THE REAL PROPERTY SECTION

OF THE BAR ASSOCIATION OF SAN FRANCISCO

Presents

HAVING REAL ESTATE CONTRACTS INTERPRETED IN YOUR CLIENT'S FAVOR

Critical Rules of Construction Every Real Estate Transactional and Litigation Attorney Should Know

Speakers

Sean Ponist, Esq.

Law Offices of Sean Ponist, P.C.

Vice-Chair BASF Real Property Section

Harold Justman, Esq.

Justman Associates

September 16, 2015

THE REAL PROPERTY SECTION

OF THE BAR ASSOCIATION OF SAN FRANCISCO

Presents

HAVING REAL ESTATE CONTRACTS INTERPRETED IN YOUR CLIENT'S FAVOR

Critical Rules of Construction Every Real Estate Transactional and Litigation Attorney Should Know

TABLE OF CONTENTS

.

PRESENTER BIOGRAPHIES

SEAN E. PONIST, ESQ.

Sean Ponist is the owner of the Law Offices of Sean Ponist, P.C., a firm specializing in real estate, construction defect and business litigation. Prior to founding his own firm, Mr. Ponist was a prosecutor with the Marin County District Attorney's Office and in-house counsel for Marcus & Millichap Real Estate Investment Brokerage Company. He has successfully tried over 25 cases to verdict. For the past five years, Mr. Ponist has been recognized as a Northern California Super Lawyer.

Mr. Ponist has also published numerous articles on real estate topics, including recent articles in The Daily Journal ("Recovering Lost Profits in Real Estate Transactions" and "Should Equitable Indemnity Apply Against Negligent Misrepresentation Claims?"), California Lawyer magazine ("The Nonrefundable Deposit – Not!") and Commercial Investment Real Estate ("Going to the Source: Minimize your liability by providing attributions").

He has further lectured for the San Francisco Bar Association ("Bringing Down the House: Assessing Damages in Real Estate Cases," "Best Use of Experts in Real Estate Cases," "The Rogue Agent: Agency Issues In Real Estate," "Private Investigation and the Legal Community," and "Commercial Real Estate Brokerage Standard of Care"), the San Mateo County Bar Association ("When Real Estate Deals Go Bad," "Expert Witnesses at Trial," and the "Agent-Principal Relationship"), the San Diego County Bar Association ("Commercial Real Estate Brokerage Standard of Care") as well as for the National Business Institute ("Direct and Cross-Examination for Civil Litigators").
Mr. Ponist graduated from *UC Davis School of Law*, receiving his Juris Doctor degree in 1999. Prior to law school, Mr. Ponist attended *UCLA* where he earned a Bachelor of Arts in Philosophy in 1995 and was a Departmental Scholar.

HAROLD A. JUSTMAN, ESQ.

Harold Justman has litigated real estate disputes for thirty-five years and is also a licensed real estate broker. He also serves as an Academic Consultant and Faculty Advisor to the Real Estate Program at Menlo College where he is an Adjunct Professor of real estate. He has also qualified as a trial expert witness regarding the standard of care of real estate brokers and other real property matters in Alameda Marin, Merced, Contra Costa, Fresno, Placer, Santa Barbara, Santa Clara, San Diego, San Mateo, San Francisco, San Joaquin and Sonoma Counties.

Mr. Justman recently presented for the Bar Association of San Francisco on "Commercial Real Estate Brokerage Standard." He has also recently published the following articles: "Foreclosure Law in California," California Real Property Journal, volume 31, no.4 (2013); "Loan Modification Law in California," California Real Property Journal, volume 32, no.2 (2014), and "The Co-Evolution of the Mortgage Market and Mortgage Law," California Real Property Journal, volume 32, No. 1 (2015). He is also the Contributing Editor and past Editor of the

California Real Estate Law Newsletter (a publication of the San Mateo County Community College District).

Mr. Justman graduated from Stanford University in 1972, and he graduated from Hastings Law School in 1975.

HAVING REAL ESTATE CONTRACTS INTERPRETED IN YOUR CLIENT'S FAVOR

I. INTERPRETING CONTRACTS

A. WHO DECIDES MEANING?

1. Generally, the Courts

Determining what a disputed contract provision means is generally left to the court to decide. (See *City of Hope Nat'l Med. Ctr. v Genentech, Inc.* (2008) 43 Cal.4th 375, 395.)

