

## RESOLUTION 04-01-2014

### DIGEST

Common Interest Developments: Legal Representation Allowed in Internal Dispute Proceedings  
Amends Civil Code section 5915 to allow members and homeowners' associations to be represented by counsel in internal dispute resolution proceedings.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

Similar to Resolution 02-03-2012, which was approved in principle as amended.

#### Reasons:

This resolution amends Civil Code section 5915 to allow members and homeowners' associations to be represented by counsel in internal dispute resolution proceedings. This resolution should be approved in principle because it ensures that homeowners association members, as well as the association, may, but are not required to, be represented by counsel during dispute resolution proceedings.

Homeowner associations must engage in an internal dispute resolution process when there is a dispute between the association and a member involving their rights, duties or liabilities. (Civ. Code, § 5900.) That process can be binding and judicially enforceable. (Civ. Code, § 5915, subd. (c).) Associations are commonly represented by general counsel and have access to their legal advice. While some associations allow their members to be represented by counsel during these proceedings, others do not. A member who is denied the opportunity to be represented by counsel in these proceedings is at a great disadvantage to the association who is represented by counsel. This resolution provides the opportunity for an equal playing field between the parties.

This resolution is similar to 02-03-2012, which was approved in principle with recommended amendments, and provided that members had the right to be represented by counsel, at their own expense, in dispute resolution proceedings. Resolution 02-03-2012 sought to amend Civil Code sections 1363.830 and 1363.840. Those sections were repealed in 2012 and replaced by Civil Code sections 5910 and 5915, respectively.

This resolution is similar to AB 1738 (Chau) (2013-2014 Reg. Sess.), which proposes that each party has the "right" to have an attorney present in these proceedings, that the attorney may present the party's position on the issue, and that each party must bear their own legal fees and costs.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 5915 to read as follows:

§ 5915

1 (a) This section applies to an association that does not otherwise provide a fair,  
2 reasonable, and expeditious dispute resolution procedure. The procedure provided in this section  
3 is fair, reasonable, and expeditious, within the meaning of this article.

4 (b) Either party to a dispute within the scope of this article may invoke the following  
5 procedure:

6 (1) The party may request the other party to meet and confer in an effort to resolve the  
7 dispute. The request shall be in writing.

8 (2) A member of an association may refuse a request to meet and confer. The association  
9 may not refuse a request to meet and confer.

10 (3) The board shall designate a director to meet and confer.

11 (4) The parties shall meet promptly at a mutually convenient time and place, explain their  
12 positions to each other, and confer in good faith in an effort to resolve the dispute.

13 (5) A resolution of the dispute agreed to by the parties shall be memorialized in writing  
14 and signed by the parties, including the board designee on behalf of the association.

15 (c) An agreement reached under this section binds the parties and is judicially enforceable  
16 if both of the following conditions are satisfied:

17 (1) The agreement is not in conflict with law or the governing documents of the common  
18 interest development or association.

19 (2) The agreement is either consistent with the authority granted by the board to its  
20 designee or the agreement is ratified by the board.

21 (d) A member may not be charged a fee to participate in the process.

22 (e) The procedures in this article shall provide that both the member and the association  
23 may be represented by counsel.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Los Angeles County Bar Association

**STATEMENT OF REASONS**

The Problem: Since existing law provides that in some circumstances, resolution of a homeowners association's dispute is binding and judicially enforceable, any default meet and confer procedure that is "fair, reasonable, and expeditious" would clearly state that both the member and the association may be represented by counsel. This is an access to justice issue since millions of California homeowners live in residential common interest developments and could be denied meaningful access to justice without a clear understanding that they have access to counsel in these internal proceedings and appeals, some of which could be binding and judicially enforceable.

The Solution: Amends section 5915 to specifically require that the default meet and confer procedures adopted by all homeowners associations' comply with a newly added subsection (e) which states that a common interest development's default meet and confer procedures in this article shall provide that both the member and the association may be represented by counsel.

**LEGISLATIVE HISTORY**

Not known.

