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## Identity theft and foreclosure surpluses: CTC Real Estate Servs. v Lepe, 2006

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**Identity theft and foreclosure surpluses:**  
***CTC Real Estate Servs. v Lepe, 2006***  
**Roger Bernhardt**

**Identity theft victim whose personal information was used to obtain loan secured by deed of trust to acquire real property may recover undistributed surplus proceeds that remained after trustee sale. *CTC Real Estate Servs. v Lepe* (2006) 140 CA4th 856, 44 CR3d 823**

In an act of identity theft, an unknown perpetrator used Lepe's name, personal information, and credit to purchase real property and obtain a loan secured by a purchase money deed of trust. Without her knowledge, title to the property was taken in Lepe's name and her name was signed on a promissory note as the maker and on a deed of trust as trustor.

The beneficiary under the deed of trust foreclosed. CTC Real Estate Services (CTC), the trustee, sold the property at a trustee sale. Surplus funds remained after payments to the lienholders. CTC petitioned the trial court under CC §2924j(c) for an order allowing the deposit of the balance of the surplus proceeds less attorney fees and costs and discharging CTC from any further responsibility. CTC explained that while it believed the equitable and fair result would be to have Lepe receive the surplus funds, it was unable to distribute them to her because she was not the actual trustor of the foreclosed deed of trust as required by CC §2924k(a)(4). The trial court discharged CTC from further responsibility and approved its request for attorney fees and costs.

Lepe submitted, under CC §2924j(a)(4), (d), what turned out to be the only claim for the undistributed surplus funds, asserting the right because her name and Social Security number had been used fraudulently by the wrongdoer to obtain funding for the purchase of property. She added that the foreclosure damaged her credit record and required her to spend considerable time dealing with the consequences: A bankruptcy proceeding had been filed in her name without her knowledge; her credit card accounts had been closed; and she was unable to borrow money for a home she intended to purchase. The trial court rejected Lepe's claim, ordering the surplus to be paid into the county general fund.

The court of appeal reversed. Personal identifying information can be the object of theft. Lepe established that her personal identifying information was misappropriated and used to obtain the property. The lending institution would have paid the surplus to the identity thief had he or she continued in the fraudulent activity. In that circumstance, Lepe would have been able to recover the surplus from the identity thief because the thief engaged in a fraudulent transaction by which he or she would have been unjustly enriched.

The mere fortuity that the wrongdoer disappeared without receiving the surplus and was not subject to legal action should not, as a matter of equity, have precluded Lepe from recovering the funds not in the thief's possession. Lepe had an equitable interest in the surplus funds from the foreclosure sale to which no one else asserted a claim or interest. Because a crime victim is entitled to trace stolen assets into other assets and obtain the final product, even though it may exceed the value of that which was stolen, Lepe was entitled to the product of the identity theft. Moreover, Lepe suffered substantial damages as a result of the identity theft.

The appellate court directed the trial court to enter an order granting Lepe's claim for payment of the undistributed surplus funds remaining after the award to CTC of its attorney fees and costs.

**THE EDITOR'S TAKE:** The trial court's outcome was so sensible that it was a shame that Lepe's attorney had to go up to the court of appeal to reach it. But obviously, both the trial and the appellate court took the matter seriously, as is shown by their shared refusal to accept the easy way out that a constructive trust explanation would provide and the reviewing court's invention of a more complicated restitution and unjust enrichment analysis to get the same result.

The appellate court's theory also has more far-ranging consequences than Lepe's straightforward constructive trust claim, since it should also work to protect *other* unpaid creditors victimized by the same scam and entitle them to share in the surplus along with Lepe. I can think of three possible other parties who might claim some part of the surplus as restitution for their losses:

1. The thief has disappeared and we cannot know precisely how his scheme worked, but it would not have made sense for him to have made a downpayment out of his own pocket; he somehow or other must have obtained 100 percent or 100 percent plus financing. Was this from the seller? (There were two mortgages on the property; it is unlikely that the second one was hard money.) Could the seller make some kind of claim to the surplus, over and above payment of her note and deed of trust? She was the last identifiable owner of the property (the predecessor, if not the successor in interest), and that perhaps should count for something.

2. Was the thief's bankruptcy filing done only to stall the foreclosure, or were other creditors listed on the schedules? If they were victimized by theft of the same identity, even if in other transactions, might not they claim this surplus as restitution, since constructive trust (and its tracing requirement) was not the theory used?

3. It is unlikely that the thief went through all of this effort just to own empty property, which makes me suspect that he was probably rent skimming as well. See CC §890. If tenants were defrauded out of security deposits or subsequently evicted by the foreclosure, then they too should have some claim to that surplus.

Anyway, if the thief is still around, I'd like to propose my name for his next acquisition. As long as he sticks to acquiring single family houses, where I will have antideficiency protection if the market turns down, I would even be willing to split any surplus with him if it goes up instead.—*Roger Bernhardt*