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Real Estate Case Summaries

Ms. Callahan has had a rich career handling primarily business / financial / real property disputes in state and federal courts around the country. This experience covered a broad spectrum of industries and subject matters – including various types of disputes involving real estate and real estate. The following describes some of her experience in this area:

Construction/Development Disputes

Early in her litigation career, Ms. Callahan spent about two years representing civil engineers and soils engineers in disputes concerning construction/design defects (completed projects) and scope of work (projects in progress) involving several residential development projects in Southern California. As a mediator, Ms. Callahan has been involved in cases where the project has failed and disputes then develop between the lender, on the one hand, and the guarantors and developer, on the other, concerning such things as proper utilization of sums drawn upon the construction line, the lender's obligation to fund, the guarantors' liability for any deficiency and the amount of that deficiency. A few of the more interesting cases Ms. Callahan has mediated are described below:

Failed Hotel Project. Corporate entity borrowed over $7 million from bank to construct a hotel property. The loan was secured by the subject property. Additionally, the principals of the developer entity personally guaranteed the loan. While the principals had extensive real estate holdings, their guarantees were unsecured. The developer was unable to complete the project and the loan went into default. Litigation then ensued to enforce the loan agreement and personal guarantees. An agreement was reached whereby the defendants agreed to entry of judgment in a state court action and agreed not to contest the bank's right to foreclose on the property. As part of the stipulated judgment, the guarantors agreed to waive their right to a "fair market value hearing" unless the amount bid at the foreclosure sale was less than $6 million. At the foreclosure sale, the bank purchased the property at the Trustee's sale by a credit bid in the amount of $5 million. A dispute then ensued in which the guarantor's initiated proceedings to determine the fair market value of the project at the time of sale and the bank initiated proceedings to enforce the remaining amounts due under the stipulated judgment against the guarantors.

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Mechanic's Lien Dispute. Subcontractor on a large residential project brought suit against the general contractor, the former owner, the lender and the surety for payment of the amounts owed for goods and services supplied to the project. Subcontractor also sued the current owner for foreclosure on mechanic's lien, action on payment bond, quantum meruit and account stated. The current owner then sued for declaratory relief disputing the subcontractor's mechanic's lien because it had acquired title to the property through a judicial foreclosure.

Lien Dispute. Investor bought an incomplete residential construction project and then started investing monies to complete the project when it learned that the property was encumbered by a first priority bank lien as a result of the bank initiated nonjudicial foreclosure proceedings. The investor's title search showed the lien as having been reconveyed, but that turned out to be a "false reconveyence." The investor sued to enjoin the foreclosure sale, complaining that the bank was aware that a "false reconveyence" had been recorded, but had unjustly sat back while the investor purchased and improved the property.

Failed Residential Development Project. Bonding company brought suit against principal/indemnitor of developer for completion expenses associated with a failed residential development project. Before the lawsuit was filed, the bonding company and indemnitor had worked together to obtain refunds from various parties who had received deposits that would no longer be utilized because the final phase of the project was not going to be built. When the lawsuit was commenced, the indemnitor claimed that he had worked out an understanding with the lead representative from the bonding company that he would be excused from performance under the indemnification agreement in exchange for his assistance and cooperation in obtaining the deposit refunds and negotiating compromise agreements with vendors and contractors who had worked on the completed phases of the project, but had not been paid.

Landlord / Tenant

As a mediator, arbitrator and advocate, Ms. Callahan has dealt with landlord-tenant disputes – involving both commercial and residential properties – in a variety of contexts. Some of the more interesting cases are described below:

Restoration & Non-Monetary Default Dispute (Mediator). Landlord owned a large commercial property in which it occupied half of the property and rented out the other half to a beverage bottling business. Both the nature and growth of the business caused problems to the point that the landlord was unwilling to agree to terms for an extension of the lease and claimed that the tenant was in breach of numerous non-monetary provisions of the lease, including making changes to the leased premises that penetrated the roof without the landlord's permission, conducting operations in such a way as to create a mold problem, and using the parking lot as outside storage. The dispute that came to mediation was how to negotiate a termination of the lease that would 1. allow the tenant sufficient time to find and relocate to another facility, and 2. provide the landlord with sufficient assurance and security that the leased premises would be restored and the roof and mold damage remediated.

