ARTICLE:
NOT SO FAST, COUNSELOR: WHEN ATTORNEY'S FEES MAY BE RECOVERED IN CONNECTION WITH A REAL PROPERTY SECURED DEBT

By Karl E. Geier[*]

Two decisions reported elsewhere in this issue[1] examine the same narrow aspect of attorney's fees recovery in wrongful foreclosure cases arising out of the standard form of deed of trust customarily used in residential mortgage transactions in California. In *Hart v. Clear Recon Corp.*,[2] the court of appeal reversed an award of attorney's fees to the lender as the "prevailing party" against the borrower-related parties asserting wrongful foreclosure; in that case, the court of appeal refused to find that Paragraph 9 of the uniform deed of trust, which authorizes the lender to recover costs of preserving security and protecting the lender's rights in the property, was an "attorney's fees provision" within the meaning of the California reciprocal attorney's fees statute, Civ. Code, § 1717, and held it could not be used by the lender as a basis for recovering attorney's fees against parties who had not signed the note or the deed of trust. In *Chacker v. JPMorgan Chase Bank, N.A.*,[3] the court of appeal also reversed an award of attorney's fees to the lender under Paragraph 9 of the uniform instrument, holding that while Paragraph 9 would authorize the lender to recover attorney's fees incurred to *defend* against the borrower's action to enjoin a non-judicial foreclosure, it did not support a separate award of attorney's fees recoverable against the plaintiff borrower under Civ. Code, § 1717, but only allowed the lender's attorney's fees to be added to the borrower's promissory obligation, i.e., as an additional amount secured by the deed of trust.

Both of these cases turned on the contractual language of the uniform instruments, the application of case law under Civ. Code, § 1717, and, in the case of *Chacker*, the court's further conclusion that Paragraph 14 of the uniform instrument, which authorizes a lender to seek reimbursement for attorney's fees, in certain circumstances, also only allows those fees to be added to the secured indebtedness and not to recover a "freestanding contractual attorney fees award."[4]

It is important to recognize that neither *Hart* nor *Chacker* involved a stan-

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dard bilateral "prevailing party" attorney's fees clause. In *Hart*, the court, following several unpublished federal district court decisions,[5] found that Paragraph 9 of the uniform form deed of trust could not be construed as a "attorney's fees provision" subject to § 1717, and no other attorney's fees clause contained in the loan documents was applicable because the actual litigants had not signed the note and did not sue under provisions of the contract, but rather sought to enjoin a wrongful foreclosure against property in which they, as non-loan parties, claimed an interest.[6] In *Chacker*, the court of appeal, in an unpublished part of its decision, supported the lender-related defendants' rights to assert attorney's fees under various provisions of the loan documents and § 1717, but it then concluded that their attorney's fees could only be added to the debt secured, and not recovered in a separate order.[7]

In neither *Hart* nor *Chacker*, however, was the court required to sort out the somewhat ambiguous and conflicting statutory provisions allowing recovery of attorney's fees in various stages of the foreclosure process. Nor was the court in either case faced with the implications of the one-action rule or the anti-deficiency laws for the recovery of attorney's fees by a lender. Therefore, it would not be wise to use *Hart* or *Chacker* as a guide to attorney's fees claims by secured lenders in California. The following discussion provides an overview of several statutory and judicially-created limitations on recovery of attorney's fees by real property secured lenders.

1. Attorney's Fees at Loan Reinstatement:

A lender that incurs attorney's fees in connection with a loan in default is restricted by law from demanding full reimbursement of all such fees. Under Civ. Code, § 2924c, the borrower has a statutory right to "reinstate" a delinquent debt that has been accelerated by the beneficiary, and to thereby compel the termination of the non-judicial foreclosure process, by paying the delinquent amounts of principal, interest, taxes, assessments, insurance premiums or other advances actually known to be in default at the time of recording the notice of default, plus certain amounts in default on recurring obligations, plus reasonable costs and expenses of preparing and serving the notice of default, including attorney's or trustee's fees as limited by the statute.[8] As long as "a person authorized to cure a default" does so by paying the required sums within a three-month period following the recordation of the notice of default, all proceedings must be dismissed and the obligation and deed of trust or mortgage reinstated as if the acceleration of the debt had not occurred.[9]

