

**RESOLUTION 03-02-2015**

**DIGEST**

Real Property: Clarifies That a General Reference to a Deed of Trust Is a Mortgage

Amends Civil Code section 2920 to clarify that a promissory note secured by a deed of trust may be referred to as a “mortgage.”

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Association recommends that legislation be sponsored to amend California 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. The prevalent financing documentation for loans secured by California real estate is a promissory note secured by a deed of trust. If you ask a lay person who owns his or her own home subject to a loan whether he or she has a “mortgage,” the likely answer would be “yes.” Similarly, people discuss “foreclosure” in the context of trustee’s sales, when in fact a trustee’s sale is, technically, not a foreclosure. Even the appellate courts use mortgage terms in connection with the analysis of deeds of trust. Please see, e.g., Najah v. Scottsdale Insurance Company (2014) 230 Cal.App.4th 125, 129, fn.3. With a traditional mortgage, the lender has to file a formal lawsuit to foreclose on the equity of 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., to enable the beneficiary to realize on the security. Either way, if you don't pay the note, you lose your property. 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. It should be possible to remain clear that the enforcement mechanism contemplated by a deed of trust sets it apart from the traditional mortgagor/mortgagee arrangement requiring legal action to foreclose the equity of redemption, while at the same time recognizing that "mortgage brokers" broker deeds of trust. The law should reflect the vernacular to avoid unnecessary confusion.

The Solution: This Resolution clarifies that specifically for purposes of general reference, a deed of trust is a mortgage, as that is defined in Civil Code section 2920, subdivision (a), subject to the exception in subdivision (b), so as to avoid confusion, particularly among lay persons.

### **IMPACT STATEMENT**

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

### **CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

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### **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 a promissory note secured by a deed of trust may be referred to as a "mortgage." This resolution should be approved in principle because it updates the Civil Code to reflect the types of transactions actually occurring, and will assist courts, attorneys, and laypersons alike in ensuring the vernacular of the statute is identical to the intended meaning of the parties.

The definition of a mortgage found in Civil Code section 2920, subdivision (a) would logically include a deed of trust, because 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), while

the deed of trust procedure adds a third party to the mix, the trustee who holds 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. The prevalent financing documentation for loans secured by California real estate is a promissory note secured by a deed of trust. However, if one asks a lay person – who owns his or her own home subject to a loan – whether he or she has a “mortgage,” the likely answer would be “yes.” Similarly, people discuss “foreclosure” in the context of trustee’s sales, when in fact a trustee’s sale is, technically, not a foreclosure. Even the appellate courts use mortgage terms in connection with the analysis of deeds of trust. (See, e.g., *Najah v. Scottsdale Insurance Company* (2014) 230 Cal.App.4th 125, 129, fn. 3.) Other than the rare private transactions involving deeds or other conveyance documents, traditional mortgages are no longer used in California. Further, it should be possible to differentiate between the enforcement mechanisms for a deed of trust and a traditional mortgagor/mortgagee arrangement requiring legal action to foreclose, while at the same time recognizing that “mortgage brokers” broker deeds of trust. The law should reflect the common usage to avoid unnecessary confusion.

Resolution 02-01-2012 was introduced as Assembly Bill No. 1240 (2013-2014 Reg. Sess.)