owner from enjoying his or her private property rights. Common claims include: physical damage, crop damage, and water blockage.

For example, say the government confiscates a portion of a property owner's property and builds an army base. That base conducts routine military training exercises that cause intolerable noise and disturbance to the property owner's right to quiet enjoyment. In this case, the property owner may have the right to recover damages through inverse condemnation.

Some of the main instances in which a property owner can recover damages for inverse condemnation include:

- When there is a physical seizure of property
- When the seizure of a portion of a property causes the property's value to be drastically diminished
- When the seizure of property does not directly benefit the public

Case Review: *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006)

The case, *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507., involved a private advertising company suing the City of Los Angeles for inverse condemnation.

The City of Los Angeles planned to plant trees along a public street. However, those trees would partially block the billboards set up on the roadside property of a private advertising agency (Regency Outdoor Advertising, Inc.). Regency Outdoor Advertising alleged that the trees would obstruct motorists' views of the billboards and damage its business. It filed a lawsuit against the City for inverse condemnation.

The City of Los Angeles spent over $90,000 hiring expert testimony for the case. The Superior Court held that owners of roadside property did not have the right to be seen. Therefore, Regency Outdoor Advertising was not entitled to compensation. The court ruled in favor of the City of Los Angeles, and also held Regency Outdoor Advertising liable for the City's legal fees. Regency Outdoor Advertising appealed. The Court of Appeals upheld the lower court's ruling.

Regency Outdoor Advertising appealed to the Supreme Court. The Supreme Court argued that under Business & Professions Code, Section 5412, no compensation was required. The court affirmed both of the lower court's decisions and required Regency Outdoor Advertising to pay the government for reviewing the case.

Case Review: *Dina v. People ex Rel. Department of Transportation (*2007)

The case, *Dina v. People ex Rel. Department of Transportation* (2007) 151 Cal.4th 1029., involved a dispute between a property owner and the Department of Transportation over inverse condemnation.

The Department of Transportation constructed a freeway adjacent to a property owned by Dina. Dina argued that the construction caused cracks in her patio and other structural damages to her home. Dina further claimed that the noise and dust created by the presence of the freeway entitled her to damages. She sued the Department of Transportation over claims of inverse condemnation, nuisance, and negligence.

The Superior Court reasoned the Dina's claims were unsubstantiated, contending that there was no direct proof of the connection between the freeway project and the cracks to her property. Dina appealed. The Court of Appeals upheld the lower court's ruling. The court denied Dina's subsequent request to have her case reviewed by a jury. (Under California law, plaintiffs do not have the right to inversion condemnation proceedings in the presence of a jury.)

Severance Damage

When the confiscation of a property directly reduces the property's value, the property owner may be entitled to **severance damages** (Code of Civil Procedure, Section 1240.150).

Severance damages are measured by the loss in property value through the confiscation, construction, or alteration of the owner's property. Typically, assessors will use the average price per square feet to determine the value of the property that was confiscated or altered.

California Civil Code, Section 1263.440 (a) states: "The amount of any damage to the remainder and any benefit to the remainder shall reflect any delay in the time when the damage or benefit caused by the construction and use of the project in the manner proposed by the plaintiff will actually be realized."

For example, if the government confiscates a portion of a property owner's property for building a public highway and a piece of machinery damages the owner's non-confiscated property, the government must pay the owner the value of the confiscated property, as well as the resulting damages from the machinery.

Case Review: *Gilbert v. State* (1990)

The case, *Gilbert v. State* (1990) 218 Cal.3d 234., involved a landowner seeking severance damages for restrictions on his water rights during a drought.

The State instituted a water moratorium in an area due to an ongoing drought. It temporarily halted new water service connections in order to protect the state's water reserves. A landowner (Gilbert) alleged that the water moratorium violated his water rights. He brought legal action against the State, seeking severance damages.

The Superior Court contended that the State did not violate Gilbert's water rights because it was fulfilling a legitimate public purpose. It argued that since Gilbert had purchased the land without any water service, the water moratorium did not warrant severance damages. The court ruled in favor of the State.

Government Seizure

The government has the legal authority to confiscate property being used for criminal or terrorist activities. A **government seizure** -- also referred to as an asset seizure and asset forfeiture -- is used to prevent violators of the law from engaging in further illegal activity. While initially used to combat criminal organizations, gangs, and drug creation/distribution, government seizures have also been used to combat the presence of terrorism.

Unlike in eminent domain cases, property owners in government seizure cases are not entitled to compensation. The government is required to mail a notice of the property's seizure to the property owner no more than 60 days after the seizure for state cases and 90 days for federal cases. The defendant then has 35 days to respond to the claim.

If a government seizure is based on the fact that a property is being used to conduct illegal business, the burden of proof is on the government to prove this (U.S Code Section 983 (c3)). If the government provides false statements that lead to a seizure, the government may need to forfeit the seized property.

Case Review: *U.S. v. 3814 N.W. Thurman Street* (1999)

The case, *U.S. v. 3814 N.W. Thurman Street* (1999) 164 F.4d 1191., involved a mortgage applicant who submitted false documentation to a federal lender.

A mortgage applicant (Thurman) indicated on an application that she made $308,000 total over the previous three years. In reality, she had only made $27,000 and intentionally failed to disclose that she had over $100,000 in total liabilities. Thurman's false statements on the loan application were discovered because she sent false tax returns. Because the lender was part of a federal agency, the fraud was quickly discovered. The government brought a lawsuit.

The District Court granted summary judgment in favor of the government. It ordered Thurman's property to be seized on federal fraud charges. Thurman appealed. The Court of Appeals reversed part of the lower court's ruling. Although it held Thurman liable on all fraud charges, it ruled that the forfeiture of the Thurman's property was too excessive and in violation of the constitutional rights of the property owner. Therefore, it reversed the forfeiture of Thurman's property.

Case Review: *U.S. v. James Daniel Good* (1993)

The case, *U.S. v. James Daniel Good* (1993) 114 S.Ct. 492., involved the United States government's attempt to seize the home of an alleged drug dealer.

The U.S government obtained a warrant to search the home of an alleged drug dealer (Good). Upon doing so, the government discovered over 89 pounds of marijuana and nearly $4,000 in cash. Good served one year in jail. Nearly five years after searching Good's house, the U.S. government brought legal action seeking to forfeit Good's four-acre property. It cited 21 United States Code, Section 881 (a) (7), claiming that the property was subject to forfeiture because it was used to facilitate a drug trade, which was a violation of federal law.

A U.S. magistrate judge ruled that the government's case was valid and granted a warrant with the order to seize the property. Shortly thereafter, Good filed a claim insisting that the government's seizure of his property deprived him of his due process rights. Good further claimed that the government's lawsuit was not brought forward in a timely manner.

The Superior Court ruled in favor of the government. Good appealed. The Court of Appeals overturned the lower court's ruling, contending that the seizure of Good's property without a hearing violated his due process. (The due process clause of the Fifth Amendment guarantees that no person's rights shall be infringed upon, including a fair trial for the rights of one's property.) The court also indicated that the Fourth Amendment protects landowners from wrongful seizure. Because the government brought the case to court without following the proper procedures, the government did not have the right to seize the property.