2. Limited Exception

When there are disputed issues of fact and contract interpretation turns on the credibility of witnesses or disputed evidence, those disputed factual issues will be submitted to a jury. Once the jury decides the facts, the court may either interpret the contract in light of those findings or allow the jury to do so. (*City of Hope Nat'l Med. Ctr. v Genentech, Inc.* (2008) 43 Cal.4th 375, 395.)

B. INTERPRETATIVE PROCESS

1. Contract Language Itself

First, the court looks to the contract's language. If it is clear and explicit, it governs. (Civ. Code §1638.) (Nonetheless, even at this stage, however, the court will provisionally consider evidence outside the contract to determine whether the language is reasonably susceptible to more than one interpretation (see discussion *infra*).)

2. Parol/Extrinsic Evidence

Second, to the extent a term is ambiguous (or may be ambiguous), the court will attempt to discern the parties' intent from extrinsic evidence related to the contract's purpose, formation, and performance. (See Civ. Code §1647; *City of Hope Nat'l Med. Ctr. v Genentech, Inc*., supra.)

The parol evidence rule prohibits the introduction of extrinsic evidence to vary or contradict the express terms of an integrated written instrument. The terms of a writing that the parties intend as a final expression of their agreement cannot be contradicted by evidence of a prior agreement or a contemporaneous oral agreement. (Miller & Starr, 1 Cal. Real Est. (3d ed. 2015) § 160 (emphasis added), citing, *inter alia*, Code Civ. Proc., § 1856, *Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 15; *EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 175-176 [final draft controls].)

"The decision as to whether to admit extrinsic evidence is a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions in order to determine if any ambiguity exists, i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If, in light of the extrinsic evidence, the court decides that the language is "reasonably susceptible" to the proposed interpretation, the extrinsic evidence is admitted to aid in the second step of interpreting the contract and the intent of the parties. When the language is reasonably susceptible to two interpretations, extrinsic evidence of either meaning is admissible. The extrinsic evidence is not admissible on the issue of contract interpretation when the terms of the contract are not reasonably susceptible of the proposed interpretation." (*Ibid*.)

Admission of Party Opponent—has the opposing party ever stated an intent inconsistent with its current position and/or consistent with your position?

3. Rules of Construction

Third, if extrinsic evidence does not resolve any ambiguity, the court will fall back on default rules of construction. (See Civ. Code §1649; Code of Civ. Proc. §1864.)

II. NOTE RE EVIDENTIARY ISSUES—ADMISSIBILITY AND CONSTRUCTION

A. AUTHENTICITY

1. Traditional Means

Personal Knowledge / Business Records.

2. Ancient Documents

A deed or other writing creating, terminating or otherwise affecting an interest in property is presumed to be authentic if it: (a) Is at least 30 years old, (b) Is in such condition as to create no suspicion concerning its authenticity, (c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and, (d) Has been generally acted upon as authentic by persons having an interest in the matter. (Evidence Code § 643.)

3. Reliance Upon Document

"A writings may be authenticated by evidence that: (a) The party against whom it is offered has at any time admitted its authenticity; or (b) The writing has been acted upon as authentic by the party against whom it is offered." (Evidence Code § 1414.)

4. Handwriting Comparison

"Where a writing whose genuineness is ought to be proved is more than 30 years old, the [handwriting] comparison … may be made with writing purporting to be genuine, and generally

respected and acted upon as such, by persons having an interest in knowing whether it is genuine." (Evid. Code § 1419.)

5. Circumstantial Evidence

"The law is clear that the various means of authentication as set forth in Evidence Code section 1410-1421 are not exclusive." People v. Gibson (2001) 90 Cal.App.4th 371, 383. "Circumstantial evidence, content and location are all valid means of authentication." Id. (emphasis added), citing *People v. Oguin* (1994) 31 Cal.App.4th 1355, 1372-1373 and Young v. Sorenson (1975) 47 Cal.App.3d 911, 915. In Gibson, for instance, a manuscript, seized during the execution of a search warrant, was admitted into evidence. Although no one was able to testify that the defendant had written the manuscript nor that the writing belong to her by comparison to another writing, the Appellate Court concluded that the manuscript was properly admitted because circumstantial evidence showed the defendant was "acting as a madam, the manuscript discussed the prostitution business, and the locations where" the manuscript was found (i.e., in a room used by defendant).

