

Real Property Law Section E-Bulletin



Welcome to the May 2011 edition of the Real Property Law Section (RPLS) E-Bulletin.

Here are the features in this month's E-Bulletin:

- [Webinar: Conducting Environmental Impact Review on Endangered Species Act Implementation, May 20, 2011](#)
- [Final Phase of "Hot Topics" Series Covering a Variety of Business Practice Areas Offered by the Business Law Section Ends on May 25, 2011](#)
- [Joint Meeting of RPLS and Sacramento County Bar Real Property Section in Sacramento, June 13, 2011](#)
- [Save the Date: Real Estate and Law Symposium, Co-Sponsored by SPIRE \(Stanford Professionals in Real Estate\) and the Real Property Law Section, November 9, 2011](#)
- [Helen's Hints, by Helen Shin -- Set up your Facebook and Twitter Accounts. The State Bar Sections \(including the RPLS and CYLA\) are now on Facebook and Twitter!](#)
- ["Matt's Musings" by Matt Henderson](#)
- [Our Own E-Bulletin Cartoonist, Scott Miller!](#)
- [DRE Consumer Alert on Lawsuit Marketers Requesting Upfront Fees for Home Mortgage Relief](#)
- [Practice Tip: Shared appreciation loans](#)
- [Case Alert: First National Mortgage Company v. Federal Realty Investment Trust](#)
- [Case Alert: City of Los Angeles v Superior Court](#)
- [Case Alert: Ashley II of Charleston, LLC v. PCS Nitrogen, Inc. and 3000 E. Imperial, LLC v. Robertshaw Controls Co.](#)
- [The California Real Property Journal](#)
- [Section News: Kudos to the committee, sponsors, presenters and all attendees for a great 30th Annual Real Property Retreat, April 29 - May 1, 2011, at Torrey Pines](#)
- [Section News: Kudos to presenters, sponsor and attendees of the panel on Short Sale Dilemmas and Recent Developments held in Los Angeles on May 11, 2011](#)
- [Get to Know Our Subsection Chairs," introducing Randy Sullivan, Co-Chair of the Real Estate Sales and Brokerage Subsection](#)

Practice Tip: Shared Appreciation Loans Shared appreciation loans have experienced renewed popularity recently, helping to fill part of the void left by the decline in securitized mortgage products. A shared appreciation loan is a loan secured by real property that gives the lender a contingent deferred interest in the form of a share of (a) the appreciation in the value of the property, (b) a portion of the rents produced by the property, or (c) both.

In California, shared appreciation loans are permitted by statute: California Civil Code § 1917 et seq. provides that the lien of a deed of trust securing a shared appreciation loan shall secure principal, accrued interest and contingent deferred interest. Additionally, the statute provides that shared appreciation loans are exempt from California's usury laws, and that the relationship of the borrower and lender is that of a debtor and creditor, not a partnership or joint venture. In the absence of such a statute, a shared appreciation loan could inadvertently cause the lender's lien to merge into the borrower's fee interest in the property, thereby extinguishing the lien.

When drafting loan documents for a shared appreciation loan, attorneys should take care to follow a few requirements set

forth in the statute:

(1) Any deed of trust securing a shared appreciation loan must indicate on the document that it secures a shared appreciation loan.

(2) The definition of a shared appreciation loan in Civil Code § 1917(b) expressly excludes loans secured by owner-occupied residential property containing one to four residential units.

A loan secured by such property that purports to be a shared appreciation loan may violate California's usury laws, thereby providing numerous defenses to the borrower, including claims to recover past interest paid and treble damages from the lender. Additionally, the lender's lien could be extinguished by the doctrine of merger, as described above. Therefore, lenders should generally avoid making such loans. However, Civil Code § 1917.006 contains separate rules for shared appreciation loans made by local government authorities secured by owner-occupied residential property, and Civil Code § 1917.320 et seq. contains extensive rules for shared appreciation loans to senior citizens secured by owner-occupied residential property. Attorneys should carefully review such code sections before undertaking any shared appreciation loans governed thereby.

We would like to thank Michael J. Zerman of Zuber & Taillieu LLP in Los Angeles and Co-Chair of the Real Estate Finance Subsection for submitting this Practice Tip. mzerman@ztlp.com; www.ztlp.com.