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Acosta: Mortgagor Removal of Fixtures

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Husband and wife intentionally harmed lender by removing statutorily specified improvements (including fixtures) from home and were properly convicted under Pen C §502.5, which is not unconstitutionally vague.

People v Acosta (2014) 226 CA4th 108

Husband and Wife bought a home, then sought refinancing to borrow $700,000. Based on the appraisal of the home, which showed exceptional upgrades, Lender specified in the deed of trust that "fixtures now or hereafter a part of the property" were secured collateral. 226 CA4th at 113. After the couple defaulted, Lender scheduled the home for a foreclosure sale on June 14, 2010, but told the Husband and Wife they could stay in the home until the end of the month. Wife e-mailed Lender on June 9, 2010, demanding $10,000 in exchange for the keys to the house and threatening that the home would not be left in good condition otherwise. The house did not sell to a third party at the foreclosure sale. When Lender went to view the property, it found "total destruction," including missing doors, countertops, appliances, cabinet doors and drawers; trees cut down and plants torn up; black dye and spray paint spread over areas of the house; and extensive damage to the pool, whirlpool, and rock facing on the house. 226 CA4th at 113. Both Husband and Wife were convicted of violating Pen C §502.5 by intentionally harming a lender by removing statutorily specified improvements, including fixtures, from the home. Husband and Wife appealed; the court of appeal affirmed the convictions.

Penal Code §502.5 is not unconstitutionally vague because a layperson could read the statute and reasonably understand what behavior was prohibited: intentionally removing improvements and fixtures from the home to harm a lender. Although the statute uses the archaic term "freehold" and refers to "attached or affixed" "improvements," an average person can understand those terms in context. 226 CA4th at 117.

Furthermore, the jury was properly instructed about what constitutes a fixture or improvement by reference to CC §660, which in part defines a fixture as something "permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." While the intent of the annexing party is pertinent to show whether there is an objective manifestation of permanence (as stated in §660), the subjective intent of defendant is flatly irrelevant. "[T]he essential question for the j0ury is whether consideration of all of the evidence of permanence persuades beyond a reasonable doubt that the attachment was intended to be permanent." 226 CA4th at 122. Thus, by instructing on both Pen C §502.5 and CC §660, the trial court committed no error and the jury properly convicted both

Husband and Wife.

THE EDITOR'S TAKE: Nine months in jail may be a severe sanction for destroying mortgaged property, but I don't know how much good that does the lender, because revenge is not repayment. On that feature, the opinion does not give us many of the relevant numbers. It does tell us that the original loan amount was $700,000 when the house was worth $705,000, and that three years later, when the lender foreclosed, it collected $144,000 from its insurance company and $178,500 from reselling the house to third parties. If the lender thus got back $322,500 from those two sources, that still left it with an apparent shortfall of some $300,000-$400,000. Could the lender have gone after the defendants for some of that loss?

This was a refinance loan and so was probably covered by CCP §580b (prohibiting deficiency judgment). But the foreclosure was by trustee sale, meaning that the defendants might have a CCP §580d defense against deficiency liability. The harm that the defendants had done to the property looks like waste under CC §2929, as well as fixture removal under Pen C §502.5, meaning that if damage was done in bad faith, the lender could go after them despite the antideficiency rules. See *Cornelison v Kornbluth* (1975) 15 C3d 590, 604.

However, the opinion does not tell us how much was due on the loan when the lender went to sale, nor—more importantly—does it say how much the lender bid at the sale. If a full credit bid was made (as lenders too often do), then the lender was not harmed by the damage caused by the defendants because legally it had been paid in full. The doctrine of bad faith waste may avoid the antideficiency rules, but not the full credit bid rule. The only monetary liability these despoiling defendants may incur is for their supervised probation costs.—*Roger Bernhardt*