B. HEARSAY

1. Statement in Transfer Document

"Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by the hearsay rule if: (a) The matter stated was relevant to the purpose of the writing, (b) The matter stated would be relevant to an issue as to an interest in the property; and (c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement." (Evid. Code § 1330.)

2. Ancient Writings Exception

"Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter." (Evid. Code §1331.)

3. Statement of Declaration Concerning Title/Interest

The statement of a declarant concerning his title or interest in any property is not made inadmissible by the hearsay rule. (Evid. Code § 1225.)

4. Adoptive Admission

An adoptive admission is not hearsay (i.e., an admission in which a party "has by words or other conduct manifested his adoption of his belief in its truth"). (Evid. Code § 1221.)

C. FACTS CONCLUSIVELY PRESUMED TRUE

Evidence Code section 622 provides that the "facts recited in written instruments are conclusively presumed to be true as between the parties thereto, or their successors in interest."

"[T]he recording of a deed restriction is ordinarily regarded as imparting constructive notice of its contents to subsequent purchasers." (*Alfaro v. Community Housing Imp. System & Planning Ass'n, Inc.* (2009) 171 Cal.App.4th 1356, 1385, citing, *inter alia*, Civ. Code § 1213.) "Constructive notice is 'the equivalent of actual knowledge; i.e., knowledge of its contents is conclusively presumed.'" (*Id*., citing 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 203, p. 408.) "Without doubt, the presumption of notice thus raised by this code provision is conclusive and incontrovertible." (*Alfaro* at 1385.)

Exception—*Stoneridge Parkway Partners LLC v. MW Housing Partners III LP* (2007) 153 Cal.App.4th 1373.

III. RULES OF CONSTRUCTION

A. GENERAL RULES

1. The Intent of the Parties

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code §1636.) California follows an objective approach to interpreting contracts, meaning that the parties' outward manifestation of intent controls. As a general rule, a party's subjective, unexpressed understanding of a term's meaning is irrelevant in determining what the contract means.

2. Language of Contract

a. Contractual Language Controls

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code § 1638.) "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title." (Civ. Code § 1639.)

b. Exception for Fraud, Mistake or Accident

However, "When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded." (Civ. Code § 1640.)

c. Failure to Read no Excuse

Failure to read all or part of contract, however, does not invalidate the agreement in whole or in part. In *Stewart v. Preston Pipeline, Inc.*, for instance, the court held that plaintiff's claim that he did not read or understand the agreement before signing it did not even raise a triable issue as to whether he was bound by the terms of the agreement. (134 Cal.App.4th 1565, 1587 (2005).) The *Stewart* Court further noted that it was aware of no cases "that stand for the extreme proposition that a party who fails to read a contract but nonetheless objectively manifest his assent by signing it," may avoid the legal implications thereof. (*Ibid*.)

3. Whole of the Contract / Effect to Every Part

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code 1641; see also, *Mitchell v. Exhibition Foods, Inc.* (1986) 184 Cal.App.3d 1033.)

4. Several Contracts Taken Together

"Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." (Civ. Code § 1642.)

5. Interpretation In Favor Of Contract

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code § 1643.)

6. The Meaning of Words

a. Ordinary Meaning

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civ. Code § 1644.)

b. Technical Terms

"Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense." (Civ. Code § 1645.)

Trade usage evidence can also be persuasive in resolving ambiguities or establishing that the parties intended to place special meanings on terms. To use this evidence, a party first must establish that a relevant trade usage or custom existed. This usually requires expert testimony. Even if a trade usage is established, it might not be not binding on the parties unless it is sufficiently certain, continuous, and uniform. Both parties must have actual knowledge of the practice, or it must be so well known in the industry as to create a presumption of knowledge. (See *Heggblade-Marguleas-Tenneco, Inc. v Sunshine Biscuit, Inc.* (1976) 59 Cal.App.3d 948.)

A court of appeal ruled that industry custom and practice was relevant in establishing that a talent agent's commission agreement with actress Lisa Kudrow required the payment of post termination commissions for engagements entered into before termination. (See *Howard Entertainment, Inc. v Kudrow* (2012) 208 CA4th 1102.)

7. Law of the Place

"A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." (Civ. Code § 1646.) Expert testimony regarding usage of the place is not limited to the same place; expert testimony regarding the usage of a similar place is admissible. (*Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d 1432, 1442.)

8. Contracts Explained By Circumstances

"A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Civ. Code § 1647.)

9. Interpretation Restricted to Object of Intent

"However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." (Civ. Code § 1648.)