**IMPACT STATEMENT**

The proposed resolution does not affect any other law, statute or rule.

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**RESPONSIBLE FLOOR DELEGATE:** Joseph Goldstein

## RESOLUTION 04-02-2014

### DIGEST

#### Real Property: Service and Recording of Mechanic's Liens

Amends Civil Code section 8416 to add a requirement that lenders, reputed lenders and property owners of record be named in and served with a recorded mechanic's lien.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Civil Code section 8416 to add a requirement that lenders, reputed lenders and property owners of record be named in and served with a recorded mechanic's lien. This resolution should be approved in principle because the service on additional parties will ensure that all interested parties will have an opportunity to be heard in any proceeding resulting from the original filing.

Under current law, a mechanic's lien need only be served on the owner, or reputed owner, if known. This creates a situation where other lenders and owners are denied notice. This can create serious problems where portions of the properties may be sold to new owners who would not receive service of the lien.

The public is better served in any proceeding when all interested persons, whether or not persons of record, are notified of the proceeding in time to protect their individual interests.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 8416 to read as follows:

#### § 8416

- 1 (a) A claim of mechanics lien shall be a written statement, signed and verified by the
- 2 claimant, containing all of the following:
- 3 (1) A statement of the claimant's demand after deducting all just credits and offsets.
- 4 (2) The name of the owner or reputed owner, if known, the name of the lender or reputed
- 5 lender, if known, and any owner of the property as reflected in records of the County Recorder or
- 6 County Assessor for the county in which the property is located. The claimant may conduct an
- 7 in person search of the County Recorder or County Assessor's records, may rely on the County
- 8 Recorder or County Assessor's internet accessible records if owner identity or owner address
- 9 information is provided, or may rely upon a third party data provider with access to such data
- 10 from the County Recorder or County Assessor's office.
- 11 (3) A general statement of the kind of work furnished by the claimant.
- 12 (4) The name of the person by whom the claimant was employed or to whom the
- 13 claimant furnished work.

14 (5) A description of the site sufficient for identification.

15 (6) The claimant's address.

16 (7) A proof of service affidavit completed and signed by the person serving a copy of the  
17 claim of mechanics lien pursuant to subdivision (c). The affidavit shall show the date, place, and  
18 manner of service, and facts showing that the service was made in accordance with this section.  
19 The affidavit shall show the name and address of the owner or reputed owner upon whom the  
20 copy of the claim of mechanics lien was served pursuant to paragraphs (1) or (2) of subdivision  
21 (c), and the title or capacity in which the person or entity was served.

22 (8) The following statement, printed in at least 10-point boldface type. The letters of the  
23 last sentence shall be printed in uppercase type, excepting the Internet Web site address of the  
24 Contractors' State License Board, which shall be printed in lowercase type:

25  
26 "NOTICE OF MECHANICS LIEN  
27 ATTENTION!

28 Upon the recording of the enclosed MECHANICS LIEN with the county recorder's office of the  
29 county where the property is located, your property is subject to the filing of a legal action  
30 seeking a court-ordered foreclosure sale of the real property on which the lien has been recorded.  
31 That legal action must be filed with the court no later than 90 days after the date the mechanics  
32 lien is recorded.

33 The party identified in the enclosed mechanics lien may have provided labor or materials for  
34 improvements to your property and may not have been paid for these items. You are receiving  
35 this notice because it is a required step in filing a mechanics lien foreclosure action against your  
36 property. The foreclosure action will seek a sale of your property in order to pay for unpaid  
37 labor, materials, or improvements provided to your property. This may affect your ability to  
38 borrow against, refinance, or sell the property until the mechanics lien is released.

39 BECAUSE THE LIEN AFFECTS YOUR PROPERTY, YOU MAY WISH TO SPEAK WITH  
40 YOUR CONTRACTOR IMMEDIATELY, OR CONTACT AN ATTORNEY, OR FOR MORE  
41 INFORMATION ON MECHANICS LIENS GO TO THE CONTRACTORS' STATE  
42 LICENSE BOARD WEB SITE AT [www.cslb.ca.gov](http://www.cslb.ca.gov)."