Lease Validity & Enforceability Dispute (Arbitrator). Landlord owned a shopping center located on what had been designated as a Super Fund Clean-Up site because a portion of the property had once housed dry cleaning operations. By the time the landlord acquired the center, it had been fully remediated, but was still subject to monitoring by the local environmental quality control agency. The tenant in this case refused to take possession and claimed that no contract had been formed due to lack of consent or, in the alternative, claimed that rescission was in order based upon alleged negligent misrepresentation, constructive fraud or intentional misrepresentation concerning the nature and scope of the environmental quality control agency's continued monitoring, its right to access of the leased premises and its right to install monitoring stations inside the leased premises, all of which was discovered when the tenant submitted its proposed plans of improvement to the landlord and was told that they would need to be approved by the environmental control agency who, in turn, informed the tenant of its plans to install monitoring stations in various locations of the tenant's whole foods grocery store. A number of issues were raised for discussion in this arbitration, including the legal effect of the landlord's reletting of the subject premises for a term less than that provided in the tenant's lease (if the lease survived the tenant's attacks on validity and enforceability).

Restoration, Repair & Replacement Dispute (Mediator). Landlord was an international business man who owned a second, luxury home in a gate guarded community in Southern California, which he intended to one day make his primary residence after he retired. Due to projects that would require the business man's attention in other parts of the world for at least two years, he decided to lease the second home. The lease required an advance security deposit of $25,000, plus advance funding of half of the rent due under the lease, which amounted to $180,000, for a total up-front deposit of $205,000. The lease then required that the other half of the rent due under the lease be paid in monthly installments of $7,500. The financial aspects of the lease were fully performed, with two exceptions: 1. the tenant did not pay the last month's rent, and 2. during the course of the lease, the tenant had deducted approximately $10,000 from her rent for repairs. The dispute at mediation concerned the tenant's demand for return of her deposit, less the last month's rent, on the one hand, and the landlord's demand for damages in excess of the deposit for repair, restoration and replacement of lost personal property items that were in the house. In this regard, it was undisputed that the tenant had replaced all of the carpeting in the house, made structural changes to the house, and thrown away several built-in cabinets.

Sale & Assignment of Restaurant Lease and Liquor License (Advocate). In a Chapter 11 bankruptcy proceeding, Ms. Callahan represented the original lessor of a leasehold involving prime, waterfront property located in Newport Beach with respect to the preservation of its rights against the debtor and the debtor's bankruptcy estate under a pre-petition sublease which had been assumed by the Chapter 11 debtor-in-possession prior to the case being converted to a proceeding under Chapter 7. Through Ms. Callahan's efforts the leasehold was secured and the locks were changed immediately after the conversion so as to protect the leasehold and its contents from vandalism and looting. A buyer was located and a purchase/sale/assumption agreement was negotiated under the terms of which the original lessor was made financially whole and the value of the leasehold as an established restaurant location preserved.

Deposit Refund Dispute (Mediator). Landlord owned several duplexes, which she operated as rentals. Tenant was a good tenant for several years. However, problems arose when he moved out and demanded the return of his deposit. The landlord denied that request and claimed that the tenant owed her money for water-damage repairs due to a leak in the plumbing in the master bathroom. The landlord claimed that the damage was so extensive, the leak had obviously been present for quite some time and that the tenant had a duty to report same to the landlord.

Neighbor-to-Neighbor / HOA

From time to time, Ms. Callahan has been called upon to mediate neighbor disputes involving such things as lot-line, view, tree and fence disputes. A few of the more interesting cases she has mediated are described below:

Ejectment Dispute (Mediator). The defendant was an organization where the members each own one share of stock in the corporation that entitled them to exclusive occupancy of a specific apartment unit located in a complex of apartments that comprise a retirement community. The retirement community did not include any assisted-care facilities. The CC&R's expressly required that members be able to live independently. Plaintiff in this matter was the downstairs neighbor of a member who progressively had problems with memory, depression and dementia, which caused problems in their living arrangement due to such things as repeated flooding incidents due to the upstairs member forgetting to turn the bath water off, walking around the premises naked and throwing objects out of the upstairs window. Plaintiff sued the mutual corporation for damages and the mutual corporation sued the downstairs member for ejectment when he refused to sell his share of stock back to the mutual and find other living accommodations.