10. Contract, Partly Written and Partly Printed

"Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded." (Civil Code § 1651; see also, *Integrated, Inc. v. Alec Fergusson Elec. Contractors* (1967) 250 Cal.App.2d 287 [If a contract is comprised of a pre-printed form and handwritten or typed modifications, the handwritten or typed material will prevail].)

11. Reconciliation of Repugnancies

"Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract." (Civil Code § 1652.) In essence, where two clauses of contract appear to be contradictory, the court should attempt to reconcile conflicting clauses so as to give effect to whole of instrument, assuming that is possible within framework of general intent of the contract.

12. Inconsistent Words Rejected

"Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected." (Civil Code § 1653.)

13. Interpretation Against Drafter

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." (Civ. Code § 1654.)

In light of this rule of construction, many contracts include a clause states, in part, that the contract should be construed as though both parties to the agreement drafted it.

14. Reasonable Stipulations Implied and the Implied Covenant of Good Faith and Fair Dealing

"Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention." (Civil Code § 1655.)

"It is well settled that, in California, the law implies in every contract a covenant of good faith and fair dealing. Broadly stated, that covenant requires that neither party do anything which will deprive the other of the benefits of the agreement. In addition to this principal function, the covenant has a subsidiary use for the parties' predicament. In the case of a contradictory and ambiguous contract ... the implied covenant may be applied to aid in construction." (*Mitchell v. Exhibition Foods, Inc.* (1986) 184 Cal.App.3d 1033, 1043 (emphasis added).)

"The scope of the covenant of good faith derives substance from its contextual setting. The precise nature and extent of the duties imposed ... will depend upon the contractual purposes." (*Id*. at 1043, citing *Egan v. Mutual of Omaha Ins. Co*. (1979) 24 Cal.3d 809, 818; accord *Betts v. Allstate Ins. Co*. (1984) 154 Cal.App.3d 688, 705; *National Life & Accident Ins. Co. v. Edwards* (1981) 119 Cal.App.3d 326, 339.)

15. Necessary Incidents Implied

"All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded." (Civil Code § 1656; see also, Armstrong v. Smith (1942) 49 Cal App.2d 258 [where contractor undertook to construct a dwelling house for owner, the law implied a promise on the part of owner to permit the plaintiff to build according to the details of the contract and entry upon the land].)

16. Time for Performance

"If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly--as, for

example, if it consists in the payment of money only--it must be performed immediately upon the thing to be done being exactly ascertained." (Civ. Code § 1657; see also, *Schmidt v. Callero* (1950) 97 Cal.App.2d 582 [where neither contract for sale of resort nor any parol agreement specified definite time within which vendors should complete title search and furnish clear title, vendors were entitled to reasonable time to deliver title].)

17. Uniform Vendor and Purchaser Risk Act

"Any contract hereafter made in this State for the purchase and sale of real property shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise: (a) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid; (b) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid. (Civ. Code § 1662.)

18. Specific over General

"[U]nder well established principles of contract interpretation, when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision." (*Prouty v. Gores Tech. Group* (2004) 121 Cal.App.4th 1225, 1235; see also Civ. Code § 3534 ("particular expressions [in a contract] qualify those which are general"). "[I]t is settled that when, as here, a general and a specific provision of a contract are inconsistent, the specific provision will control." (*Sanserino v. Shamberger* (1966) 245 Cal.App.2d 630, 635, citing *Wilder v. Wilder* (1955) 138 Cal.App.2d 152, 158.)

19. Course of Performance

Aside from drafting history, courts recognize that the parties' course of performance after contract inception, but before a dispute arises, is good evidence of intent. Cases sometimes refer to this conduct as the 'parties' practical construction.' (*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 922). Course of performance not only is relevant in construing ambiguous terms but also can "'supplement or qualify the terms of the agreement' or 'show a waiver or modification of any term inconsistent with the course of performance.'" (161 Cal.App.4th at 920 [internal citation omitted].)

20. Internal Memos/Practice

A party's internal, practical construction of an agreement can be relevant to interpret a term even if the other contracting party was not aware of the words or acts or did not concur in them. A court invoked this rule in a licensing dispute involving systems designed to prevent the unauthorized copying of movies and other copyrighted content stored on DVDs. (See *DVD Copy Control Ass'n, Inc. v Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697.) The parties

disagreed about whether certain content-protection specifications applied to their licensing agreement. One of defendant's employees had prepared an internal memorandum acknowledging that its technology had to comply with the specifications. The court held that this memorandum was admissible against the defendant, even though the other side never received the document or was even aware of it before the litigation. (*Ibid*.)