43 (b) A claim of mechanics lien in otherwise proper form, verified and containing the  
44 information required in subdivision (a), shall be accepted by the recorder for recording and shall  
45 be deemed duly recorded without acknowledgment.

46 (c) A copy of the claim of mechanics lien, which includes the Notice of Mechanics Lien  
47 required by paragraph (8) of subdivision (a), shall be served on the owner or reputed owner, the  
48 lender or reputed lender, and any owner of the property as reflected in records of the County  
49 Recorder or County Assessor for the county in which the property is located. Service shall be  
50 made as follows:

51 (1) For an owner or reputed owner to be notified who resides in or outside this state, by  
52 registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing, postage  
53 prepaid, addressed to the owner or reputed owner at the owner's or reputed owner's residence or  
54 place of business address or at the address shown by the building permit on file with the  
55 authority issuing a building permit for the work, or as otherwise provided in Section 8174. For  
56 the lender or reputed lender, by registered mail, certified mail, or first-class mail, evidenced by a  
57 certificate of mailing, postage prepaid, addressed to the lender or reputed lender at the address  
58 identified in the Preliminary Notice or as may be reflected in the records of the County Recorder  
59 in which the property is located. For any owner of the property as reflected in records of the  
60 County Recorder or County Assessor for the county in which the property is located, by  
61 registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing, postage  
62 prepaid, addressed to the address reflected in the records of the County Recorder or County  
63 Assessor.

64 (2) If the owner or reputed owner cannot be served by this method, then the copy of the  
65 claim of mechanics lien may be given by registered mail, certified mail, or first-class mail,

66 evidenced by a certificate of mailing, postage prepaid, addressed to the construction lender or to  
67 the original contractor.

68 (d) Service of the copy of the claim of mechanics lien by registered mail, certified mail,  
69 or first-class mail, evidenced by a certificate of mailing, postage prepaid, is complete at the time  
70 of the deposit of that first-class, certified, or registered mail.

71 (e) Failure to serve the copy of the claim of mechanics lien as prescribed by this section,  
72 including the Notice of Mechanics Lien required by paragraph (8) of subdivision (a), shall cause  
73 the claim of mechanics lien to be unenforceable as a matter of law.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** San Diego County Bar Association

## **STATEMENT OF REASONS**

The Problem: Under current law, mechanics, materialmen and laborers filing a mechanic's lien against property for services, materials and labor provided need only serve the mechanic's lien on the "owner or reputed owner, if known" despite the fact that the prerequisite 20-Day Preliminary Notice needs to be served on the owner or reputed owner and lender or reputed lender. The problem is that the current system does not adequately ensure that owners, whose property is subjected to the lien, and lenders, who may have a secured interest in the property, receive notice of the lien. The problem is amplified by the fact that subcontractors are allowed rely on information provided by the general contractor in serving the preliminary notice and have no obligation, under current law, to perform a follow up inquiry in preparing the mechanic's lien. The problem is ripe for occurrence in construction of commercial properties where portions of a project may be sold during construction to new owners who were never served with the preliminary notices and would not receive service of the mechanic's lien.

The Solution: This resolution amends Civil Code section 8416 governing the content of the mechanic's lien and requirements for service of the lien to add a requirement that the lender or reputed lender and any owners as reflected in the records of the County Recorder or County Assessor be named in the lien and served with the lien. It requires the claimant filing the lien to conduct an inquiry of County Recorder or County Assessor records for the identity of owners. To lessen the potential burden associated with such an inquiry, it allows for a search of the Recorder and Assessor's records through the internet, where such records are made available via the internet, or via a third party data provider such as title companies or services like Lexis or WestLaw.

## **LEGISLATIVE HISTORY**

Not known.

## **IMPACT STATEMENT**

The proposed resolution does not affect any other law, statute or rule.

