

ARTICLE

Deeds in Lieu: Merger Doctrine Does Not Apply Where Grantee Is Senior Lienholder

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One of the options available to lenders and borrowers confronting a failing project and a defaulting loan is to negotiate a deed in lieu of foreclosure transaction. This consensual transfer of title to the property from the borrower to the lender avoids formal foreclosure proceedings against the borrower. In *Decon Group, Inc v. Prudential Mortgage Capital Co, LLC*, a California appellate court recently held that where a senior lienholder receives a grant deed containing an anti-merger clause in lieu of foreclosure on a property that is also subject to a junior lien, the senior deed of trust lien does not merge into title and the senior lienholder retains the right to foreclose on the property and to extinguish the junior lien. This decision should help dispel the reluctance of title companies to insure title upon a sale after the two-step process of a deed in lieu followed by non-judicial foreclosure.

The article concludes that the *Decon* decision reaffirms the longstanding principle that a senior lienholder's acceptance of a grant deed in lieu of foreclosure comes with a presumption that the lien does not merge into title. The authors also note that strong and effective grant deed drafting is fundamental to a lender's ability to avoid the consequences of a merger and take advantage of the benefits of accepting a deed in lieu of foreclosure.

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