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LENDER LIABILITY FOR FAILURE TO ENFORCE LIFE-THREATENING HOUSING CODE VIOLATIONS

INTRODUCTION

Recent fires in hotels and apartment houses in California and elsewhere have called attention to the fact that large numbers of such buildings, particularly in the larger central city areas, are in glaring violation of housing codes, and little progress is being made toward correction.[1] The problem in this context is not general habitability requirements for residential leaseholds;[2] rather, it is the existence of code violations which directly threaten life. The urgent concern is fire hazards: at a minimum, every multiple dwelling unit more than two stories in height should have adequate and functioning fire escapes, enclosed stairways, main exit doors that swing outwards,[3] automatic alarm systems, automatic sprinklers, fire extinguishers,[4] adequate lighting in halls and stairways, and there should be proper maintenance and use of electrical wiring and of electrical and gas appliances.[5]

While local city and county governments are charged with

1. Of particular note was the fire which occurred at the Gartland apartment house in San Francisco. The Gartland was an old building in the central city. The owner refused to comply with city housing codes, particularly the requirement that, in order to arrest the spread of fires, all such structures must be equipped with sprinkling systems and enclosed stairwells. The city brought suit to abate a nuisance. In December, 1975, one month before the case was to go to trial, a fire broke out in the Gartland and quickly spread through the five story building. As a result, thirteen people were killed, and more were seriously injured. There is little doubt that if the Gartland owner had complied with the code requirements, the magnitude of this tragedy would have been greatly reduced. *See* San Francisco Chronicle, Dec. 13, 1975, at 1, col. 4.

2. This is not to deny that rental housing should be kept in a good state of repair, secure from the elements and from intruders, or that malfunctioning equipment should be promptly repaired or replaced. Indeed, much of what is said in this Note may have application in these areas.

3. *See* CAL. ADM. CODE, tit. 24, §§ B17333-B1747 (1976); CAL. ADM. CODE, tit. 25, § 1096 (1975); *see also* UNIFORM BUILDING CODE app. ch. 13, § 1313 (d), (f), (h), (i) (1976).

4. CAL. ADM. CODE. tit. 25, §§ 1082, 1084 (1975).

5. *Id.* §§ 1076, 1078.

enforcing the housing codes,[6] municipalities do not appear to have sufficient resources to accomplish the task alone. There is a pressing need for a fast, summary way to force operators of hotels, motels, and apartment houses to correct life-threatening housing code violations. It is suggested that a partial solution lies in the private sector. Lending institutions that have loaned money for the purchase of offending buildings should be encouraged to enforce codes by using their power of foreclosure. The problem, of course, is that merely because lenders have the power of foreclosure, it does not necessarily follow that they will exercise that power. The reality of the market system is that the power of foreclosure is only exercised if it is in the lender's economic self-interest to do so. In general, financial institutions make decisions on the basis of risk minimization. The key, then, is to manipulate the risk equation by creating a potential loss to the lender if it does *not* exercise its right to foreclose. It must be made more expensive for the lender to fail to exercise its power than to exercise it. Aside from considerations of altruism and social responsibility, which are not without value in the risk equation,[7] the most effective way to encourage lenders to act is to impose tort liability. It is the thesis of this Note that lending institutions that hold mortgages or deeds of trust on existing apartment houses, hotels, or motels which they know to have life-threatening violations of the housing codes may be held liable for negligence for any injuries resulting from such violations.

The question of whether lenders have a duty of care to protect those persons jeopardized by known life-threatening housing code violations is reduced to a determination of the "sum total of those considerations of policy which lead the law to say that such persons are entitled to protection."[8] Lenders are not in privity of contract with potential plaintiffs. The courts in California have determined that in such a case, the issue of whether public policy dictates the imposition of liability involves a balancing of

6. *See* CAL. HEALTH & SAFETY CODE §§ 17960-17961 (West Supp. 1978).

7. Indeed, several lending institutions in California have demonstrated a concern for maintaining the quality of their portfolios. Bay View Federal Savings and Loan in San Francisco is a case in point. According to the Office of the San Francisco City Attorney, when Bay View is informed of a violation in a building in which it has a security interest, it has a policy of declaring the owner in default for waste, and if the violation is not corrected, the savings and loan association forecloses. Interview with Edward C.A. Johnson, Deputy Attorney, City and County of San Francisco, in San Francisco (April 18, 1978).

8. Dillon v. Legg, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968). *See also* W. PROSSER, LAW OF TORTS 325-26 (4th ed. 1971).

factors, including: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of the harm; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the plaintiff's injury; (5) the moral blame attached to the defendant's conduct; (6) the policy of preventing future harm; and (7) the availability of insurance.[9] The decision as to the existence of a duty of care is a matter of law, to be determined by the courts, not the triers of fact.[10]

When a qualified building inspector determines that building conditions are life-threatening due to violations of the housing codes, the foreseeability and certainty of injury are self-evident. Thus, in the present context, there are three broad issues to be considered in determining whether to impose a duty upon lenders. The first is the preventive effect of a rule of liability.[11] As will be seen, local enforcement of codes is currently inadequate, mainly because of limited resources and a cumbersome legal machinery. Because of the recent development of uniform codes, however, and because lenders possess a summary power of fore-

9. This often cited formulation was originally stated by the California Supreme Court in Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958). *Biakanja* involved a negligently drafted will. The test has been applied in a wide variety of situations, including dangerous conditions on real property. *See* Merrill v. Buck, 58 Cal. 2d 552, 561-62, 375 P.2d 304, 310, 25 Cal. Rptr. 456, 462 (1962) (real estate agent liable for negligent failure to warn tenant of dangerous basement steps); Rowland v. Christian, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968) (tenant has duty to warn guest of known dangerous condition on leased premises); Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976) (psychiatrist has duty to warn third parties of extreme danger disclosed by patient); *see also* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 310-15, 379 P.2d 513, 522-25, 29 Cal. Rptr. 33, 42-45 (1963), *overruled on other grounds*; Dillon v. Legg, 68 Cal. 2d 728, 748, 441 P.2d 912, 925, 69 Cal. Rptr. 72, 85 (1968).

Other factors commonly mentioned by the courts are: (1) the social utility of the activity causing the injury compared with the risks involved in its conduct; (2) the kind of person with whom the actor is dealing; (3) the workability of a rule of care in terms of the parties' relative ability to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; (4) the body of statutes and judicial precedents which color the parties' relationship; and (5) the prophylactic effect of a rule of liability. Raymond v. Paradise Unified School Dist., 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. 847, 851-52 (1963), *cited with approval,* Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968). *See also* Kindt v. Kauffman, 57 Cal. App. 3d 845, 854, 129 Cal. Rptr. 603, 609 (1976); Rainer v. Grossman, 31 Cal. App. 3d 539, 544, 107 Cal. Rptr. 469, 472 (1973); W. PROSSER, *supra* note 8, at 326-27.

10. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 307-09, 379 P.2d 513, 520-21, 29 Cal. Rptr. 33, 40-41 (1963), *overruled on other grounds*; Dillon v. Legg, 68 Cal. 2d 728, 748, 44 P.2d 912, 925, 69 Cal. Rptr. 72, 85 (1968), *followed in* Weirum v. RKO General Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471, (1975).