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**RESPONSIBLE FLOOR DELEGATE:** Darin Wessel

## RESOLUTION 04-03-2014

### DIGEST

Real property: Broadens Definition of Mortgage to Include a Deed of Trust.

Amends Civil Code section 2920 to clarify that mortgages include a deed of trust on real property secured by a promissory note.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

Similar to Resolution 02-01-2012, which was approved in principle.

#### Reasons:

This resolution amends Civil Code section 2920 to clarify that mortgages include a deed of trust on real property that is secured by a promissory note. This resolution should be approved in principle because the general public already commonly uses both terms to refer to an obligation secured by real property and containing a method to foreclose on a defaulted obligation.

This resolution would clarify that the terms “deed of trust” and “mortgage” can be used interchangeably without affecting the enforceability of instruments containing those terms. Mortgages and trust deeds differ in really only one aspect. In a mortgage, title to the property only passes when the obligation is satisfied. In a trust deed, title is passed to a trustee who holds title until the obligation is satisfied. The trustee then conveys title to the obligor under the note.

The nomenclature for obligations secured by real property evolved from different historical backgrounds. The eastern two-thirds of the country refers to a real property loan as a mortgage. West of the Rockies, trust deeds are much more common. In real life, they are much the same. Interchanging the terms in general conversation should not have legal consequences.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 2920 to read as follows:

#### § 2920

1 (a) A mortgage is a contract by which specific property, including an estate for years in  
2 real property, is hypothecated for the performance of an act, without the necessity of a change of  
3 possession. Subject to subdivision (b) hereof, a promissory note secured by a deed of trust may  
4 be referred to as a “mortgage,” without affecting the interpretation or enforceability of any of its  
5 terms by such reference.

6 (b) For purposes of Sections 2924 to 2924h, inclusive, "mortgage" also means any  
7 security device or instrument, other than a deed of trust, that confers a power of sale affecting  
8 real property or an estate for years therein, to be exercised after breach of the obligation so  
9 secured, including a real property sales contract, as defined in Section 2985, which contains such  
10 a provision.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Bar Association of Northern San Diego county

## **STATEMENT OF REASONS**

The Problem: The definition of a mortgage found in Civil Code section 2920, subdivision (a) would logically include a deed of trust, as such an arrangement clearly hypothecates the property for the performance of an act, that is, repayment of the money borrowed. Because a traditional mortgage normally involves two parties, the mortgagor (borrower) and mortgagee (lender) whereas the deed of trust procedure adds a third party to the mix, the trustee, to hold legal title to avoid the necessity of a judicial action to foreclose, lenders have sought to avoid having deeds of trust characterized as mortgages, leading to the language of section 2920, subdivision (b) which excepts deeds of trust from the class of mortgages with powers of sale.

If you ask a lay person who owns his or her own home subject to loan whether he or she has a “mortgage,” the likely answer would be “yes.” In fact, Civil Code section 2923.1 provides for a “mortgage broker” as licensed person who provides “mortgage brokerage services” arranging “a residential mortgage loan made by an unaffiliated third party.” However, other than the rare private transactions involving deeds or other conveyance documents, nobody does traditional mortgages in California any more. The law does not reflect the vernacular in use today.

The Solution: The universal financing documentation for loans secured by California real estate is a promissory note secured by a deed of trust. The supposition is, either way, if you don’t pay the note, you lose your property. The difference is that with a traditional mortgage, the lender has to file a formal lawsuit to foreclose on the equity for redemption, whereas with a deed of trust, the lender/beneficiary need merely instruct the trustee to perform the non-judicial trustee’s sale process described in Civil Code sections 2924, et seq. This Resolution makes clear that the enforcement mechanism contemplated by a deed of trust sets it apart from the traditional mortgagor/mortgagee arrangement, while at the same time recognizing that “mortgage brokers” broker deeds of trust. This Resolution reflects the vernacular to avoid unnecessary confusion.

## **LEGISLATIVE HISTORY**

Not known.