In this context, a distinction must be drawn between attorney's fees and other costs incurred to protect the mortgagee's security and/or the mortgagee's interest in the obligation or the deed of trust, on the one hand, and attorney's fees incurred in connection with the preparation and service of the notice of default and related default proceedings, on the other hand. If attorney's fees have been incurred and properly added to the obligation secured by the debt (as is typically authorized by language in the deed of trust), and demand has been made for payment of these amounts, then unless some other contractual limitation applies, the borrower may be required, as a condition of reinstating the remaining indebtedness, to pay the outstanding attorney's fees and other costs incurred to protect security.[10] Otherwise, such amounts, not yet delinquent or included as amounts in default in the notice of default, cannot be demanded as a condition of reinstatement.[11]

Section 2924c specifically requires, as a condition of reinstatement, the payment to the beneficiary of "the entire amount due at the time payment is tendered, with respect to . . . advances actually known by the beneficiary to be, and that are, *in default and shown in the notice of default*, under the terms of the deed of trust or mortgage in the obligation secured thereby" (emphasis added).[12] In other words, amounts that have been incurred but have not been demanded of the borrower are not yet delinquent or in default, and these amounts, even though incurred, could not be required to be paid as a condition of reinstatement; in order to require such payment as a condition of reinstatement, the lender would have to re-notice the default and include demand for the delinquent sums in the notice of default. (The statute defines "recurring obligations," but they are limited to post-notice of default payments of principal and interest or rents, taxes, assessments, and hazard insurance.[13] There is no provision for adding other advances made to protect security to the reinstatement amount required after filing a notice of default that does not identify the referenced sums as being due and delinquent).

Despite the above limitations on the recovery of attorney's fees and other amounts incurred to protect security or protect the mortgagee's interest in the subject mortgage and related loan obligations, the Civil Code does allow a limited recovery of foreclosure-related costs as a condition of reinstatement. These amounts are prescribed by the statute and include certain mailing and posting costs and the costs of a trustee's sale guarantee,[14] plus trustee's or attorney's fees in an amount determined by a sliding scale based on the principal

sum of the secured debt, that can be as little as $350 for the first $50,000 or less of debt, and goes up by a series of decreasing fractional percentages of specified portions of the debt in excess of $50,000.[15] The statutory limit applies to attorney's fees and trustee's fees cumulatively, and not separately to each. The allowable amounts of trustee's or attorney's fees that may be demanded as a condition of reinstatement are quite limited and must be "actually incurred in enforcing the terms of the obligation . . .."[16] Even if the fees demanded as a condition of reinstatement do not exceed the statutory limits and are therefore "conclusively presumed to be lawful and valid" under the statute,[17] the fees must have been actually incurred or they may not be added to the amount allowed to reinstate.[18]

2. Attorney's Fees Incurred In Connection With A Redemption or Payoff After Recording the Notice of Sale:

After the initial three-month period following the notice of default has elapsed, the beneficiary may proceed to file a notice of sale, which triggers a different statute governing the lender's recovery and foreclosure-related attorney's fees. The amounts of attorney's fees and costs that may be demanded up to and including the date of the sale are limited by Civ. Code, § 2924d, again with a statutory "sliding scale" that begins at $475 and goes up by a series of fractional percentages of the principal sum, decreasing as the amount of the principal increases.[19] The borrower still has a right to reinstate the loan by paying amounts in default and allowable expenses and fees until the reinstatement period has finally expired (which occurs, in substance, five business days prior to the scheduled date of the trustee's sale, either as initially noticed, or as postponed following the original sale date).[20] Thereafter, the borrower has no continuing right of reinstatement by payment of less than the entire amount owing under the obligation secured. In that event, under the usual rules for avoiding a foreclosure, a borrower can tender the full amount due, including charges and fees, and obtain a rescission of the pending trustee sale proceedings.[21] Otherwise, the property may be sold and the lender may include the costs and fees incurred in the default proceedings and in the sale process, including its attorney's fees as limited by the statute.[22]

Under all circumstances, until the property actually is sold, the amount of attorney's and trustee's fees that the beneficiary may demand and receive from the borrower is limited by § 2924d.[23] The statutory limit is cumulative of both attorney's and trustee's fees. The principal amount against which the fractional

sums are determined is based on the "unpaid principal sums secured . . . as of the date the notice of default is recorded," and the recoverable amounts are in lieu of, not in addition to, the amounts authorized to be charged for reinstatement under § 2924c.[24]