11. *See* note 9 *supra.*

closure, lenders are in a position to exert a powerful influence in preventing harm. In such a case, the policy of the law suggests imposing a duty.[12]

The second crucial issue is the relationship of the parties.[13] The analysis is complicated by the fact that there are four distinct classes of parties involved: (1) the injured people; (2) the building owners; (3) the building inspection agencies; and (4) the lenders. It will be argued in this Note that because lenders have provided themselves with the power to enforce housing codes and have manifested an intent to enforce them, they have placed themselves in such a relationship to owners, inspection agencies, and injured parties as to imply a duty of enforcement.[14]

The third issue is the social cost of a rule of liability in terms of the burdens on lenders which must be spread among the members of society and in terms of the possible reactions of lenders.[15] It will be contended that the costs will not be burdensome, both because lenders can insure against any losses and because they have the means and the power to foreclose quickly and summarily, thereby minimizing their exposure to liability.

1. LOCAL ENFORCEMENT OF HOUSING CODES

In opposition to the extension of tort liability, lenders will no doubt point out that housing code enforcement is the province of city and county agencies.[16] A persuasive argument can be made that state law has provided a full and adequate machinery for

12. *See* note 9 *supra* and accompanying text.
13. *Id.*
14. *Id.*
15. *Id.*
16. CAL. HEALTH & SAFETY CODE § 17960 (West Supp. 1978) provides:

> The building department of every city or county shall enforce within its jurisdiction all the provisions of this part and rules and regulations promulgated thereunder pertaining to the erection, construction, reconstruction, movement, enlargement, conversion, alteration, repair, removal, demolition, or arrangement of apartment houses, hotels, or dwellings.

Section 17961 provides further that

> [t]he housing department or, if there is no housing department, the health department of every city or county shall enforce within its jurisdiction all the provisions of this part and rules and regulations promulgated thereunder pertaining to the *maintenance, sanitation, ventilation, use or occupancy of apartment houses, hotels or dwellings.*

Id. § 17961 (emphasis added).

local enforcement[17] and that little incremental benefit will be derived from forcing lenders to duplicate or assume entirely the enforcement function. As will be seen, however, while local agencies are certainly the mainstay of code enforcement, they simply do not have the economic resources or adequate legal remedies to enforce housing codes effectively.

A. Municipal Enforcement Is Inadequate

At the outset, a clear distinction must be made between "building codes" and "housing codes." The former regulate the construction of new buildings, while the latter regulate the use and occupancy of existing buildings. The authority to promulgate building and housing codes stems from the police power of the states.[18] Historically in the United States, the writing of these codes has been delegated largely, if not entirely, to the cities and counties, and it has been a jealously guarded function of these local municipalities. In addition, cities and counties are almost universally charged with both the inspection and enforcement functions of both building codes and housing codes.[19] Predictably, this has resulted in an almost complete lack of uniformity in codes and tremendous disparities in procedures and enforcement.[20] As will be shown, however, there is a growing trend toward the use of uniform codes, not only in California, but nationwide as well.

While building codes have existed for hundreds of years, formalized housing codes as such were practically unknown in the United States until the beginning of the twentieth century.[21] Unfortunately, most housing codes developed as mere appendages to the building codes,[22] and the two are still generally combined

17. *See* notes 32-39 *infra* and accompanying text.

18. *See* Cal. Const. art XI, §§ 1-5, 7. For an excellent discussion of the roots of the authority to enact building and housing codes in the United States see C. Rhyne, Survey of the Law of Building Codes (1960). For an informative discussion of the various types of local government organizations and their concomitant powers see C. Adrian, State and Local Governments (2d ed. 1967).

19. C. Rhyne, *supra* note 18, at 7-8; Cal. Health & Safety Code §§ 17960-17970 (West Supp. 1978).

20. For an excellent discussion, national in scope, of the causes and problems of nonuniform codes see C. Field & S. Rivkin, The Building Code Burden 61 (1975) [hereinafter cited as Field & Rivkin].

21. For a summary of the history of the development of housing codes and building codes see Guandolo, *Housing Codes in Urban Renewal,* 25 Geo. Wash. L. Rev. 1, 5-7 & n.8 (1956) (note 8 includes a bibliography).

22. *See* Note, *Rent Withholding Won't Work: Need for a Realistic Rehabilitation*

under a single heading. Indeed, in California, statutes regulating existing buildings are strewn among those regulating new construction under the general title "State Housing Law,"[23] and the same agencies and governmental units are charged with the adoption and enforcement of both types of codes.[24] This is unfortunate because the problems of administration and enforcement are manifestly different. The building codes regulate the construction industry, while the housing codes regulate owners of houses and, more importantly for the purposes of this Note, operators of apartment houses, hotels, and motels.

Building codes are substantially easier to enforce. The builder must obtain a permit from the local municipality, and an inspector must approve the construction as it progresses. If the builder does not comply with the building code provisions, the inspector can refuse to approve it; the building cannot be legally occupied until such approval is obtained.[25] The enforcing agency is assisted by the fact that lenders typically condition loans upon compliance with codes, and owners, in turn, will refuse to pay a builder who fails to obtain approval of the building inspector.[26] Builders of new construction are also threatened by the potential of tort liability. In recent years in California and elsewhere, products liability theory has been applied to builders,[27] and construc-

Policy, 7 LOY. L.A.L. REV. 66, 88 (1974).

23. CAL. HEALTH & SAFETY CODE §§ 17910-17995 (West 1964 & Supp. 1978).

24. *See* note 16 *supra*.

25. CAL. ADM. CODE, tit. 25, § 1034 (1974). *See* UNIFORM BUILDING CODE §§ 301-306 (1976).

26. For example, the construction loan application used by Fidelity Savings requires the owner to furnish Fidelity with a copy of the building permit. *See* FIDELITY SAVINGS, APPLICATION FOR MAJOR REAL ESTATE LOAN, Form FDL 264 (on file in the *Golden Gate University Law Review* Office). Owners ordinarily use documents supplied by the American Institute of Architects to require that the builders comply with all laws, ordinances, rules, regulations, and lawful orders of any public authority bearing on the performance of the work. *See* AMERICAN INSTITUTE OF ARCHITECTS, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION (1976) (Doc. A 201); *see also* AMERICAN INSTITUTE OF ARCHITECTS, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR. (1977) (Doc. A 101).

27. The first extension of strict liability to builders of housing occurred in New Jersey in 1965. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). In 1969, the California Court of Appeal applied the doctrine to a builder who "mass produced" residential homes. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 227-28, 74 Cal. Rptr. 749, 752 (1969). *Cf.* Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969) (grading contractor held strictly liable for defective land fill). *See also* Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974). In *Pollard*, the California Supreme Court applied warranty theory, rather than strict liability theory, in holding that a builder of five apartment houses was liable for defective construction. The court stated: "A contract to build an entire building is essentially a contract for material and labor, and there is an *implied warranty* protecting the owner from

tion not in accordance with building codes is considered strong evidence against a builder in such a lawsuit.

In the case of housing codes, however, an enforcing agency has much greater burdens. First, there are many more existing buildings to inspect than there are buildings under construction. Also, because buildings deteriorate, inspection must be an ongoing process, rather than a one-time inspection, as is the case for new construction. A building that passes inspection one year may not pass the following year. Finally, there is an attitudinal difference. The builder of a new building does not ordinarily resent the inspector, except in the sense of considering the process to be bothersome, The landlord of an apartment house, however, particularly in a slum area, is likely to be hostile to building inspectors, looking upon the process as "snooping." Many tenants may feel the same way. The inspection of an existing building involves the search of private homes, which raises constitutional issues that are not applicable in the inspection of a new building site.[28]

Inspection, however, is only the beginning. If a housing code violation is discovered, how will a city or county force the owner to correct it? A municipality has substantially less private assistance in its enforcement of housing codes than it does with respect to building codes. Lenders of purchase money, with notable exceptions,[29] are generally aloof. They become involved only at the time of purchase by simply refusing to loan.[30] The singular problem with housing code violations is that they develop over time, either because the building falls into disrepair or because of the adoption of newer, more stringent safety requirements. For this reason, since a loan covers many years, enforcement at the time the loan is made is not sufficient. Products liability theory will not work. Housing code violations do not involve the manufacture of a new product, but rather the sale of a used product. The typical offending building was built decades ago and has

defective construction." *Id.* at 378, 525 P.2d at 91, 115 Cal. Rptr. at 651 (citations omitted) (emphasis added).