B. RULES SPECIFIC TO LEASES

1. Uncertainty Interpreted Against Landlord

"Generally, ambiguities or uncertainties in the terms of an option to renew or extend are construed against the landlord on the theory that he or she is the party who caused the ambiguity." (Miller & Starr (3d ed. 2015) 7 Cal. Real Est. § 19:36; see also, *Erickson v. Boothe* (1947) 79 Cal.App.2d 266, 272; see also, *Buck v. Cardwell* (1958) 161 Cal.App.2d 830, 836.).) "It is generally held that in construing provisions of a lease relating to renewals, if there is any uncertainty, the tenant rather than the landlord is to be favored." (*McAulay v. Jones* (1952) 110 Cal. App. 2d 302, 306.)

2. Promotion of Continued Use

"One of the covenant's components which has been established in the field of commercial leases is a duty on the part of a landlord to promote the continued use and occupancy of the premises by an existing tenant." (*Mitchell v. Exhibition Foods, Inc.* (1986) 184 Cal.App.3d 1033, 1043, citing *Lippman v. Sears, Roebuck & Co.* (1955) 44 Cal.2d 136, 142–143; *Cordonier v. Central Shopping Plaza Associates* (1978) 82 Cal.App.3d 991, 999–1000; *Edmond's of Fresno v. MacDonald Group, Ltd.* (1985) 171 Cal.App.3d 598.) "Our decision is in accord with the general rule that contracts should be construed to make them effective and lawful. (*Klepper v. Hoover* (1971) 21 Cal.App.3d 460, 465; see also, Civ. Code §§ 1643, 3541.)

3. Lease Forfeiture Disfavored

The law construes ambiguous provisions so as to avoid a forfeiture which is disfavored by the law. (*Ballard v. MacCallum* (1940) 15 Cal.2d 439, 444; 1 Witkin, Summary of Cal.Law, Contracts, § 251, p. 282.)

4. Option Rights Vest

"An option to extend or renew the term of the lease gives the optionee a specifically enforceable right to compel the extension or renewal of the lease upon the terms of the option. A tenant who has exercised the option properly is entitled to specific performance of the renewal for the additional term." (Miller & Starr (3d ed. 2015) 7 Cal. Real Est. § 19:36.) Similarly, in the matter of *In re Marriage of Joaquin* (1987) 193 Cal.App.3d 1529, 1532-1533, the appellate court held that, once exercised, "an option [becomes] an indefeasible right in the optionee to have real property transferred to him." "Indefeasible," of course, means "[t]hat which cannot be defeated, revoked, or made void." (Gilbert, Law Dictionary (1994) p. 124.)

C. RULES SPECIFIC TO REAL PROPERTY

1. Deeds

"The prime rule for interpreting deeds is to determine the objective (and not the subjective) intent of the parties by an examination of the deed." (3 Miller & Starr at § 8:1, citing Civ. Code 1066, 1105, 1636-1639, *City of Manhattan Beach v. Sup. Ct.* (1996) 13 Cal.4th 232, 238.) "In the absence of mistake, fraud, or other matter affecting the validity of the instrument, and except where collateral matters are involved, a deed executed in consummation of an agreement between the parties merges all prior negotiations and agreements relating thereto; and, with the exceptions noted, the deed becomes the measure of the rights of the parties." (*Id*., citing Civ. Code, §§ 1625, 1638, 1639; *Wing v. Forest Lawn Cemetery Assn*. (1940) 15 Cal.2d 472, 479.)

2. Fixtures

"When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed … belongs to the owner of the land, unless he chooses to require the former to remove it or the former elects to exercise the right of removal."

"Nowhere does the Code give the right to remove buildings, unless that right is expressly granted or reserved in the instrument creating the tenancy, or the buildings are such, or so erected, as not to partake of the realty." (*West Coast Lumber Co. v. Apfield* (1890) 86 Cal. 335, 339.)

3. Deeds of Trust

There are Constitutional limitations on state laws that impair the contract rights of a deed of trust (U.S. Constitution Article I, Section 10.) Accordingly, California courts are reluctant to imply that a state law limits the exercise of the contract rights of a deed of trust. (*Mabry V. Superior Court* (2010) 185 Cal.App.4th 208, 223). However courts can use their authority to interpret contracts to determine the rights and obligations pursuant to the terms of the deed of trust. California courts have used contract interpretation principles to include HAMP's "must offer" directive in loan modification agreements. (*Bushell v. JP Morgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915.)