Once the trustee's sale has occurred, the trustee may deduct all reasonable costs and expenses of the sale plus aggregate trustee's or attorney's fees in an amount of $475 or one percent of the unpaid principal sum, whichever is greater, from proceeds of the sale otherwise required to be distributed.[25] Again, as in the reinstatement context, these limits on fees and costs incurred to trustees and attorneys are related to the foreclosure and default process, and would not necessarily include other amounts incurred as attorney's fees for the protection of security or the protection of the mortgagee's interest in the secured obligation. In any case, these "protective advances" cannot be added to the principal sum that is used as the basis for calculating the amount of attorney's and trustee's fees allowable by the statutory formula if they were not actually included as sums due in the notice of default. These amounts in all cases are limited to percentages of "the unpaid principal sum secured" as of "the date the notice of default is recorded."[26]

3. Attorney's Fees Recoverable Outside the Foreclosure Process; the One-Action Rule:

As a matter of contractual interpretation, the *Chacker* court held that attorney's fees incurred to protect against an action filed to enjoin foreclosure could not be awarded by a "standalone attorney fees order" but rather had to be added to the principal indebtedness secured.[27] This, in effect, would compel the lender to pursue and exhaust its security for the debt in order to recover the attorney's fees as well as other amounts secured by the deed of trust, before seeking any recourse recovery from the borrower. While unstated in the *Chacker* opinion, this is the necessary effect of deeming the amount added to the debt secured, under the California one-form of action rule embodied in Code Civ. Proc., § 726.[28] Thus, in *Chacker*, if the creditor had actually attempted to execute on the judgment embodying the award of attorney's fees, there is a fair chance that the sanction aspects of the one-action rule (possible loss of lien and/or an obligation to disgorge the amount collected in lieu of retaining the sums paid), could have been applied under the principles of *Security Pacific National Bank v. Wozab*.[29] Indeed, it is arguable that by demanding and receiving an award of attorney's fees in the trial court, the creditor has already violated

the one-action rule by seeking a monetary recovery without first foreclosing against the collateral as required by Code Civ. Proc., § 726, subd. (a).[30]

Whether attorney's fees awarded to a lender can be collected without violating the one-action rule is not entirely clear. The case law in this area is limited. In *Passanisi v. Merit-Mcbride Realtors, Inc.,*[31] the court held that a recovery of an award of attorney's fees incurred in defending against an action to enjoin foreclosure filed by the debtor did not constitute a violation of the one-action rule by the lender because the recovery of such fees was not an action to recover the secured debt to which § 726 applies.[32] In *Passanisi*, the lender had affirmatively elected *not* to include the attorney's fees award in the debt secured by the deed of trust and collected it separately before foreclosing, and was held not to have violated § 726 by doing so, but was barred from retaining additional fees not allowed by the court when it distributed proceeds of a subsequent nonjudicial foreclosure.[33] Whether *Passanisi* is the last word on this subject is questionable; at least one other court has suggested that attorney's fees incurred outside the foreclosure process must be added to and "treated as part of the secured debt."[34]

There are circumstances in which a recovery of attorney's fees as well as other ancillary relief may be obtained by a creditor in connection with litigation outside the foreclosure context without running afoul of the one-action rule, including some tort claims involving fraud and bad faith waste[35] and certain claims with respect to environmentally impaired property or under an environmental indemnity.[36] These exceptions are quite limited, and a lender who attempts to demand and receive payment of an attorney's fees award and to enforce the award outside the non-judicial or judicial foreclosure process by direct recourse rather than to treat the award as an amount secured by the property is on treacherous ground.

4. Issues Associated With the Scope of An "Attorney's Fees Provision":

As recited in the unpublished portion of the court of appeal opinion in *Chacker*, under well-established California authority, the so-called "American Rule" leaves each party to a lawsuit to pay its own attorney's fees in the absence of a specific provision of a statute or contract to the contrary.[37] Thus, "parties may validly agree that the prevailing party will be awarded attorney's fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract."[38] Although Civ. Code, § 1717 does provide for reciprocity,

i.e., if a contractual attorney's fee provision allows one party to recover fees, then it will be deemed to allow the other party to recover fees if it is a "prevailing party,"[39] even where there is such a "reciprocal" provision, the contractual terms may limit the type and amount of fees that may be recovered as to certain transactions or events or only as to certain types of claims.[40]

Both the *Hart* and the *Chacker* cases involved, in part, disputes over whether particular clauses in the deed of trust or note constituted an "attorney's fees provision" within the meaning of Civ. Code, § 1717. Section 1717 provides, in substance, that a party to a contract, whether he or she is the party specified in the contract or not, can always recover attorney's fees as the prevailing party in litigation "where the contract specifically provides attorney's fees and costs, which are incurred to enforce that contract shall be awarded either to one of the parties or to the prevailing party."[41] In this context, the *amount* of the fees is determined by the court and must be reasonable, and the court must also determine whether there is a prevailing party and if so, which party it is.[42] In order for the statute to apply, however, it must first be shown that "the contract specifically provides that attorneys fees and costs, which are incurred to enforce that contract, shall be awarded . . .."[43]