28. The inspection procedure in California is governed by CAL. HEALTH & SAFETY CODE §§ 17970-17972 (West 1964), which provide that if the occupant is absent from the dwelling, a court order must be obtained in order to inspect. *See generally* Allnutt & Mossinghoff, *Housing and Health Inspection: A Survey and Suggestions in Light of Recent Case Law,* 28 GEO. WASH. L. REV. 421 (1960).

29. *See* note 7 *supra.*

30. A lender's outright refusal to loan may give rise to a charge of discrimination, however. *See* note 120 *infra* and accompanying text.

been sold and re-sold many times. To date, products liability theory has not been applied to sellers of used products, so there is little likelihood at this time that the doctrine will be extended to the sale of used buildings. Furthermore, the California Legislature has affirmatively insulated lenders from liability for defective new construction.[31]

A municipality is therefore left to its own devices. The procedure in California is fairly typical. The enforcing agency serves notice on the owner to repair the building, or in extreme cases, to vacate and demolish it.[32] An owner who refuses to comply may be found guilty of a misdemeanor and fined up to five hundred dollars or sentenced up to six months in jail.[33] This is an ineffective remedy, however, and in many cases, particularly where the required compliance would be very expensive, owners may prefer to pay the fine.[34] In the realm of *direct* enforcement, the city or county may bring a civil action against the owner to abate a nuisance.[35] If the court finds that a public nuisance exists, an injunction may issue,[36] and an owner who refuses to comply is

31. In 1968, liability for defective construction of new buildings was extended to lenders. In Connor v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968), the California Supreme Court held that the lender "had a duty to exercise reasonable care to prevent the construction and sale of seriously defective homes to plaintiffs." *Id.* at 867, 447 P.2d at 618, 73 Cal. Rptr. at 378. Great Western, however, had done more than merely lend money; it had been an active participant in the building project and had financed a poorly capitalized contractor. Following *Connor,* the legislature, with near-blinding speed in 1969, limited the holding to its facts by enacting CAL. CIV. CODE § 3434 (West 1970), which states:

> A lender who makes a loan of money, the proceeds of which are used or may be used by the borrower to finance the design, manufacture, construction, repair, modification or improvement of real or personal property for sale or lease to others, shall not be held liable to third persons for any loss or damage occasioned by any defect in the real or personal property so designed, manufactured, constructed, repaired, modified or improved or for any loss or damage resulting from the failure of the borrower to use due care in the design, manufacture, construction, repair, modification or improvement of such real or personal property, unless such loss or damage is a result of an act of the lender outside the scope of the activities of a lender of money or unless the lender has been a party to misrepresentations with respect to such real or personal property.

32. CAL. ADM. CODE, tit. 25, § 1013 (1977); UNIFORM HOUSING CODE §§ 1101-1103 (1976). *See also* CAL. HEALTH & SAFETY CODE §§ 17980, 17982 (West 1964).

33. CAL. HEALTH & SAFETY CODE § 17995 (West 1964).

34. *See* G. STERNLIEB, THE TENEMENT LANDLORD (2d ed. 1969), wherein the fines for housing code violations are described as "license fees for running slums." *Id.* at 180.

35. CAL. HEALTH & SAFETY CODE § 17980 (West 1964).

36. *Id.* §§ 17980-17983.

subject to sanctions for contempt.[37] While this a powerful remedy, a public nuisance action is cumbersome, time-consuming, and expensive. It is a full scale civil suit, and most local governments, particularly cities with large numbers of recalcitrant owners, do not have the resources to use this remedial device for every case. As an alternative to obtaining a contempt order against an owner, an enforcing agency may apply to a court for an order authorizing the city or county itself to make the repairs or to demolish the building.[38] This, of course, is even more time-consuming and requires the commitment of large sums of money, not to mention the fact that it puts the city or county in the building repair business. The cost of the repairs undertaken will become a quasi-tax lien on the property.[39] If the lien is not paid, however, the city or county must foreclose its lien in order to recover its money, thereby necessitating another judicial proceeding. This process puts local governmental entities in the landlord as well as the real estate business. Needless to say, this procedure is rarely used.[40]

It is abundantly clear that municipalities, both because they lack resources and because they lack an efficient, summary remedy, cannot adequately enforce housing codes alone. This is not to say that governmental enforcement should be abandoned. Local agencies should and must continue to enforce the codes to the limits of their capacities. Further remedies are needed, however, not to supplant or duplicate local enforcement, but to augment it.[41]

B. Toward Uniform Housing Codes

Because both building codes and housing codes historically have been a matter left largely to local municipalities,[42] there has been a nearly complete lack of uniformity in the codes from one

37. Cal. Civ. Proc. Code § 1209(5) (West Supp. 1978).

38. Cal. Adm. Code, tit. 25, § 1019 (1974); Uniform Housing Code §§ 1501-1502 (1976). *See* Cal. Health & Safety Code § 17983 (West 1964). For a discussion, national in scope, of the powers and procedures for enforcing housing codes see Urban Land Use Policy 140-45 (R. Andrews ed. 1972).

39. Cal. Adm. Code, tit. 25, § 1021(b) (1974); Uniform Housing Code §§ 1601-1612 (1976).

40. The San Francisco City Attorney's Office has indicated that this procedure generally is used only to demolish a building. Interview with Edward C.A. Johnson, Deputy City Attorney, City and County of San Francisco, in San Francisco (April 18, 1978).

41. For a slightly dated, but still informative, analysis of the effectiveness of various remedies for housing code violations see F. Grad, Legal Remedies For Housing Code Violations (1968).

42. *See* note 19 *supra.*

city to another. Since most lenders have loans outstanding in many areas, this lack of uniformity would place a heavy burden on a lender charged with liability for violations of any of the codes, and it also raises the question of whether the local codes are valid indicators of what is and what is not a life-threatening violation. A forceful argument can be made that cities and counties pass many of their codes in response to local pressures, instead of basing them upon sound considerations of health and safety.[43] A lender may ask why a particular condition is a fire hazard in one city, but not in another.

Since 1961, California has been moving toward a comprehensive uniform code regulating buildings used for human habitation.[44] In 1965, the state created the Commission of Housing and Community Development and the Department of Housing and Community Development.[45] The administration of the State Housing Law was placed under the jurisdiction of that department.[46] The primary functions of the Department of Community Development are to gather, coordinate, and disseminate information, to assist local governments in planning and community development, and to develop a California Statewide Housing Plan.[47] The Commission of Housing and Community Development is empowered to adopt, repeal, and amend rules and regulations necessary to carry out its functions.[48] The statutes creating these statewide agencies signaled the beginning of the road to uniform-

43. *See generally* FIELD & RIVKIN, *supra* note 20, at 49-101. The authors point out that local officials are vulnerable to competing political, economic, and social influences in setting code standards, and that they lack the resources or the technology to evaluate new procedures or materials. Because municipal governments usually do not have the resources to make tests and evaluations themselves, they are often forced to rely on the advice or opinions of local contractors or professional associations, whose economic self-interests may predominate over safety concerns. This can work two ways: special interests may wish to force the use of methods or products which are unnecessary, with the result that there is little benefit in terms of safety, but the cost of operating rental housing is unduly increased and passed along to lesses as rental increases; on the other hand, such interests may wish to prevent the use of new innovations which are less expensive than other products and methods.