## **IMPACT STATEMENT**

The proposed resolution does not affect any other law, statute or rule.

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**RESPONSIBLE FLOOR DELEGATE:** K. Martin White



## RESOLUTION 04-04-2014

### DIGEST

#### Mechanic's Lien: Dismissal for Failure to Prosecute Within Six Months

Amends Civil Code section 8462 to allow discretionary dismissal of complaint to enforce mechanic's lien if plaintiff fails to prosecute claim within six months of filing complaint.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Civil Code section 8462 to allow discretionary dismissal of complaint to enforce mechanic's lien if plaintiff fails to prosecute claim with six months of filing complaint. This resolution should be approved in principle because it would give the court the discretion to weed out cases that are not being reasonably prosecuted.

Currently, a plaintiff can file a case and then ignore it for up to two years by failing to have a summons issued. The defendant's property may become encumbered, causing lenders to withhold funds. The defendant's property may suffer increasing damage because the plaintiff refuses to prosecute or compromise its claim. This amendment would give the trial court discretion to dismiss a complaint to enforce a lien if the case is not brought to trial within six months after the action is commenced and will close the window to intentional non-meritorious delay.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 8462 to read as follows:

§ 8462

- 1           (a) Notwithstanding Section 583.420 of the Code of Civil Procedure, if an action to
- 2 enforce a lien is not brought to trial within two years after commencement of the action, the court
- 3 may in its discretion dismiss the action for want of prosecution.
- 4           (b) Notwithstanding Section 583.420 of the Code of Civil Procedure, if service is not
- 5 made within six months after the action is commenced, the court may in its discretion dismiss the
- 6 action for want of prosecution.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Sacramento County Bar Association

## **STATEMENT OF REASONS**

The Problem: Existing law permits defendants to move for discretionary dismissal if service is not made within two years after the action is commenced. Code Civ. Proc. §583.420. Discretionary dismissal is also permitted if an action to enforce a mechanic's lien is not brought to trial within two years after commencement. Civ. Code §8462. Plaintiffs must commence actions within 90 days after recording their mechanic's lien to preserve their rights. Civ. Code §8460. An action is commenced when the complaint is filed, not when the summons is issued. Code Civ. Proc. §350. Currently, plaintiffs may preserve their rights to a mechanic's lien by filing a complaint to enforce the lien, but don't need to have a summons issued. Plaintiffs who fail to have the summons issued may then choose to not prosecute the action while the defendant is damaged during this "limbo" period. The Trial Court Delay Reduction Act, Case Management Program, California Rules of Court, and Civil Code are not effectively addressing this "limbo" period.

The Solution: When a mechanic's lien is filed, the defendant's property is encumbered and lenders may withhold funds. The defendant is continuously damaged while the action is pending. Commencing the action, but failing to serve the defendant, places enormous pressure on the defendant to settle the action without being able to defend their position on the merits. This resolution will help close the "limbo" period by creating an earlier avenue for requesting discretionary dismissal. This resolution will provide the defendant with a possible remedy against plaintiffs who intentionally delay prosecution by failing to have their summons issued. It will also encourage plaintiffs prosecute their actions. Making discretionary dismissal will allow the court to consider uncontrollable delays due to court processing times. Discretionary dismissal will also permit the court to take into consideration the actions of plaintiffs who are actively attempting to prosecute the matter.

## **LEGISLATIVE HISTORY**

Not known.

## **IMPACT STATEMENT**

The proposed resolution does not affect any other law, statute or rule.

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**RESPONSIBLE FLOOR DELEGATE:** Trevor Carson

## RESOLUTION 04-05-2014

### DIGEST

Property: Fines for Landlords Who Fail to Provide an Address for Personal Service

Adds Civil Code section 1962.1 to penalize landlords who violate Civil Code section 1962 by failing to provide an address at which personal service can be effected.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution adds Civil Code section 1962.1 to penalize landlords who violate Civil Code section 1962 by failing to provide an address at which personal service can be effected. This resolution should be approved in principle because it provides an enforcement mechanism for existing law and encourages landlords to comply with existing law.