Both *Hart* and *Chacker* arose under the uniform Fannie Mae/Freddie Mac instruments that are in common use in residential mortgage lending both in California and elsewhere, which evidently do not include a typical reciprocal attorney's fees clause. Many commercial loan transactions, particularly where both parties are represented by counsel, include direct reciprocal attorney's fees provisions that are applicable in case of any dispute arising to interpret, construe, or enforce the applicable loan documents. In such cases, the threshold question of whether or not there is an applicable "attorneys fees provision" within the meaning of Civ. Code, § 1717 will not be difficult to resolve. That said, the ultimate issue is what the loan documents provide, which cannot be determined without reading the documents.

In the *Hart* decision, relying on several unpublished federal district court decisions, the court of appeal concluded that Paragraph 9 of the standard form deed of trust is not a "litigation attorney's fees provision" and only allows addition of fees to the debt secured, and does not support a reciprocal attorney's fees recovery either by the lender or by the borrower.[44]

In many cases, there is an attorney's fees provision in the promissory note,

and if the action involves enforcement of the debt or defenses to enforcement of the debt, such a provision may support an award to either party as the "prevailing party" even if it purports only to allow fees to be recovered by the lender. In other words, when a contract provides for an award of attorney's fees to one party but not the other, Civ. Code, § 1717 makes the right reciprocal.[45] Moreover, a non-signatory defendant, sued on a contract as if he or she were a party to it, can also recover attorney's fees as a prevailing party if the plaintiff would have been entitled to attorney's fees if he or she prevailed in enforcing the underlying contractual obligation against the defendant.[46] In other contexts, the notion that non-signatories can be eligible for fees based on contractual clauses in certain circumstances, depending on the language of the applicable attorney's fees clause, has been acknowledged by the courts.[47]

Often the issues in borrower-lender litigation (such as wrongful foreclosure) may involve claims in tort as well as claims under the contracts between the parties, and the availability of attorney's fees to either party in such mixed cases of tort and contract can involve a complex application of existing case law under Civ. Code, § 1717. The case law involving application of Civ. Code, § 1717 to attorney's fees claims in litigation is voluminous and extensively discussed in legal treatises, and is not summarized here.[48]

5. Anti-deficiency Law Issues:

A separate set of issues relevant to a secured lender's attorney's fees claims arises out of the anti-deficiency statutes. The anti-deficiency issues arise under two related statutes. After a non-judicial sale, the beneficiary is absolutely barred under Code Civ. Proc., § 580d from recovery of a "deficiency" from other assets of the debtor.[49] In the case of a purchase money indebtedness (i.e., either a seller carry back encumbrance for a portion of the purchase price or, in narrow circumstances involving single family or one-to-four family residences, a third party loan made to pay all or a portion of the purchase price of the residence), the creditor also is barred from recovery of a "deficiency" under the operation of Code Civ. Proc., § 580b even if the creditor proceeds by judicial foreclosure.[50]

There have been a few cases in which the application of the purchase money anti-deficiency statute to recovery of the beneficiary's attorney's fees have been considered. In *Hunt v. Smyth*,[51] a court upheld recovery of a personal judgment against the trustor for attorney's fees incurred by the beneficiary in defending against a trustor's action to enjoin a foreclosure sale, on the basis that these ad-

ditional funds were outside the scope of the "purchase money" anti-deficiency law and were more in the nature of other additional loans and advances and not part of the purchase price of the property.[52] Another case, *Flynn v. Page*,[53] involved a post-foreclosure action for damages by the trustor, and the award of attorney's fees to the prevailing party beneficiary was held not to be barred either by Code Civ. Proc., § 580b or by the post-trustee sale anti-deficiency bar, § 580d, and was enforceable even after the foreclosure sale had occurred.[54] The latter decision relied heavily on *Passanisi v. Merit-Mcbride Realtors,* mentioned above, which generally supports the notion that attorney's fees incurred by the beneficiary to protect against the debtor's action to enjoin foreclosure are not required to be included as part of the secured debt, and therefore an action to recover such fees is not an action to recover the secured debt within the meaning of either of § 726 (the one action rule) or § 580d, whether the fees are awarded before or after the foreclosure is completed.[55] Another decision, *Jones v. Union Bank of California*,[56] holds that attorney's fees incurred by the lender *after* completing a nonjudicial sale in defending a subsequent suit by the borrower for damages or to set aside the sale are not covered by § 580d, because it would make no sense to consider such *future* fees part of the debt secured at the time the foreclosure sale occurred.[57]