44. CAL. HEALTH & SAFETY CODE §§ 17910-17995 (West 1964 & Supp. 1978).

45. 1965 Cal. Stats. 3041. The statute was replaced in 1977 by CAL. HEALTH & SAFETY CODE §§ 50400, 50550 (West Supp. 1978), which provide for the continuing existence of the Department and the Commission, respectively.

46. The State Housing Law was formerly administered by the Department of Industrial Relations. *See* 1961 Cal. Stats. 3920. In 1965, the administration was transferred to the Department of Housing and Community Development. *See* CAL. HEALTH & SAFETY CODE §§ 17920-17921 (West Supp. 1978).

47. CAL. HEALTH & SAFETY CODE §§ 50450-50518 (West Supp. 1978).

48. *Id.* § 50559.

ity of building and housing codes in California. In the 1969 statutes, the legislature specifically required that the administrative rules and regulations adopted by the Commission of Housing and Community Development should impose requirements equal to or more restrictive than the then-existing Uniform Building Code, Uniform Housing Code, Uniform Plumbing Code, Uniform Mechanical Code and National Electrical Code.[49]

In enacting the 1961 law and the 1965 amendments, however, the state did not preempt the entire field of building regulations. Local cities and counties were still allowed to impose restrictions "equal to or greater than" those imposed by the Commission,[50] and the entire administration and enforcement function was (and still is) left to local government.[51] In 1970, however, Health and Safety Code section 17922 was amended to provide that the state Commission of Housing and Community Development should impose "the same requirements" as are contained in the uniform codes.[52] In the same session, in what at first appeared to be the final step to statewide uniformity in the codes, the legislature eliminated the provision allowing local governments to impose restrictions "equal to or greater" than the uniform codes[53] and passed Health and Safety Code section 17958, which required the governing body of every city or county to adopt "ordinances or regulations imposing the same [uniform code] regulations adopted pursuant to [Health and Safety Code] section 17922 within one year after November 23, 1970."[54] The statute further provided that if the city or county failed to act, the provisions would *automatically* become applicable within one year after November 23, 1970.[55] This seemed a clear mandate that every city

49. 1961 Cal. Stats. 3920 (current version at CAL. HEALTH & SAFETY CODE § 17922 (West Supp. 1978)).

50. *See* 1961 Cal. Stats. 3922; *id.* § 11, at 3926.

51. *Id.* § 8, at 3923-26 (current version at CAL. HEALTH & SAFETY CODE §§ 17960-17990 (West 1964 & Supp. 1978)). *See* notes 4 & 16 *supra* and text accompanying notes 24-41 *supra.*

52. 1970 Cal. Stats. 2785. The current version at CAL. HEALTH & SAFETY CODE § 17922 (West Supp. 1978) allows the Commission more latitude by providing that it impose *"substantially* the same requirements as are contained in the *most recent editions"* of the uniform codes. *Id.* (emphasis added)). For a chart showing the percentage of cities which have adopted uniform codes see FIELD & RIVKIN, *supra* note 20, at 43. The chart is informative, in that it is broken down by various demographic characteristics.

53. 1970 Cal. Stats. 2785 (current version at CAL. HEALTH & SAFETY CODE § 17951 (West Supp. 1978)).

54. *Id.* at 2786 (current version at CAL. HEALTH & SAFETY CODE § 17958 (West Supp. 1978)).

55. *Id.*

or county in California was required to adopt the uniform codes referred to in Health and Safety Code section 17922.[56] At the same time that it passed section 17968, however, the legislature also passed section 17958.7, which in pertinent part provides:

> [N]othing contained in this part shall be construed to require the governing body of any city or county to alter in any way building regulations enacted on or before November 23, 1970.[57]

The California Attorney General seized upon this latter provision, stating that "it seems reasonable to conclude that the provision of section 17958 imposing state regulations upon cities and counties failing to adopt regulations imposing similar requirements by

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56. The legislature made this intent clear:

> *The Legislature hereby finds and declares that the uniformity of codes throughout the state of California is a matter of statewide interest and concern* since it would reduce housing costs and increase the efficiency of private housing construction industry and its production. [*sic*]
>
> Uniformity can be achieved within a framework of local autonomy, by allowing local governments to adopt changes making modification in such codes based on differences in local conditions, but requiring express findings as reasons for those changes, which would serve as a deterrent to the excessive adoption of changes or modifications.
>
> Thus such uniformity, by bringing about such reduction of costs and increase of efficiency, would substantially help to meet the housing needs within this state.

Id. (emphasis added). *But see* Baum Electric Co. v. City of Huntington Beach, 33 Cal. App. 3d 573, 109 Cal. Rptr. 260 (1973), in which the court upheld a city's imposition of an electrical code requirement different from that found in the National Electrical Code, without any showing of a difference in local conditions. The court stated that

> [w]hile statewide uniformity in the adoption and enforcement of building regulations was unquestionably one of the objectives of the 1970 amendments to the State Housing Law, a correlative, if not the paramount policy underlying the building regulations is the protection of public health and safety. It would be unreasonable to assume the Legislature intended that considerations of safety must yield to a policy of uniformity.

Id. at 581-82, 109 Cal. Rptr. at 266 (citation omitted) (footnote omitted). *Baum*, however appears to have been limited by Danville Fire Protection Dist. v. Duffel Financial & Constr. Co., 58 Cal. App. 3d 241, 129 Cal. Rptr. 882 (1976) (hearing denied by California Supreme Court on July 8, 1976). In *Danville*, the court, citing the legislative language quoted above, invalidated a local ordinance requiring more restrictive fire protection devices than those required by state law and regulations. *Id.* at 243, 129 Cal. Rptr. at 883-84. The court held that the 1970 amendment to Health & Safety Code § 17922 and the regulations promulgated thereunder had *preempted local regulation. Id.* at 248-49, 129 Cal. Rptr. at 886-87. The *Danville* court stated that *Baum* "held that state law does not preempt cities from adopting *additional* regulations and *subjects not covered* by state law and regulations where the regulations are consistent with the particular [uniform code] mentioned in section 17922." *Id.* at 249 n.7, 129 Cal. Rptr. at 887 n.7 (emphasis added).

57. CAL. HEALTH & SAFETY CODE § 17958.7 (West Supp. 1978).

a prescribed time has a limited application."[58] Unfortunately for those favoring uniform codes, a court of appeal agreed with the Attorney General and held that "section 17958 only applies to building activities not already regulated by existing city ordinances."[59] This holding rendered section 17958 ineffective as a vehicle for establishing uniformity of local codes. Since most municipalities, particularly larger cities with a large stock of older buildings, already had extensive codes before 1970, adoption of uniform codes by local cities and counties is still essentially a voluntary matter, except as to those matters "not already regulated."

In 1974, however, the legislature again amended Health and Safety Code Section 17922. The sweeping amendment provides that if the state Commission of Housing and Community Development does not adopt the uniform codes by regulation, "the most recent editions of the uniform codes referred to in this section shall be considered to be adopted and in effect one year after the date of publication."[60] In contrast to the severe limitations which were placed on section 17958 in its provision for city and county adoption, there is no limitation on the provision in section 17922 calling for automatic adoption of the uniform codes by the *state.* The plain meaning of section 17922, as amended, is that the uniform codes are now in full force and effect in California. Since local agencies are required to enforce the state Housing Law[61] and since state law preempts local law,[62] the local agencies are re-

58. 54 OP. CAL. ATT'Y GEN. 87-88 (1971).