Lot Line Dispute (Mediator). The defendants were new neighbors who purchased a home next door to plaintiff. Unbeknownst to defendants, there had been a long-running feud between plaintiff and their seller about a whole host of things, including tree trimming, compliance with community guidelines, and both sides claiming that the other's fence deviated from the lot line and encroached on their lot. Both homes were located on a slope where the bottom portion was mostly unusable brush area. After the defendants moved in, plaintiff demanded that they remove and relocate the entire fence that separated their two properties. At the upper end/street level of the properties, that would mean removing a concrete pad and built-in storage unit for trash bins and tools so that plaintiff could extend the garden next to her carport. At the lower end of the properties, that would mean plaintiff losing the corner of her paddle tennis court that encroached upon the defendants' property, and a new fence being built through dense brush in an area neither used.

View Dispute (Mediator). In a hillside community, one neighbor proposed improvements to an existing home and sought approval from the homeowners association. The across-the-street neighbors objected, complaining that the proposed construction would unreasonably interfere with view rights for which they had paid a premium. In accordance with the CC&R's the neighbors were required to mediate the dispute before the association would act on the proposed improvement request.

Partition & Equitable Ownership

As both an advocate and mediator, Ms. Callahan has been involved in cases where title and/or disposition of real property is involved. The following are a few of the more interesting cases:

Tracing Title to Establish Equitable Ownership (Advocate). Callahan represented an elderly woman in a financial elder abuse action filed against her eldest son. The object of the lawsuit was to recover title to a $20 million real estate portfolio the elder had amassed over a 50-year period of time. When the elder was in her 70's, the elder gradually fell off title to her portfolio of properties and put title in the name of her two sons. She did this as an estate planning strategy directed at avoiding estate taxes. The elder did this pursuant to an oral agreement with her two sons that the properties still belonged to her in terms of any rents or sale proceeds and her ability to improve, sell, encumber, or trade any of the properties in her sole discretion. Over time, the elder traded out of rental properties into raw land and other non-income producing properties (e.g., a ranch and a vacation home that the family used). In order to keep the portfolio in place, the two sons contributed to their mother's support. When a dispute later arose between the eldest son and his mother, he stopped contributing to her support and would not allow her to sell one of the properties so that she could have a "nest egg" to live on. The other son did not dispute his mother's ownership of the portfolio and advanced her the monies needed to file a lawsuit to return title of the portfolio to the elder. The lawsuit included a claim for financial elder abuse and involved tracing the source of monies and/or the disposition of "historical" properties to the current portfolio to show that it was the elder's money that had been used to acquire the properties. The lawsuit was settled on terms favorable to the elder on the first day of a two-week jury trial.

Disposition of Co-Owned Property Through Partition (Advocate). As a follow-on to the above case, further disputes and lawsuits arose between the elder's two sons concerning the division and disposition of properties they received under the terms of the aforementioned settlement. One such dispute concerned the division of a ranch which was owned with a third party, which was resolved through an action for partition by sale. For the properties co-owned by just the two brothers, division was accomplished through an action for partition in which some of the properties were divided in kind and others were partitioned by court-supervised sale.

Real Property / Lien Dispute (Mediator). Lender made a $520,000 loan to Jane Doe in 2006. The loan fell into default shortly after the financial crisis of 2008 and the value of the property plummeted to less than half of what it was worth at the time the 2006 loan was made. Jane Doe proposed a short sale transaction for the property to be sold to Joe Smith in 2010. Before close of escrow, Jane Doe executed a grant deed in favor of Joe Smith and Joe Smith then executed a grant deed in favor of Sally Doe (purported mother of Jane Doe). The short sale transaction never closed and Sally Doe remained on title until 2014 when she sold the property to Bob Brown for $350,000. Nothing was aid to the Lender from that sale. All cash was pocketed by Sally Doe. The Lender was unaware of the Sally Doe / Bob Brown transaction until 2016 when it decided to pursue nonjudicial foreclosure since the property value had almost doubled since 2008. The title insurer for Bob Brown then brought suit to quiet title in Bob Brown's favor and to enjoin the foreclosure sale on the grounds that the Lender was bound by the 2010 short sale agreement even though it did not receive the funds. When contacted about

the 2010 short sale, Jane Doe disclaimed ever having any type of interest in the subject property and disavowed any knowledge or involvement in the 2006 loan and 2010 short sale. Needless to say, there was a lot to talk about in this matter.