Civil Code section 1962, requires that landlords provide tenants with an address where personal service can be made. However, there is currently no penalty for landlords who violate that requirement. This resolution fills that gap so that landlords will be encouraged to comply with existing law, and will help ensure that tenants can enforce their right live in a habitable property. Although a mandatory minimum fine of \$1,000 may seem high if the landlord's violation was an honest and inadvertent error, a lower amount would be less likely to encourage landlords to comply with their existing obligations. For instance, a landlord could always claim that the omission was inadvertent, and therefore, the risk of facing a \$500 penalty would be outweighed by the benefits of never being served with a complaint and never having to defend a habitability claim. Further, these penalties only apply if the court finds that the property in fact breaches the warranty of habitability; the tenant must prove the landlord breached that warranty before any penalty is assessed against the landlord. The landlord of an uninhabitable property should not be able to avoid responsibility for that property by also violating their obligation to give the tenant an address for serving a complaint.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to add Civil Code section 1962.1 to read as follows:

§ 1962.1

- 1 Any landlord who violates Civil Code section 1962 by failing to provide an address at
- 2 which personal service can be effected, shall be subject to a civil penalty not less than \$1,000 nor
- 3 more than \$5,000 if the court also finds that the property fails to comply with the Warranty of
- 4 Habitability as stated in Civil Code section 1941.1.
- 5 The civil penalties provided for in this section are in addition to any other penalty
- 6 provided by law. In enforcing this section, the Court shall take into consideration whether the

7 violation was inadvertent, and in its discretion, may decide not to penalize a landlord when that  
8 violation was due to a clerical error or inadvertent mistake.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** San Mateo County Bar Association

## **STATEMENT OF REASONS**

The Problem: Civil Code section 1962 requires landlords to provide tenants with an address where the landlord can be personally served. Civ. Code § 1962(b). However, there is no penalty attached to a violation of this Section.

Tenants living with uninhabitable dwellings, as is defined by the Warranty of Habitability in Civil Code section 1941.1, are effectively blocked from enforcing their rights against landlords who refuse to provide an address where personal service can be effected. Many landlords only provide a P.O. Box mailing address. As a result, their tenants are unable to initiate lawsuits.

Although legal mechanisms exist to effect service without a personal address, such as Civil Code section 1962.7, many tenants are not aware of them. This new penalty creates a strong incentive for landlords to comply with the disclosure requirement. Civil Code section 1962 requires landlords to provide tenants with an address where the landlord can be personally served. Civ. Code § 1962(b). However, there is no penalty attached to a violation of this Section.

Tenants living with uninhabitable dwellings, as is defined by the Warranty of Habitability in Civil Code section 1941.1, are effectively blocked from enforcing their rights against landlords who refuse to provide an address where personal service can be effected. Many landlords only provide a P.O. Box mailing address. As a result, their tenants are unable to initiate lawsuits.

Although legal mechanisms exist to effect service without a personal address, such as Civil Code section 1962.7, many tenants are not aware of them. This new penalty creates a strong incentive for landlords to comply with the disclosure requirement.

The Solution: This resolution creates a penalty of \$1,000 to \$5,000 for a landlord's failure to provide an address for personal service if a tenant shows there is also a violation of the Warranty of Habitability as defined in Civil Code section 1941.1.

## **LEGISLATIVE HISTORY**

Not known.

## **IMPACT STATEMENT**

The proposed resolution does not affect any other law, statute or rule.

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**RESPONSIBLE FLOOR DELEGATE:** Stephen Ilg

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**COMMENTS TO RESOLUTION 04-05-2014**

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**BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY**

DISAPPROVE: There are consequences for noncompliance with Civil Code Section 1962 (a)(1)(B). Civil Code Section 1962 (c) does not allow a successor owner or manager to serve a 3 day notice or otherwise evict a tenant during any period of noncompliance. Civil Code Section 1962 (d) provides that a noncompliant party who enters into a rental agreement is deemed the agent of each person who is an owner for the purpose of service of process and other reasons. Civil Code Section 1962 (f) provides if the address provided does not allow for personal delivery, it is presumed that rent mailed to the address provided is deemed received on the date posted. Adding a minimum \$1,000 penalty is punitive particularly since many individual landlords are unaware of the requirements of Civil Code Section 1962 and tenants can usually find of the address of the owner by checking the county tax assessor or recorders records (see 04-02-2014).