To summarize, the effort by a secured creditor to recover attorney's fees in a separate action before completing the foreclosure is risky, but the anti-deficiency bar usually will not prevent recovery of those fees in a personal judgment when they are incurred after the fact, assuming they fall within the scope of *Jones* and *Passanisi*, i.e., fees incurred to defend or ward off a borrower's claim of wrongful foreclosure to enjoin the foreclosure. However, *Passanisi* is the only direct reported California case authority for the proposition that attorney's fees are outside of the one-action and anti-deficiency rules, and should be approached with caution. In particular, if the language of a provision for attorney's fees appears to require the fees to be added to the debt, or does not clearly authorize a separate award, the lender who pursues collection of such fees outside of the foreclosure process may find itself entwined in appellate litigation over those very issues—and the *Chacker* decision, in particular, suggests the opposite course of action often will be required. If the dispute has arisen in some other context between the borrower and the lender, the lender may be better advised to include the amounts in the sum secured by the deed of trust, and pursue a claim for recovery of a deficiency by judicial foreclosure rather than take the

chance of not recovering those fees if the collateral will not cover the amount of the fees awarded.

6. Recovery of Attorney's Fees In A Judicial Foreclosure Action:

Whether the attorney's fees are awarded in connection with some other dispute between the lender and the borrower or its successors and privies, or are incurred to protect the security of the lender or its interest in the secured debt or mortgage, the lender can treat the award as added to the debt, make demand for payment, and pursue a non-judicial or judicial foreclosure to recover the amount. If the creditor completes a non-judicial foreclosure, however, then the operation of Code Civ. Proc., § 580d will be to bar any recovery of a "deficiency," which would include any portion of the debt secured by the property. Where there is likely to be a deficiency because the value of the property will not cover the combined debt including attorney's fees the lender seeks to recover, the lender's alternatives are (a) to seek a post-trustee's sale recovery in reliance on *Passanisi v. Merit-Mcbride Realtors, Inc.*, and risk making new law in this area, (b) to abandon the notion of recovering any fees or other costs that cannot be recouped from the sale of the collateral, or (c) or to pursue a judicial foreclosure. The judicial foreclosure would allow recovery of the "deficiency," including the attorney's fees that have become a part of the secured debt, subject to the operation of the purchase money antideficiency laws.[58]

In addition, however, the recovery of attorney's fees incurred in the judicial foreclosure process itself is governed by another somewhat confusing and inconsistent set of statutory provisions. First, under Civ. Code, § 2924d, the court, on issuing a decree of foreclosure, has "discretion to award attorney's fees, costs and expenses as are reasonable, if provided for in the note, deed of trust, or mortgage, pursuant to § 580c of the Code of Civil Procedure."[59] Section 580c, in turn, provides that:

> "[T]he mortgagor or trustor may be required to pay only such amount as trustee's or attorney's fees for processing the judicial foreclosure as the court may find reasonable and also the actual cost of publishing, recording, mailing and posting notices, litigation guarantee, and litigation cost of suit."[60]

The two statutes, read together, require an attorney's fees provision in the promissory note or deed of trust that is broad enough to allow for attorney's fees to be recovered in connection with the collection of the debt or foreclosure of the collateral, and then further limit these amounts to a sum ordered by the court and determined to be reasonable in the course of the judicial foreclosure.

In the absence of such an attorney's fees provision, the court may not have authority to grant any attorney's fees award at the conclusion of the judicial foreclosure.

Code of Civil Procedure § 726, subd. (a) adds further support for the notion that such an award requires an operative attorney's fees provision; it provides in relevant part:

> "In the action [for judicial foreclosure] the court may, by its judgment, direct the sale of the encumbered property . . . and the application of the proceeds of sale to the payment of the cost of court, the expenses of levy and sale, and the amount due plaintiff, *including, where the mortgage provides for the payment of attorney's fees, the sum of attorney's fees as the court shall find reasonable, not exceeding the amount named in the mortgage*." (emphasis added).