59. People v. Wheeler, 30 Cal. App. 3d 282, 290, 106 Cal. Rptr. 260, 266 (1973). *Accord,* Sierra Club v. California Coastal Zone Conservation Comm'n, 58 Cal. App. 3d 149, 158, 129 Cal. Rptr. 743, 749 (1976).

60. 1974 Cal. Stats. 2751 (current version at CAL. HEALTH & SAFETY CODE § 17922 (West Supp. 1978)).

61. *See* note 16 *supra.* CAL. HEALTH & SAFETY CODE § 17952 (West Supp. 1978) provides that if the local agency fails to enforce the codes, the state will enforce them.

62. *See In re* Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962). In *Lane,* the California Supreme Court stated that

> [a] *local ordinance is invalid if it attempts to impose additional requirements in a field that is preempted by the general law.*
>
> Whenever the Legislature has seen fit to adopt a general scheme for the regulation of a particular subject, the entire control over whatever phases of the subject are covered by state legislation ceases as far as local legislation is concerned.

Id. at 102, 372 P.2d at 899, 22 Cal. Rptr. at 859 (citations omitted) (emphasis added). *Lane* was cited as authority for state preemption of local code regulation in Danville Fire Protection Dist. v. Duffel Financial & Constr. Co., 58 Cal. App. 3d 241, 248, 129 Cal. Rptr. 882, 886 (1976). For further discussion of *Danville* see note 56 *supra.*

quired to enforce the uniform codes, regardless of whether the local government has adopted them.[63]

The 1974 amendments to the State Housing Law also represent the first attempt by the state legislature to provide comprehensive and definite guidelines for the regulation of *existing buildings.*[64] Health and Safety Code section 17920(f) adopted the Uniform Housing Code definition of "substandard buildings" and recognized the need for some flexibility in codes applying to older buildings.[65] Section 17920.7 required the Commission of Housing and Community Development to adopt special structural fire safety rules and regulations for existing multiple story apartment houses, hotels, and motels.[66] In 1974, the Commission passed a set of Special Regulations for Existing Buildings pursuant to section 17920.7.[67]

There has been surprisingly little comment regarding these very important steps in California toward uniformity in housing codes (and building codes) and the enactment for the first time of concrete, comprehensive, statewide uniform regulations for existing buildings. While a lending institution might argue persuasively that local codes are not reliable indicators of life threatening conditions[68] or that it is unduly burdensome for lenders to keep track of the various codes of every city and county, these arguments pale when posed against the provisions of the uniform codes, which are written by independent agencies of experts[69] and are now adopted statewide.

It is clear, however, that uniformity of housing codes, while it facilitates the process of *identifying* life-threatening conditions all over the state, does not solve the problem of enforcement.

63. Although no court has unequivocally expressed this proposition, the court of appeal came close in *Danville. See* note 56 *supra.*

64. Since 1965, Health and Safety Code § 17912 has served as a basis for regulating the use, maintenance, and occupancy of existing structures, but no guidelines were provided for such regulation, and no Administrative Code regulations were passed until 1974.

65. CAL. HEALTH & SAFETY CODE § 17920(f) (West Supp. 1978).

66. *Id.*

67. CAL. ADM. CODE, tit. 25, §§ 1095, 1096 (1977).

68. *See* note 43 *supra.*

69. The Uniform Housing Code and the Uniform Building Code are written by the International Conference of Building Officials; the Uniform Plumbing Code is written by the International Association of Plumbing and Mechanical Officials; the Uniform Mechanical Code is written by the International Conference of Building Officials and the International Association of Plumbing and Mechanical Officials; and the National Electrical Code is written by the National Fire Protection Association.

Enforcement is still entirely a local matter, and is slow, cumbersome, and expensive.[70] There is a pressing need for another remedy to force building owners to comply.

II. LENDER ENFORCEMENT OF HOUSING CODES

A. LENDERS HAVE THE POWER TO ENFORCE

Lending institutions that have loaned money for the purchase of an offending building are in a uniquely advantageous position to bring pressure to bear on owners. Lenders already possess all the necessary legal machinery in the form of their security instruments (mortgages or deeds of trust), which carry the statutory right of judicial foreclosure,[71] and, without exception, they have a contractual right of private sale in the event of default.[72] The question, of course, is whether the lender has the *right* to exercise its powers of foreclosure or private sale merely because the borrower fails to comply with housing codes.

A lender has the right to foreclose, either judicially or privately at its option,[73] if the borrower breaches any provision in a security instrument.[74] While foreclosure is most commonly exercised because a borrower fails to make payments on the loan, security instruments also contain a long list of agreements by borrowers to do (or not to do) certain things for the protection of the lender's *security interest.* For example, the following language, excerpted from a typical deed of trust in general use in Northern California, demonstrates the control which a lender may exercise over a borrower:

> To Protect The Security Of This Deed Of Trust
> The Parties Agree As Follows:
> A. Rights and Duties of the Parties
>
> . . . .

70. *See* text accompanying notes 32-41 *supra.*

71. CAL. CIV. CODE § 2931 (West 1974); CAL. CIV. PROC. CODE §§ 725a, 726 (West 1955 & Supp. 1978).

72. CAL. CIV. CODE §§ 2924, 2932 (West 1974). Sections 2924b-2924h specify the procedures for a private sale.

73. CAL. CIV. PROC. CODE § 725a (West 1955). Rights and remedies will vary depending on which procedure is used, but the decision is entirely at the option of the lender. *See* CAL. CIV. PROC. CODE § 726 (West Supp. 1978); CAL. CIV. PROC. CODE §§ 580b, 580d (West 1976).

74. CAL. CIV. PROC. CODE § 726 (West Supp. 1978); CAL. CIV. CODE § 2932 (West 1974).

> 7. Maintenance and Preservation of the Subject Property. Trustor [borrower] covenants: (i) to keep the Subject Property in good condition and repair; . . . (iv) *to comply with and not suffer violations of* (a) *all laws, ordinances, regulations, standards . . . , which laws . . . affect the Subject Property* and pertain to acts committed or conditions existing thereon, including (but without limitation) *such work or alteration, improvement or demolition as such laws . . . mandate*; (v) not to commit or permit waste thereof . . . .
> B. Default Provisions
>
> 1. Rights and Remedies. At any time after default in the payment or performance of any obligation secured or imposed hereby, Beneficiary [lender] and Trustee shall have the following rights and remedies:
>
> (a) With or without notice, to declare all obligations secured hereby immediately due and payable;
>
> . . . .
>
> (c) To commence and maintain an action or actions in any court of competent jurisdiction to foreclose this instrument as a mortgage or to obtain specific enforcement of the covenants of Trustor hereunder . . . ;
>
> . . . .
>
> (e) To execute a written notice of such default and of its election to cause the Subject Property to be sold to satisfy the obligations secured hereby.[75]

Since the housing codes, whether state or local, have the force of law, certainly "affect" the property, and require "work, alteration, improvement or demolition" in case of violation, the above language clearly gives the lender the right to declare a default, accelerate the loan, and exercise its power of judicial foreclosure or private sale if the borrower does not comply with the law.

75. WELLS FARGO BANK, N.A., DEED OF TRUST, form # REL 16 (9-75) (on file in the *Golden Gate University Law Review* Office).

