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Joint Venture Exception to the Usury Laws

In *Junkin v. Golden West Foreclosure Service, Inc.* (Jan. 5, 2010) 180 Cal.App.4th 1150, the First District Court of Appeal affirmed the trial court's finding that because the transaction involved was a joint venture, it was exempted from the usury laws.

In this case, Donald L. Junkin III filed a complaint against Golden West Foreclosure Service, Inc. and Garry Bennett to enjoin the threatened foreclosure of an office building in San Carlos under an allegedly usurious promissory note and deed of trust held by Bennett. Junkin, a licensed real estate agent, has owned and operated several real estate agencies and mortgage brokerage companies. "Bennett was a 'hard money' lender who specialized in providing money quickly at high rates" and Junkin had borrowed from Bennett and invested in property jointly with Bennett on numerous prior occasions.

In 2004, Junkin and Bennett purchased commercial property together and were jointly obligated on a loan from an institutional lender. In addition, Bennett loaned Junkin \$856,000 to cover the remainder of the purchase price and in return received a promissory note, carrying an interest of 12%, secured by a deed of trust in favor of Bennett. Junkin and Bennett both held title to the property and considered themselves to be partners in the venture. Further, Junkin owned a 90% interest and Bennett owned a 10% interest in the property. After a sequence of failed payments by Junkin to Bennett, Bennett quitclaimed his 10% interest back to Junkin and later retained Golden West Foreclosure Service, Inc. to foreclose on the property.

Junkin filed a complaint against Golden West and Bennett, alleging that his promissory note was usurious and the foreclosure was unlawful. Bennett argued that "even if the interest rate on the loan could be characterized as usurious, there was no usury under the joint venture exception to the usury laws." The trial court found that the joint venture exception was applicable and entered judgment in favor of defendants.

The court of appeal affirmed the judgment. It began its analysis by examining the usury laws. Usury is defined as "the charging of interest for a loan or forbearance on money in excess of the legal maximum." 8 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 21:1, p.4, fn. omitted. The maximum amount that may be charged in California is set forth in the Constitution. See Cal. Const., art XV, § 1. The court noted that while many exceptions to the usury law exist, only the joint venture exception was at issue in this case. Quoting a leading treatise, the court explained that, "where the relationship between the parties is a bona fide joint

venture or partnership, the advance by the partners or joint venturers is an investment and not a loan, and the profit or return earned by the investor is not subject to the statutory maximum limitations of the Usury Law." 8 Miller & Starr, Cal. Real Estate, *supra*, § 21:1, p.48, fn. omitted.

Citing to *Miller & Starr*, the court identified several factors relevant to determining whether a transaction is a bona fide joint venture: (1) whether there is an absolute obligation of repayment (Junkin was obligated to repay the note in favor of Bennett), (2) whether the investor may suffer a risk of loss (Bennett assumed a risk of the loss of capital), (3) whether the investor has any right to participate in management (even though Bennett did not participate in the management, the court viewed this as his personal choice rather than anyone preventing him from doing so), (4) whether the subject property was purchased from a third party (as in this case), and (5) whether the parties considered themselves to be partners in the transaction (both Junkin and Bennett testified they considered themselves to be partners). Applying these factors, the court affirmed the judgment, holding that because a joint venture existed, the joint venture exception to the usury rules applied.

This case highlights the importance of carefully considering how loans involving a joint venture are structured as well as the entity that will be used to make the loan. For example, if Bennett had used a family trust or other entity to make the loan to Junkin, it is not clear if the court would have reached the same conclusion.

For further information, please contact [Allison Berkley](#) at (213) 617-5521.