Again, the statute requires some form of attorney's fees provision contained in the deed of trust, and has been held to allow recovery only where the mortgage (as distinguished from the promissory note) contains an attorney's fees provision.[61]

A further issue is that if the sheriff's sale of the property pursuant to the judicial foreclosure decree does not provide proceeds sufficient to pay all sums due, including the attorney's fees as awarded by the court, then in order to recover additional amounts, the creditor must pursue a deficiency judgment in the manner prescribed by § 726, subd. (b). Here, the court must determine not only the amount of the debt, including attorney's fees, that was due but also the "fair value" of the property sold and the difference between the amount of the indebtedness and the fair value of the property sold.[62]

Yet another provision of the Code of Civil Procedure, § 730, provides that in all cases of foreclosure of a "mortgage," the attorney's fees "shall be fixed by the court in which the proceedings are had, any stipulation to the mortgage to the contrary notwithstanding."[63] Under this provision, a contractual effort to prescribe attorney's fees or other amounts in lieu of fees (such as liquidated damages) may be overridden by the court in determining the award of fees to be included in the judgment or any deficiency.[64]

Finally, if the property has been sold in judicial foreclosure, in limited circumstances the debtor has a right of redemption, in which case the amount required to be paid to redeem the property is further limited by statute to include a "redemption price." The "redemption price" is defined in Code Civ.

Proc., § 729.060 in a manner that does not explicitly cover attorney's fees that may be incurred before or after the sale and not be included in the price paid at the sale.[65] A creditor who acquires the property collateral is generally limited from conditioning redemption on payment of these additional amounts.[66]

7. Conclusion:

As reflected by the *Hart* and *Chacker* decisions, the lender's right to recover attorney's fees against a borrower under a standard form deed of trust is limited by the contractual terms of the instrument as well as the principles of Civ. Code, § 1717, concerning contractual attorney's fee provisions. A lender who meets these substantive requirements for an attorney's fees award must still consider carefully whether it should add the fees to the secured debt and pursue collection through the judicial or nonjudicial foreclosure process, or seek to recover the fees in a separate action or proceeding. In many cases the lender will either be compelled to add the fees to the debt (as occurred in the *Chacker* decision) or risk violating the one-action rule or other restrictions on recovering attorney's fees in foreclosure. Although there is authority for separate recovery of attorney's fees in certain contexts, there is no single universal rule applicable to all such recoveries.

ENDNOTES:

[1]*Chacker v. JPMorgan Chase Bank, N.A.*, 27 Cal. App. 5th 351, 237 Cal. Rptr. 3d 921 (2d Dist. 2018), reported at page 121; *Hart v. Clear Recon Corp.*, 27 Cal. App. 5th 322, 237 Cal. Rptr. 3d 907 (2d Dist. 2018), reported at page 123, infra.

[2]*Hart v. Clear Recon Corp.*, 27 Cal. App. 5th 322, 237 Cal. Rptr. 3d 907 (2d Dist. 2018).

[3]*Chacker v. JPMorgan Chase Bank, N.A.*, 27 Cal. App. 5th 351, 237 Cal. Rptr. 3d 921 (2d Dist. 2018).

[4]*Id.* at 357.

[5]*Valencia v. Carrington Mortg. Services, LLC*, 2013 WL 3223628 (D. Haw. 2013); *DuFour v. Allen*, 2017 WL 1433303 (C.D. Cal. 2017); *Tyler v. Wells Fargo Bank, N.A.*, 2016 WL 3752394 (Cal. App. 4th Dist. 2016), unpublished/noncitable.

[6]*Hart v. Clear Recon Corp.*, *supra*, 27 Cal. App. 5th at 328-329, and see fn. 6 of the court's opinion. The court also found that another provision of the uniform deed of trust that was arguably an attorney's fees provision (Paragraph 22) had not been asserted at the trial court but only on appeal and could not be

raised as an "after the fact justification for the fees awarded by the trial court on a different basis."

[7]*Chacker v. JPMorgan Chase Bank, N.A.*, supra, 27 Cal. App. 5th at 358-359.

[8]Civ. Code, § 2924c, subd. (a)(1).

[9]Civ. Code, § 2924c, subd. (a)(1).

[10]*Jones v. Union Bank of California*, 127 Cal. App. 4th 542, 548, 25 Cal. Rptr. 3d 783 (2d Dist. 2005); *Walker v. Countrywide Home Loans, Inc.*, 98 Cal. App. 4th 1158, 1174, 121 Cal. Rptr. 2d 79 (2d Dist. 2002); *Caruso v. Great Western Savings*, 229 Cal. App. 3d 667, 676, 280 Cal. Rptr. 322 (2d Dist. 1991); *Buck v. Barb*, 147 Cal. App. 3d 920, 925, 195 Cal. Rptr. 461 (1st Dist. 1983).