## RESOLUTION 04-06-2014

### DIGEST

Property: Prohibits HOAs from Redacting Information about Financial Transactions

Amends Civil Code section 5215 to prohibit homeowner associations from redacting information about financial transactions.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Civil Code section 5215 to prohibit homeowner associations from redacting information about financial transactions. This resolution should be approved in principle because it ensures transparency, fairness and accuracy in HOA financial transactions.

Civil Code section 5205 allows members to inspect association records, which include financial statements showing income and expenses. Members, who pay dues to the HOA, have an interest in ensuring that the HOA's financial records are accurate and that there are no undisclosed conflicts of interest between the HOA, its board or other members, and persons hired by the HOA. This resolution furthers that interest by preventing HOAs from using Civil Code section 5215 as a way to hide undisclosed conflicts, or secretly bestowing favors on other members. This resolution also ensures that members can review complete records so that they can accurately audit the HOA's use of member dues.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 5215 to read as follows:

#### § 5215

1 (a) Except as provided in subdivision (b), the association may withhold or redact  
2 information from the association records if any of the following are true:

3 (1) The release of the information is reasonably likely to lead to identity theft. For the  
4 purposes of this section, "identity theft" means the unauthorized use of another person's personal  
5 identifying information to obtain credit, goods, services, money, or property. Examples of  
6 information that may be withheld or redacted pursuant to this paragraph include bank account  
7 numbers of members or vendors, social security or tax identification numbers, and check, stock,  
8 and credit card numbers.

9 (2) The release of the information is reasonably likely to lead to fraud in connection with  
10 the association.

11 (3) The information is privileged under law. Examples include documents subject to  
12 attorney-client privilege or relating to litigation in which the association is or may become  
13 involved, and confidential settlement agreements.

14 (4) The release of the information is reasonably likely to compromise the privacy of an

15 individual member of the association. This subsection does not authorize the association to  
16 redact from records defined as interim financial statements under Civil Code section 5200(a)(3)  
17 any of the following information:

18 (A) The identity of the counterparty to any transaction with the association, including but  
19 not limited to association members;

20 (B) The date of any transaction with the association;

21 (C) The amount of any transaction with the association;

22 (D) The nature of the transaction.

23 (5) The information contains any of the following:

24 (A) Records of goods or services provided a la carte to individual members of the  
25 association for which the association received monetary consideration other than assessments.

26 (B) Records of disciplinary actions, collection activities, or payment plans of members  
27 other than the member requesting the records.

28 (C) Any person's personal identification information, including, without limitation, social  
29 security number, tax identification number, driver's license number, credit card account  
30 numbers, bank account number, and bank routing number.

31 (D) Minutes and other information from executive sessions of the board as described in  
32 Article 2 (commencing with Section 4900), except for executed contracts not otherwise  
33 privileged. Privileged contracts shall not include contracts for maintenance, management, or  
34 legal services.

35 (E) Personnel records other than the payroll records required to be provided under  
36 subdivision (b).

37 (F) Interior architectural plans, including security features, for individual homes.

38 (b) Except as provided by the attorney-client privilege, the association may not withhold  
39 or redact information concerning the compensation paid to employees, vendors, or contractors.  
40 Compensation information for individual employees shall be set forth by job classification or  
41 title, not by the employee's name, social security number, or other personal information.

42 (c) No association, officer, director, employee, agent, or volunteer of an association shall  
43 be liable for damages to a member of the association or any third party as the result of identity  
44 theft or other breach of privacy because of the failure to withhold or redact that member's  
45 information under this section unless the failure to withhold or redact the information was  
46 intentional, willful, or negligent.