If the borrower were to challenge the lender's exercise of its power of foreclosure, it would appear that the lender would have the burden of showing that the borrower's default constituted an *actual* threat to the lender's security interest.[76] Since the lender's loan is secured by the physical property, it might be argued that only a violation which threatened to physically damage the property would jeopardize the security interest and that a life-threatening code violation in no way constitutes a direct threat to the lender's security.[77] This argument must fail, however, because of the possibility that a local enforcement agency will succeed in having the building declared a public nuisance.[78] The city or county then may repair the building at public expense and order that the cost be assessed against the property as a special assessment. This special assessment would constitute a lien on the property[79] and would have priority over the lender's purchase-money lien.[80]

Clearly, such a special assessment lien would constitute a direct economic threat to the lender's security interest in the property. If the special assessment lien is foreclosed, the lender

76. *Cf.* La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 884, 489 P.2d 1113, 1126, 97 Cal. Rptr. 849, 862 (1971) (provision that entire loan balance is "due on encumbrance" will be sustained only if reasonably necessary to protect the lender's security); Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 638, 526 P.2d 1169, 1175, 116 Cal. Rptr. 633, 639 (1974) (clause in deed of trust will be enforced against trustor who sells the secured property under an installment land contract only upon a showing of a legitimate threat to the lender's security interest).

77. It might be said, however, that the existence of such a violation decreased the value of the property itself.

78. *See* note 36 *supra* and accompanying text.

79. *See* text accompanying notes 38-39 *supra.*

80. Tax liens may be made superior to a preexisting mortgage lien. This is entirely a question of legislative intent. *See* 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW 1533 (8th ed. 1973); *Cf.* Guinn v. McReynolds, 177 Cal. 230, 232-33, 170 P. 421, 422 (1918). There can be no doubt that the California Legislature intended that a special assessment lien would be paramount to a preexisting mortgage lien. UNIFORM HOUSING CODE (1976) specifically provides:

> The City Council may thereupon . . . assess said charge [for repair or demolition] against the property involved.
>
> . . . .
>
> Immediately upon its being placed on the assessment role the assessment shall be deemed to be complete, the several amounts assessed shall be payable, and the assessments shall be liens against the lots or parcels of land assessed, respectively. *The lien shall be . . . paramount to all other liens* except for state, county, and municipal taxes with which it shall be upon parity.

Id. §§ 1605, 1608 (emphasis added).

will be forced to pay the lien in order to protect its security.[81] In California, the lender then is privileged to add any amount it pays on the lien to the indebtedness due under its security instrument.[82] This may be of small consolation to the lender, however. There is no assurance that an owner will be able to pay the increased debt, and the lender who pays the assessment cannot recover from the owner in a direct suit but must look only to its security.[83] This situation puts the lender in the position of being *forced* to finance the improvement, regardless of its reluctance to do so. Lending institutions do not like to be forced to finance; they become uncomfortable when their risk-taking decisions are made for them.[84] The answer for the lender is to declare the owner to be in default *before* any special assessment lien attaches to the property. In this way, the lender can force the owner to comply with the codes or lose the property, thereby leaving the lender free to decide whether to finance the owner's compliance. If the lender does not wish to take the risk, the owner must attempt to finance the repair by other means, such as a junior mortgage, which

81. It has long been settled law in California that a lender can pay the taxes and other superior liens in order to protect its security, and hold the property for such payment without any express authority in the security instrument. *See* Savings & Loan Soc'y v. Burnett, 106 Cal. 514, 536, 39 P. 922, 928 (1895).

82. CAL. CIV. CODE § 2876 (West 1974) provides: "Where the holder of a special lien is compelled to satisfy a prior lien for his own protection he may enforce payment of the amount so paid by him as part of this claim for which his own lien exists." CAL. ADM. CODE, tit. 25, § 1013 (1977) provides:

> If such building is encumbered by a mortgage or deed of trust, of record, and the owner of such building shall not have complied with the order of the enforcement agency on or before the expiration of 30 days after the mailing and posting of the notice, the mortgagee or beneficiary under such deed of trust may, within 15 days after the expiration of said 30-day period, comply with the requirements of the order of the enforcement agency, in which event the cost to such mortgagee or beneficiary shall be added to and become a part of the lien secured by said mortgage or deed of trust and shall be payable at the same time and in the same manner as may be prescribed in said mortgage or deed or trust for the payment of any taxes advanced or paid by said mortgagee or beneficiary for and on behalf of said owner.

See United States Sav. & Loan Ass'n v. Hoffman, 30 Cal. App. 3d 306, 313, 106 Cal. Rptr. 275, 279 (1973).

83. CAL. CIV. PROC. CODE § 726 (West 1955). *See also* San Mateo County Bank v. Dupret, 124 Cal. App. 395, 12 P.2d 669 (1932), wherein the court stated that "a mortgagee who pays taxes upon the mortgaged property, either before or after the discharge of the mortgage by foreclosure or release, is not entitled to recover the amount so paid in an independent suit instituted after such discharge." *Id.* at 397, 12 P.2d at 670.

84. This does not mean that in certain cases lenders cannot be forced to finance. *See* the "anti-redlining" provisions of the Administrative Code, quoted in text accompanying note 121 *infra*.

under ordinary circumstances, constitutes no threat to the primary lender's security.[85] If the owner is unable to finance it, the lender can foreclose and sell the property "as is" to anyone who is willing to undertake the repairs. If the cost of the repairs is so high as to make the "as is" property worth less than the lender's outstanding debt, the lender is still protected because it can foreclose judicially, and, since commercial property is involved, the lender can obtain a deficiency judgment against the owner for the difference between the amount of the debt and the market value of the property.[86]

B. Lenders Have a Duty to Enforce

Lenders may argue that regardless of the fact that they have the power and the right to enforce housing codes, they have no *duty* to do so. Lenders engage in no affirmative acts which create defective conditions. Can they be forced to control the conduct of owners? As mere lenders of money, it may be argued that lenders have no ownership or control of the offending buildings[87] and therefore no duty of care to persons injured in them.

Misfeasance v. Nonfeasance

In the law of negligence, a distinction is made between affirmative acts which cause harm (misfeasance) and the mere failure to act to prevent harm (nonfeasance).[88] The general rule is that there is no duty to rescue or affirmatively prevent harm to a

85. *But see* La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971), in which the court recognized that there may be circumstances in which a second mortgage would endanger the security of the first lien. *Id.* at 881, 489 P.2d at 1124, 97 Cal. Rptr. at 860. As a practical matter, however, the primary lender is still protected, because all security instruments in common use by lending institutions require approval by the primary lender before the security property may be further encumbered.

86. Cal. Civ. Proc. Code § 580d (West 1976) prohibits any deficiency judgment after a private sale. *Id.* § 580b bars a purchase money lender from a deficiency judgment in a judicial foreclosure, but *only* if the property is residential property of less than four units and the purchaser lives in it. In the case of hotels and apartment houses, therefore, the lender is not barred by § 580b.

87. It is settled law in California that a mortgage or other security interest is not an interest in the property, but a mere lien. Cal. Civ. Code § 2888 (West 1974) provides: "Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien." Cal. Civ. Proc. Code § 744 (West 1955) provides: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of real property without a foreclosure and sale." *See* Johnson v. Razy, 181 Cal. 342, 344, 184 P. 657, 657 (1919).

88. W. Prosser, *supra* note 8, at 338.

stranger.[89] In order to find liability for nonfeasance, there must be "some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act."[90] There are two possible responses to the argument that failure by a lender to enforce housing codes is mere nonfeasance, and thus not an actionable wrong.

First, the lender is in a special relationship to those threatened by the violations, and it therefore has a duty to act. Lenders are not quite the same as the famous examples of the expert swimmer who is not under any duty to save a drowning person, or the physician who is not required to answer a call to save one who is dying, or the stranger who can freely watch a child hammer on an explosive.[91] The lender has undertaken to provide the financing without which the owners would not have been able to purchase the building. While this relationship may not reach the threshold of agency, partnership, or joint venture,[92] it certainly goes beyond a mere failure to rescue a stranger. By lending to an owner who neglects (or refuses) to correct a life-threatening housing code violation, the lender promotes the commercial activities that affect the interests of those ultimately injured due to the violation. The courts have gradually expanded the number and types of relationships that are sufficient to require affirmative action.[93] Prosser has opined:

> [T]here is reason to think that [the process of extension of liability for nonfeasance] may continue until it approaches a general holding that the mere knowledge of serious peril, threatening death or great bodily harm to another, which an identified defendant might avoid with little inconvenience, creates a sufficient relation, recognized by every moral and social standard, to impose a duty of action.[94]

In the case of a lender that has been given official notice of a violation, as provided in the California Administrative Code[95] and

89. *Id.* at 340-41.