[11]*Anderson v. Heart Federal Sav. & Loan Assn.*, 208 Cal. App. 3d 202, 213-215, 256 Cal. Rptr. 180 (3d Dist. 1989), reh'g denied and opinion modified, (Mar. 28, 1989).

[12]Civ. Code, § 2924c, subd. (a)(1).

[13]Civ. Code, § 2924c, subd. (a)(1).

[14]Civ. Code, § 2924c, subd. (c)(1).

[15]Civ. Code, § 2924c, subd. (d).

[16]Civ. Code, § 2924c, subds. (a)(1), (d)(1).

[17]Civ. Code, § 2924c, subd. (2).

[18]Civ. Code, § 2924c, subd. (a)(1)(C). See 71 Ops. Cal. Atty. Gen. 314, 322-324 (Opinion No. 87-1002), December 1, 1988 (automatically charging maximum trustee's fees allowable by § 2914c or § 2924d is unfair business practice if the fee charged is unreasonable; statutory presumption that fees are lawful under [current Civ. Code, § 2924c, subd. (d)], and [current Civ. Code, § 2924d, subd. (b)] does not preclude claim fees are unreasonable under the Unfair Business Practices Act, Corp. Code § 17200.

[19]Civ. Code, § 2924d, subd. (a)(1).

[20]Civ. Code, § 2924c, subd. (e).

[21]Civ. Code, §§ 2903 to 2906; See *Wadleigh v. Phelps*, 149 Cal. 627, 635-636, 87 P. 93 (1906); *Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (6th Dist. 2003); *Lichty v. Whitney*, 80 Cal. App. 2d 696, 700-702, 182 P.2d 582 (4th Dist. 1947). See generally *5 Miller & Starr, California Real Estate 4th*, §§ 13:239 to 13:241.

[22]Civ. Code, § 2924d.

[23]See Civ.Code, § 2924d, subd. (a)(1).

[24]Civ. Code, § 2924d, subd. (a)(2).

[25]Civ. Code, § 2924d, subd. (b).

[26]Civ. Code, § 2924d, subds. (a), (b).

[27]*Chacker v. JPMorgan Chase Bank, N.A.*, supra, 27 Cal. App. 5th at 357-359.

[28]See generally *5 Miller & Starr, California Real Estate 4th*, §§ 13:194 et seq. (requirements of the one action rule).

[29]*Security Pacific National Bank v. Wozab*, 51 Cal. 3d 991, 1001-1002, 275 Cal. Rptr. 201, 800 P.2d 557 (1990). See discussion in *5 Miller & Starr, California Real Estate 4th*, §§ 13:203, 13:209, 13:220.

[30]See *Walker v. Community Bank*, 10 Cal. 3d 729, 733-734, 111 Cal. Rptr. 897, 518 P.2d 329 (1974).

[31]*Passanisi v. Merit-Mcbride Realtors, Inc.*, 190 Cal. App. 3d 1496, 1506, 236 Cal. Rptr. 59 (3d Dist. 1987).

[32]*Passanisi v. Merit-Mcbride Realtors, Inc.*, 190 Cal. App. 3d 1496, 1506, 236 Cal. Rptr. 59 (3d Dist. 1987).

[33]*Passanisi v. Merit-Mcbride Realtors, Inc.*, 190 Cal. App. 3d 1496, 1506, 236 Cal. Rptr. 59 (3d Dist. 1987).

[34]*Bruntz v. Alfaro*, 212 Cal. App. 3d 411, 421, 260 Cal. Rptr. 488 (3d Dist. 1989).

[35]See *5 Miller & Starr, California Real Estate 4th*, §§ 12:206, 13:207.

[36]See Code Civ. Proc., § 726.5; *5 Miller & Starr, California Real Estate 4th*, §§ 13:200, 13:201.

[37]*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC*, 3 Cal. 5th 744, 751, 220 Cal. Rptr. 3d 650, 398 P.3d 556 (Cal. 2017).

[38]*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC*, 3 Cal. 5th 744, 751, 220 Cal. Rptr. 3d 650, 398 P.3d 556 (Cal. 2017).

[39]*Santisas v. Goodin*, 17 Cal. 4th 599, 610-611, 71 Cal. Rptr. 2d 830, 951 P.2d 399 (1998).

[40]*Brown Bark III, L.P. v. Haver*, 219 Cal. App. 4th 809, 818, 162 Cal. Rptr. 3d 9 (4th Dist. 2013).

[41]Civ. Code, § 1717, subd. (a).

[42]Civ. Code, § 1717, subds. (a), (b).

