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**Foreclosure sequencing of mixed collateral:
Kearns v Transamerica Home Loan, 2004
Roger Bernhardt**

When mixed real and personal property secure debt, as long as debt is not reduced to judgment, security may be foreclosed nonjudicially in any sequence without rendering real property lien unenforceable.

Kearns v Transamerica Home Loan (9th Cir BAP 2004) 314 BR 819

In November 1995, the Kearns obtained a consumer loan of \$34,658 from Transamerica. Transamerica obtained two separate liens as security, one in an automobile and the other a deed of trust on real estate. The Transamerica liens survived the Kearns' 1996 bankruptcy. When the Kearns defaulted, Transamerica repossessed and sold the automobile collateral. In 1998, the Kearns sold the real estate on which Transamerica still had a recorded deed of trust. Transamerica placed a demand in escrow and received \$17,398 of the sale proceeds after it refused to reconvey the deed of trust. The Kearns sued Transamerica in bankruptcy court, contending that the real property lien was satisfied by the vehicle repossession. The bankruptcy court awarded Transamerica summary judgment, ruling that it had not violated the one-action rule of CCP §726.

The Ninth Circuit Bankruptcy Appellate Panel affirmed, holding that the exercise of the nonjudicial remedy against the personal property collateral did not render Transamerica's lien on the real property unenforceable. The court determined that Transamerica did not offend the "one-action" rule of CCP §726 when it nonjudicially took and sold the automobile, because Transamerica did not resort to anything other than its security. The court stated that the nonjudicial remedy of repossession and sale of the vehicle was not an "action" within the meaning of the statute.

The court also explained that, under California law, when two items of collateral secure a single debt, the creditor may resort to the additional security following a nonjudicial foreclosure. Under either CCP §726 or Com C §9604 (which regulates enforcement of rights when one loan is secured by both real and personal property), the sequence in which the security is foreclosed is irrelevant.

THE EDITOR'S TAKE: This decision is so unsurprising that the only question I had about it was why the court wanted to publish it. Of course a creditor who holds two assets as security can dispose of each of them at separate nonjudicial foreclosure sales, and that has always been the rule. *Dreyfuss v Union Bank* (2004) 24 C4th 400, 101 CR2d 29, expressly upheld it when both assets were real estate, and *Freedland v Greco* (1950) 45 C2d 452, 289 P2d 463, upheld it (implicitly) when one asset was real and the other was personal property. (The order of selling in *Freedland* was real property before personal property, but that should not make a difference when both sales are nonjudicial; nor did it make a difference in *Florio v Lau* (1998) 68 CA4th 637, 80 CR2d 409, which had the same order of sale.) That also seems to me to be the explicit consequence of Com C §9604(a)(1)(A)'s authorization of separate foreclosure proceedings. Since a prior nonjudicial sale of real

property does not bar a subsequent sale of other real property, it is hard to see why a prior nonjudicial sale of personal property should have any different effect, when nothing in the Commercial Code or the Code of Civil Procedure seems to demand anything different. And then, finally, if a prior sale of the first asset does not bar a later sale of the second asset, that has to mean that the creditor's lien on the second asset was not lost by the completion of the prior sale. Thus, Transamerica had a right to demand payment of its deed of trust as a condition for releasing it.

The interesting issues that could have arisen were all taken away when the debtors got their discharge in bankruptcy, because that eliminated all possibility of deficiency liability after the sales were completed. But I can still wonder: Since the Kearns note was secured by a deed of trust as well as by a vehicle, could Transamerica have gone after the real estate and/or obtained a deficiency judgment if it had moved before the debtors filed bankruptcy?

My answer is a decisive "maybe or maybe not." Transamerica would have had trouble getting a deficiency judgment if it had chosen to conduct a trustee sale of the real estate as its next step, because that would run afoul of CCP §580d, prohibiting deficiencies after trustee sales, and that rule seems preserved by Com C §9604(a)(3)(D). But if Transamerica had chosen instead to judicially foreclose on its deed of trust (rather than have a trustee sale), after the vehicle sale, §580d would no longer apply, and Com C §9604(a)(2)(A) says that deficiencies after personal property sales are not prohibited. In that case, I would guess the answer might be yes.

The court also said, "If Transamerica had obtained a deficiency judgment following its taking and sale of the vehicle securing a consumer loan, then Code of Civil Procedure §726 plainly would have been transgressed in a fashion that would have eliminated the enforceability of the deed of trust." 314 BR at 826. I agree with that sentiment, but only on the assumption that the Kearns permitted such a deficiency judgment to be entered. I am not certain that, if the Kearns had objected, Transamerica could have obtained a deficiency following a personal property sale without a real estate foreclosure, because that could well be held to constitute a direct violation of the "security first" interpretation our courts give to §726, *i.e.*, not getting a money judgment until after a foreclosure of the security. If Transamerica could do this despite an objection by the Kearns, mortgagees might entirely escape the real estate "security first" principle by the simple expedient of taking some personal property of insignificant value as additional security and selling that instead. Personally, I have never believed that this reading of §726 ever did borrowers much good—except when their lenders stumbled—but since our courts seem truly to believe that it constitutes a vital element of debtor protection (see, *e.g.*, *Security Pac. Nat'l Bank v Wozab* (1990) 51 C3d 991, 25 CR 201, especially the dissent), I would be surprised if it could be taken away that easily. Transamerica might also have considered a unified judicial foreclosure sale of both assets as a prelude to a deficiency judgment, since that would certainly satisfy both the policies of exhausting all security and not having a multiplicity of actions; indeed it seems to be the procedure mandated by *Walker v Community Bank* (1974) 10 C3d 729, 111 CR 897. But while that might satisfy the real estate crowd, it is likely to

violate the personal property requirement that commercially reasonable sales depend on some commonality between assets (see *Aspen Enters. v Bodge* (1995) 37 CA4th 1811, 44 CR2d 763)—which a car and a house seem to lack. (Or could that be finessed by having the sheriff offer the two assets for sale separately, even though they were both included in the same action?)

Finally, since UCC Article 9 permits a personal property security creditor to ignore its security altogether and just sue on its note, could Transamerica just do that—start off by suing on the Kearns note, claiming to be proceeding against the personal property as permitted, and only afterwards go after the car or the land?

I wrote a column some years ago in the Reporter entitled *The Mixed Multiple Collateral Muddle*. Age has probably made it obsolete in most respects, except for the accuracy of the description in its title. *Roger Bernhardt*