90. *Id.* at 339.

91. *Id.* at 340-41.

92. *See* Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 863, 447 P.2d 609, 615, 73 Cal. Rptr. 369, 375 (1968) (combining of property, skill and knowledge in a single project not a joint venture in absence of sharing of profits and losses).

93. W. PROSSER, *supra* note 8, at 339.

94. *Id.* at 343.

95. CAL. ADM. CODE, tit. 25, § 1015 (1974) provides that notices of code violations shall

the Uniform Housing Code,[96] there is more than "mere knowledge of serious peril;" there is participation in allowing a perilous condition to exist.

The second response is that the lender's failure to enforce the housing codes is *not* nonfeasance. By the provisions found in their security agreements requiring owners to comply with all laws requiring alterations or improvements,[97] lenders have already undertaken to enforce housing codes. By this voluntary, affirmative conduct, lenders take charge and control, and thereby assume a duty of care. It is settled law that even if no duty to act exists, once a person volunteers to act, he or she may not perform what has been undertaken in a negligent manner.[98] Lenders may argue that the provision in their security instruments merely represents the power and the right to act, but does not represent an undertaking to act or a promise to act. However, the lenders have manifested an intention to enforce the codes, and it is reasonable for a tenant or other person threatened by violations to be misled into believing that lenders will not permit life-threatening housing code violations to exist in buildings in which they have security interests.[99]

Duty to Control Conduct of Others

It is often said that there is no duty to control the conduct of others.[100] There are exceptions to this rule. The most common exception occurs when a potential defendant has a special relationship to the person threatened.[101] In the context of lending

be given "to any mortgagee or beneficiary under any deed of trust of record. . . ."

96. UNIFORM HOUSING CODE § 1101-1102 (1976).

97. *See* text accompanying note 75 *supra.*

98. Schwartz v. Helms Bakery Ltd., 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967). In *Schwartz,* the court stated: "If the defendant enters upon an affirmative course of conduct affecting the interests of another, he is regarded as assuming a duty to act, and will thereafter be liable for negligent acts *or omissions." Id.* at 238, 430 P.2d at 72, 60 Cal. Rptr. at 514 (citations omitted) (emphasis added). *See also* Minoletti v. Sabini, 27 Cal. App. 3d 321, 324, 103 Cal. Rptr. 528, 529 (1972); Janofsky v. Garland, 42 Cal. App. 2d 655, 657, 109 P.2d 750, 751 (1941). *Sabini* and *Janofsky* involved voluntary undertakings by landlords, but the reasoning has general applicability.

99. *See* Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968), wherein the court found that the construction lender "failed of its obligation to buyers, the more so because it was well aware that the usual buyer of a home is ill equipped with experience or financial means to discern such structural defects." *Id.* at 867, 447 P.2d at 618, 73 Cal. Rptr. at 378 (citations omitted). *But see* note 31 *supra.*

100. *See* Harper & Kime, *The Duty to Control the Conduct of Another,* 43 YALE L.J. 886, 887 (1934).

101. Typical examples are a common carrier's duty to affirmatively protect its passengers, an innkeeper's duty to protect its guests, a hospital's duty to protect its patients,

instruments, however, this raises the question of whether a special relationship between a lender and the person *threatening* the harm gives rise to a duty to affirmatively act to prevent the harm. There is authority for such a departure from the general rule of nonliability. The most common examples are found in cases involving a parent and child[102] or the permissive use of an automobile.[103] The critical element of these cases, however, is not the particular relationship or the instrumentality involved, but whether there is *control.*[104] The duty arises only if there is both an *ability to control* and an *opportunity and necessity for exercising such control.*[105]

By virtue of their security agreements, lenders clearly have the ability to control owner-landlords. In addition to requiring compliance with laws affecting the property, lending institutions typically impose a long list of other requirements upon owners. The following is a less than exhaustive summary of the acts and restraints which Crocker National Bank imposes on an owner-landlord, on penalty of default and foreclosure:

> (1) Purchase insurance against fire and any other hazard which in the opinion of the lender should be insured against;
>
> (2) Assign all causes of action for damage or injury to the property to the lender;
>
> (3) Pay all taxes, bonds, assessments, fees, liens charges, fines, and impositions which are attributable to or affect the property;

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and a school's duty to protect its pupils. *See* RESTATEMENT (SECOND) OF TORTS §§ 314A, 315 (1965); W. PROSSER, *supra* note 8, at 349; 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW 2821 (8th ed. 1974).

102. Johnson v. Orlando, 131 Cal. App. 2d 705, 281 P.2d 357 (1955).

103. Brockett v. Kitchen Boyd Motor Co., 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968).

104. *See generally* Harper & Kime, *supra* note 100, at 891.

105. *See* Costello v. Hart, 23 Cal. App. 3d 898, 100 Cal. Rptr. 554 (1972), wherein the court observed:

> Most of the cases discussing the liability of an adult for the acts of a small child speak of the liability of the "parent." The exact blood relationship is not the test. The duty of care is imposed upon the adult who has assumed responsibility for the child's care and has the ability to exercise control.

Id. at 901, 100 Cal. Rptr. at 446 (citations omitted). *See also* RESTATEMENT (SECOND) OF TORTS § 316 (1965), *adopted in* Ellis v. D'Angelo, 116 Cal. App. 2d 310, 317, 253 P.2d 675, 679 (1953).

(4) Promptly discharge any lien which may attain priority over the lender's lien;

(5) Assign all rents and profits to the lender;

(6) Lease of rent the property only on a form approved by the lender;

(7) Refrain from accepting any pre-payment of rent without first obtaining written consent of the lender;

(8) Refrain from executing any further security agreements without prior written consent of the lender;

(9) Keep the property repaired and do not permit waste;

(1) Refrain from changing the nature of the occupancy or use of the property without prior written consent of the lender;

(11) Furnish the lender with an annual financial statement of the operation of the property; and

(12) Defend any action or proceeding purporting to affect the security, and pay all costs and attorney fees.[106]

Such a formidable constellation of requirements would appear to reduce the owner-landlord to the status of quasi-manager of the property for the benefit of the lender. These kinds of requirements, coupled with the summary power of foreclosure, clearly give lending institutions the *ability to control*[107] the owner-landlords. Furthermore, as discussed earlier, the California Administrative Code and the Uniform Housing Code provide that notice of code violations must be given directly to lenders.[108] Such notice informs lenders of the *necessity for exercising control,* and the lenders' summary power of foreclosure in the event of the

106. CROCKER NATIONAL BANK, DEED OF TRUST, ASSIGNMENT OF RENTS AND SECURITY AGREEMENT, form 91-569 (7-75) (CNB-Income Property) (on file in the *Golden Gate University Law Review* Office).