[43]Civ. Code, § 1717, subd. (a).

[44]*Hart v. Clear Recon Corp.*, *supra*, 27 Cal. App. 5th at 328-329, and see fn. 6 of the court's opinion.

[45]*Santisas v. Goodin*, 17 Cal. 4th 599, 610-611, 71 Cal. Rptr. 2d 830, 951 P.2d 399 (1998).

[46]*Reynolds Metals Co. v. Alperson*, 25 Cal. 3d 124, 128, 158 Cal. Rptr. 1, 599 P.2d 83 (1979); *Cargill, Inc. v. Souza*, 201 Cal. App. 4th 962, 134 Cal. Rptr. 3d 39 (5th Dist. 2011) (requiring the non-signatory to "stand in the shoes" of a party to the contract in order to recover).

[47]See, e.g., *Brown Bark III, L.P. v. Haver*, 219 Cal. App. 4th 809, 819, 162 Cal. Rptr. 3d 9 (4th Dist. 2013); *Super 7 Motel Associates v. Wang*, 16 Cal. App.

4th 541, 544-545, 20 Cal. Rptr. 2d 193 (4th Dist. 1993) (both cited in unpublished portions of the *Chacker* opinion).

[48]See *12 Miller & Starr, California Real Estate 4th*, §§ 40:64 to 40:83; *Witkin, Summary of California Law*, Vol. 1 Contracts § 925, Vol. 6, Torts, § 1824, Vol. 12, Real Property, § 1824.

[49]Code Civ. Proc., § 580d. See generally *Miller & Starr, California Real Estate 4th*, §§ 13:219 to 13:265 (2018).

[50]See generally *5 Miller & Starr, California Real Estate 4th*, §§ 13:285 to 13:313 (2018).

[51]*Hunt v. Smyth*, 25 Cal. App. 3d 807, 101 Cal. Rptr. 4 (1st Dist. 1972).

[52]*Hunt v. Smyth*, 25 Cal. App. 3d 807, 101 Cal. Rptr. 4 (1st Dist. 1972).

[53]*Flynn v. Page*, 218 Cal. App. 3d 342, 349, 266 Cal. Rptr. 830 (2d Dist. 1990).

[54]*Flynn v. Page*, 218 Cal. App. 3d 342, 349, 266 Cal. Rptr. 830 (2d Dist. 1990).

[55]*Passanisi v. Merit-Mcbride Realtors, Inc.*, 190 Cal. App. 3d 1496, 1506-1509, 236 Cal. Rptr. 59 (3d Dist. 1987). See also *Thoryk v. San Diego Gas & Electric Co.*, 225 Cal. App. 4th 386, 403, 170 Cal. Rptr. 3d 309 (4th Dist. 2014) (reciting that *Passanisi* effectively finds such attorney's fee awards to be outside the express terms as well as the underlying policy of Code Civ. Proc. § 580d).

[56]*Jones v. Union Bank of California*, 127 Cal. App. 4th 542, 547-548, 25 Cal. Rptr. 3d 783 (2d Dist. 2005).

[57]*Id.*

[58]See *5 Miller & Starr, California Real Estate 4th*, §§ 13:282 to 13.284 (discussing deficiency judgments generally).

[59]Civ. Code, § 2924d, subd. (e).

[60]Code Civ. Proc., § 580d.

[61]*Monroe v. Fohl*, 72 Cal. 568, 570-571, 14 P. 514 (1887); see also *Hotaling v. Monteith*, 128 Cal. 556, 558, 61 P. 95 (1900).

[62]Code Civ. Proc., § 726, subd. (b). See generally *5 Miller & Starr, California Real Estate 4th*, §§ 13:282 to 13:284 (deficiency judgment).

[63]Code Civ. Proc., § 730. Note that whether this statute applies to a "deed of trust" as distinguished from a "mortgage" apparently has not been determined by reported case authority, although the *Chase Manhattan* decision cited in the next note seems to assume that it does.

[64]See *Chase Manhattan Mortgage Corp. v. Lessel*, 55 Cal. App. 4th 10, 13, 64 Cal. Rptr. 2d 113 (2d Dist. 1997).

[65]Code Civ. Proc., § 729.060, subd. (b).

[66]See, e.g., *Wells Fargo Bank, N.A. v. 6354 Figarden General Partnership*,

238 Cal. App. 4th 370, 190 Cal. Rptr. 3d 13 (5th Dist. 2015) (discussing what may be included in or credited against the statutory "redemption price" under Code Civ. Proc., § 729.060).