D. PUBLIC CONTRACTS

1. Same Rules for Private and Public

"All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code." (Civ. Code § 1635.)

2. Public Entity Favored

"A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor." (Civ. Code § 1069.) In order for section 1069 to apply, the ambiguity must be in the grant or reservation language itself. (Contracts, 21 No. 5 Miller & Starr, Contracts, Real Estate Newsletter, citing *Coronado Cays Homeowners Ass'n v. City of Coronado* (2011) 193 Cal.App.4th 602, 611.)

3. Interplay Between the Two Statutory Provisions

In *City of Stockton v. Stockton Plaza Corp*., City of Stockton and a private party had a leasing dispute over the terms of the lease. (261 Cal.App.2d 639 (1968).) The appellate court summarily rejected the notion that the city should be held to any different standard, instead, citing section 1635, it held that "the city shall be held to the same standard as a private person." (*Id*. at 646.)

Section 1635 requires governmental agencies to contract equitably. (*Schultz v. Contra Costa County* (1984) 157 Cal.App.3d 242, 247) and further requires that such contracts be interpreted pursuant to the same rules as any other contract (*M. F. Kemper Const. Co. v. City of Los Angeles* (1951) 37 Cal.2d 696, 705 (special rules of law will not be applied merely because a governmental body is a party to a contract).) The foregoing is especially true where the government acts in a proprietary or business capacity. (*Corporation of America v. Durham Mut. Water Co.* (1942) 50 Cal.App.2d 337, 340.)

IV. FALLBACK PRINCIPLES

A. "FIRST IN TIME, FIRST IN RIGHT"

In real estate, as well as in law generally, there is the basic, long-held principle of "first in time, first in right." (See e.g., *First Bank v. East West Bank* (2011) 199 Cal.App.4th 1309, 1313 and Civ. Code § 2897 (principle applied to lien rights); *Phelps v. State Water Res. Control Bd.* (2007) 157 Cal.App.4th 89, 110-11 (principle applied to water rights), *Logan v. Driscoll* (1862) 19 Cal. 623, 624 (principle applied to mining rights); *Cappa v. F & K Rock & Sand, Inc*. (1988) 203 Cal.App.3d 172, 175 (principle applied to rights re collection of judgments); and, *Bieber v. Lambert* (1907) 152 Cal. 557, 562-63 (principle applied to rights re purchase of government land).

B. USE OF EXPERTS

1. Custom and Practice

Evidence of custom and practice is admissible to establish the general custom and practice in the industry as well as the significance of terms and conditions used in the industry. Similarly, custom and practice can supplement missing terms and conditions.

2. Exclusion of Expert Reversible Error

Exclusion of expert testimony has generally been found to be reversible error. (*Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1121 (reversible error not to admit expert testimony of custom and practice re right to commissions after termination of entertainment agreements); see also, *Bell v. Mason* (2011) 194 Cal.App.4th 1102 (same); *PM Group, Inc. v. Stewart* (2007) 154 Cal.App.4th at 63-64 (custom and practice admissible to establish significance of industry terms and conditions), citing with approval *Marx & Co. v. The Diners' Club, Inc.* (2d Cir.1977) 550 F.2d 505, 508–509 (custom and practice admissible re significance of terms in the securities business).)

Failing to have excluded expert testimony of custom and practice on a relevancy objection, a trial attorney may seek to exclude the expert on the ground that he is not qualified to render an opinion on custom and practice. Some trial judges apply a strict standard of qualifications. However, the California Supreme Court generally applies a broad standard of qualifications. (*Brown v. Colm* (1974) 11 Cal.3d 639, 646; see further, *Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.4th 1432, 1439.)

Also, a trial attorney may attempt to exclude custom and practice testimony by mischaracterizing it as a legal opinion. It is generally inappropriate for an expert to testify as to the law. (S*UMMERS v. A.L.GILBERT CO.* (1999) 69 Cal.4th 1155.)

3. Failure to Call Expert Witness Malpractice

Attorney alleged to have committed malpractice for failing to call expert witness on issue of how to interpret lease. (*Kasem v. Dion-Kindem* (2014) 230 Cal.App.4th 1395.)