47 (d) If requested by the requesting member, an association that denies or redacts records  
48 shall provide a written explanation specifying the legal basis for withholding or redacting the  
49 requested records.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Bar Association of San Francisco

## **STATEMENT OF REASONS**

The Problem: Homeowners association ("HOA") boards exercise control over many important aspects of their member's quality of life, such as parking, garbage, window coverings, noise and light, common area maintenance, improvements, and imposing assessments for current and future improvements. By bestowing favors on certain members, an "in group" can retain control over a HOA board for years or decades, promoting the interests of some at the cost of others. There are few checks or balances on the power wielded by the HOA board. One of the only checks is the members' statutory right to inspect association records, to audit whether the HOA board and its agents are properly enforcing the association's governing documents.

In resisting requests for information made by members, associations frequently invoke Civil Code section 5215 to argue that the release of unredacted financial statements that reflect the payment (or non-payment) by members of dues and other obligations comprises a “release of ... information [that] is reasonably likely to compromise the privacy of an individual member of the association.” In this way they effectively prevent their members from auditing the association’s actions.

However, invoking section 5215 in this manner is improper, since the requesting member’s use of the information is already limited by section 5230(a) which provides, among other things, that the associations records and the information they contain “may not be sold, used for a commercial purpose, or used for any other purpose not reasonably related to a member's interest as a member.” That section allows an action for injunctive relief and damages arising from improper use of such information, and authorizes an award of attorney’s fees to the prevailing party.

The Solution: Current law provides that members of a homeowners association or other common interest community are authorized to request, and the association is required to provide, specified records, including interim financial statements, containing any or all of balance sheets, income and expense sheets, and general ledgers. (*See* Civil Code section 5200 *et seq.*) A homeowners association may redact information from the records provided to a requesting member for reasons set forth in Civil Code section 5215, including when the release of which “is reasonably likely to compromise the privacy of an individual member of the association.” Civ. C. § 5215(a)(4).

This resolution would amend Civil Code section 5215 to make it clear that an association’s right to redact information based on its members’ privacy interests does not extend to basic information regarding the association’s transactions with its members. This resolution would thereby foster transparency in the operations of homeowners associations.

This resolution would also reduce claims against an association by members unhappy that the association released information of their transactions with the association by making it clear that the association did not have the right to redact such information from its financial statements. To the extent that this resolution encourages homeowners associations to provide unredacted financial statements, this resolution also would reduce claims by members who seek such information.

## **LEGISLATIVE HISTORY**

Not known.

## **IMPACT STATEMENT**

The proposed resolution does not affect any other law, statute or rule.

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**RESPONSIBLE FLOOR DELEGATE:** Matthew Gluck



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## COMMENTS TO RESOLUTION 04-06-2014

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### SACRAMENTO COUNTY BAR ASSOCIATION

DISAPPROVE: The problem with this resolution is that it is too broad in its language. The type of records to which this resolution applies are of a nature which would include transactions that may be more personal in their character. The other provisions of Section 5200, describing records to be provided by an association upon request, deal with the much more general operational budgetary aspects of an association. The records which would be included by this resolution under the heading of "interim financial statements" include general ledger entries which, more likely than not, will include such things as amounts paid under settlements or disciplinary matters. The reason that the provisions of Section 5215 (originally Section 1365.2(d)) were included in the Davis-Stirling Act were to prevent the airing of one's private business to the rest of the community. The language, as it stands, would strip away such protection and leave the potential for broadcast of information which some members, who may have been involved in a disciplinary or delinquency matter, would rather not have aired in public.

The author states that this resolution is necessary to prevent boards from gaining favor with a "cadre" of members in order to consolidate and maintain power in the association. However, anecdotal experience shows that such occurrences are extremely rare. But, as presented, this resolution would remove a protection of personal information and likely lead to the exposure of such information, with the potential to bring embarrassment to ridicule upon another member of the association.