107. *See* text accompanying note 105 *supra.*

108. *See* notes 95-96 *supra.*

refusal to comply gives the lenders ample *opportunity to exercise control*[109] within a short period of time.[110] These factors, taken together, leave no question that lending institutions stand in such a relation to owners of multiple dwelling units on which the lenders hold security interests as to give the lenders a great deal of influence over the owners' actions with respect to the buildings. Such a degree of control should imply a duty to exercise it to protect anyone likely to be injured by reason of a known housing code violation.[111]

It is immaterial that the owner-landlord of the offending building may also be guilty of negligence. It is apparent that a lender's negligence in failing to force the owner to correct code violations will only exist where the owner allows code violations to occur in the first place. It is settled law, however, that separate acts of negligence may be the concurring proximate cause of an injury.[112]

CONCLUSION

In the final analysis, liability of a lender for failure to enforce known life-threatening housing code violations is a question of policy.[113] Reliance on local agencies has failed to ensure compliance. Lending institutions have the means to compel compliance in all cases in which they have loaned money on the offending buildings, thus relieving some of the burden on local enforcing agencies. The prophylactic effect of a rule of liability,[114] forcing lenders to use their powers, is obvious. While a rule of liability will provide compensation to many injured persons who otherwise might be faced with a bankrupt defendant-owner, this is an incidental by-product. The goal is neither compensatory nor puni-

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109. *See* text accompanying note 105 *supra*.

110. CAL. CIV. CODE §§ 2924-2924f (West 1974 & Supp. 1978); CAL. CIV. PROC. CODE § 726 (West Supp. 1978).

111. Prosser states the rule as follows:

> [E]ven in the absence of such a special relation toward the person injured, the defendant may stand in such a relation toward the third person himself as to give him a definite control over his actions, and carry with it a duty to exercise that control to protect the plaintiff.

W. PROSSER, *supra* note 8, at 349.

112. Merrill v. Buck, 58 Cal. 2d 552, 25 Cal. Rptr. 456, 375 P.2d 304 (1962) (both landlord and real estate agent held liable for failure to warn tenant of dangerous condition, *not* on principles of agency, but on theory of separate acts of negligence).

113. *See* text accompanying note 9 *supra*.

114. *Id.*

tive; rather, it is preventive. Multiple dwelling units that threaten life must either be repaired or eliminated.

The actual exposure of lenders under the formulation here advanced will be minimal. Liability would not attach until such a time as the lender was informed in writing of the violation.[115] By virtue of the summary procedures of judicial foreclosure or private sale, the lender can cut off its liability. Even if a fire were to occur after the lender was informed, if the lender had already taken reasonable steps to eliminate the violation, then it would not be negligent and should not be held liable.[116] Any liability which lenders do sustain can easily be insured against by them. Lending institutions are in a better position to bear the burden of liability, and to spread the risk, than are those injured in an offending building.[117]

This raises another problem which must be considered. What about noninstitutional lenders and junior mortgagees, who do not have the vast resources of banks and savings and loan associations? Will liability be extended to them? The provisions for giving notice make no distinction between institutional and noninstitutional lenders, or between senior mortgagees and junior mortgagees.[118] There are a number of points to be made here: (1)

115. *See* notes 95-96 *supra* and accompanying text.

116. The argument could be made that a lender should be liable for a life-threatening condition even in the absence of notice from a building inspector; *i.e.*, lenders should be charged with a duty to *inspect* for violations, as well as a duty to enforce when informed of violations. This would be based on the argument that by virtue of the provisions in their security instruments, lenders have led the unsuspecting public to believe that they would not allow violations to exist in buildings in which they have a security interest. *See* notes 97-99 *supra* and accompanying text.

In view of Civil Code § 3434, quoted at note 31 *supra*, it is doubtful that liability will be carried this far. That statute was the legislature's direct response to Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1968), which had imposed liability on a lender for defective new construction. The legislature made it clear that no duty to inspect would be imposed upon a mere lender of construction-money in the absence of active participation in the project. It is doubtful, therefore, that such a duty to inspect will be imposed upon lenders of purchase-money for existing buildings. Another consideration is the cost of inspection by lenders, which would be a significant additional expense to be passed on to owners and renters. Also, inspection by lenders would be truly duplicative of the inspection function of local cities and counties. Furthermore, there is at present no legal machinery for inspection by lenders, such as that which exists for government inspectors. *See* note 28 *supra* and accompanying text. If a resident of the subject building refused to allow the lender's inspector to inspect the premises, the lender would have no recourse to the legal remedy of a search warrant.

117. U.S. Financial v. Sullivan, 37 Cal. App. 3d 5, 19, 112 Cal. Rptr. 18, 26 (1974) (dictum).

118. *See* notes 95-96 *supra.*

junior mortgagees and noninstitutional lenders can insure against the risk, just as institutional lenders can; (2) junior lenders and noninstitutional lenders have the same basic powers as an institutional lender to foreclose judicially or by private sale and can thereby minimize their risk; (3) the degree of care is partially dependent upon the provisions in the security instrument[119]—if the noninstitutional lender has a simple security instrument, without the imposing list of controls with which the institutional lenders provide themselves, then it would appear that the noninstitutional lender's "undertaking" was more limited.

There are issues on the other side of the scale. What is the social utility of allowing lenders to loan money on buildings without the threat of liability? Lenders will point out that the potential liability for a fire in a single hotel or apartment house could be in the millions of dollars. This risk must be insured against, and such insurance will be added to the lender's cost of doing business. This cost will be translated into higher interest rates, higher mortgage payments, and ultimately higher rents. The increased costs, however, are insignificant when balanced against the potential savings in lives and injuries, and it is a cost which can be spread more widely by lending institutions than by any other party. It is contended that it is better that everyone should pay slightly higher rent or slightly more interest than that a few should bear the risk of death or serious injury. Furthermore, as discussed earlier, the costs which lenders will have to spread can be minimized by the lenders themselves if they conscientiously enforce the codes.

It may also be asserted that a lender's freedom to loan money on property that is questionable, without fear of liability, may serve another socially desirable objective, however. A rule of liability might restrict the free flow of money for the restoration of older buildings and for historical preservation. This also raises the spectre of another more insidious social cost resulting from a rule of liability for lenders. Area discrimination in lending has been well documented under the pejorative term "redlining."[120] The California Administrative Code provides that:

119. *See* text accompanying notes 71-75 § 106-07 *supra.*

120. For an innovative approach to the problem of area discrimination see Andrews & Shier, *Redlining: Why Make a Federal Case Out of It,* 6 GOLDEN GATE U.L. REV. 813 (1976).

> No association shall deny a mortgage loan, or discriminate in application procedures or in the settling of the terms of conditions of any such loan, due, in whole or in part, to consideration of the conditions, characteristics or trends in the neighborhood or geographic area surrounding the security property, *unless the association can demonstrate that such consideration in the particular case is required to avoid an unsafe or unsound business practice.*[121]

Would a rule of liability provide lenders with a way to satisfy the "unsafe or unsound business practice" exception? Most redlining occurs in the central cities. Most housing code violations occur in the same locations. Lending institutions may refuse to loan on all older buildings, arguing that such buildings carry too high a risk. Once again, the answer must be that exposure of lenders will be minimal. Provided there is quick, remedial action taken to correct a violation once the lender is given notice, there will be no liability, and therefore no valid reason to refuse to loan. Again, the policy is not to "stick" lenders with liability for all of these injuries, but rather it is to enlist the aid of lenders, with their powerful weapons, to eliminate the violations which cause the injuries.

Perhaps the strongest factor in favor of imposing liability is the moral blame attached to a lender's failure to enforce the housing codes.[122] Those injured in fires in multiple dwelling units generally are ill-equipped to correct code violations. In the face of a known, serious, documented threat of death or bodily injury, it is difficult to defend a lender that fails to prevent the harm when it has already undertaken to provide itself with the legal machinery to do so.

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121. CAL. ADM. CODE, tit. 10, § 245.2 (1976).
122. *See* note 9 *supra.*