Wrongful Foreclosure/Loan Modification Disputes

Since the financial crisis of 2008, Ms. Callahan has mediated about two dozen wrongful foreclosure / loan modification cases. Three of the more interesting cases are described below:

Unique Property with Tons of Equity. In the 1980's, Plaintiff purchased a unique residential property (for about $200,000) in what is currently the chic part of Los Feliz in Los Angeles. By 2006, the property was owned free and clear and was worth over $2 million. Plaintiff borrowed $500,000, using the home as collateral, to make needed repairs, improvements and upgrades to the home. Plaintiff then borrowed $350,000, using the home as collateral, to invest in a speculative real estate venture with one of his sons that eventually failed. Concurrent with the failure of that investment in 2009-2009, the country experienced a financial crisis of historical dimensions and Plaintiff's income-earning ability was affected because he was a consultant in the financial services business, and he defaulted on the $500,000 loan. Plaintiff applied for and was denied a loan modification. The bank then proceeded to initiate nonjudicial foreclosure proceedings. The issue in this case was whether the bank violated the pre-foreclosure "reach out" requirements of the Homeowner Bill of Rights Act ("HBOR") before commencing foreclosure proceedings. Due to the Plaintiff's significant equity in the property (almost $3 million at the time of the mediation), coupled with his income-to-expense ratio (largely pulled out of proportion by the debt service on the $350,000 loan), none of the loan modification scenarios were available to him. The resolution was facilitated by an old-fashioned "workout discussion" with the bank concerning payment terms for reinstatement of the original loan (about $80,000), with contributions to be made by Plaintiff's children (who were stakeholders that stood to benefit if the home could be saved because they were going to be left the home at dad's death and would receive the stepped up basis).

Debt Discharged Through Bankruptcy Without Reaffirmation Before Loan Modification Request. The plaintiff in this case was a single mother of one who purchased a modest home in Riverside in 2006 at a time when she had a good-paying job. Plaintiff's mother lived with her and contributed to the household expenses. In 2009, Plaintiff lost her job as part of the "collateral damage" visited upon numerous businesses after the 2008 financial crisis. Plaintiff went into default on the loan and the lender commenced nonjudicial foreclosure proceedings. Plaintiff obtained a stay of those proceedings by submitting several loan modification applications, all of which were denied. When the foreclosure sale was put back on calendar, plaintiff filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code. That case was dismissed and the foreclosure sale was put back on calendar. Plaintiff then petitioned to reopen her Chapter 13 case and requested that it instead be converted to a Chapter 7 case. That request was granted, which meant that Plaintiff received a debt discharge in terms of any personal liability to any of her pre-petition creditors, including the bank. However, the bank's lien remained against the property and the bank still had the right to look to the property for repayment. A discharge order was entered in Plaintiff's bankruptcy case and the case was closed. The bank then lifted the bankruptcy hold and put the foreclosure sale back on calendar. Plaintiff

submitted another loan modification application, which the bank denied and Plaintiff then filed a lawsuit to enjoin the sale and seeking damages under various theories, including wrongful foreclosure for failure to give her a loan modification. The resolution in this case was facilitated by focusing on the legal significance of the debt discharge of the loan obligation without reaffirmation before the bankruptcy case was closed. Was there even a loan obligation eligible for modification given the strong wording of the discharge injunction provided by the Bankruptcy Code? Rather than test the issue, the parties settled.

Wild Deed Case. The bank loaned over $500,000 to "Jane Doe" in 2006 to fund the purchase of a home in Orange County. For a variety of reasons, the loan went into default in 2010 and Jane decided to sell the home and negotiated a "short sale" agreement with the bank to sell the home to Bob Brown for $250,000. The short sale requirements were not satisfied because the bank was never given a HUD-1 showing the actual closing costs and expenses. Nevertheless, escrow closed and title was put in the name of Bob Brown, who then deeded title to Sally Doe (Jane's mother). The funds used by Bob to purchase the house were sent to the bank, but the bank returned the funds to escrow, where they were lost and never returned to the short sale lender and eventually escheated to the State. In 2014, Sally Doe sold the house to Jack Jones for $400,000. By 2016, the value of the house had rebounded to the point that it was worth almost what the bank was owed on the $500,000 loan it made in 2006. So, the bank initiated nonjudicial foreclosure proceedings. Jack's title insurer initiated a lawsuit to enjoin the sale on the grounds that the bank had an obligation to reconvey pursuant to the short sale agreement it had agreed to. The resolution in this case was facilitated by focusing in on some of the unusual events that surrounded the 2010 short sale escrow and, ultimately, making a mediator's proposal that both sides accepted.