Guarantors and the California Antideficiency Legislation: Is There Room under the Umbrella of Protection?

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A creditor making a loan will sometimes require a personal guarantee as security for payment of the loan. A guarantor, is someone other than the principal borrower who promises to pay on the loan if the principal defaults. Generally, if a guarantor pays the debt, the guarantor has a right to be reimbursed by the principal debtor for the amount paid. In California, the antideficiency legislation affects a guarantee on a loan secured by a mortgage or deed of trust on real property and, in turn, affects the guarantor’s right to reimbursement.

1. A "creditor" is a person to whom a debt is owing by another person who is the "debtor" or one who has a right to require the fulfillment of an obligation or contract. BLACK'S LAW DICTIONARY 332 (5th ed. 1979).

2. A "guarantee" is a promise to answer for the payment of debt or performance on an obligation if the person ultimately liable fails to make payment or perform the obligation. Id. at 634-35 (5th ed. 1971).

3. A "guarantor" is one who promises to answer for the debt or perform the obligation of another when the person ultimately liable fails to pay or perform. CAL. CIV. CODE § 2787 (West 1974). Section 2787 expressly abolishes the distinction between a guarantor and a surety. Id. The terminology used in the 1939 amendment to the California Civil Code is that of suretyship. The terms "surety" and "guarantor" are often used interchangeably. Cormack & McCarroll, The Distinction Between Suretyship and Guaranty in States Having the Field Code Provisions, 10 S. CAL. L. Rev. 371 (1937). The statute further declares that guarantees of collection and continuing guarantees are terms of suretyship obligations. CAL. CIV. CODE § 2787 (West 1974).

For the sake of clarity (and in following the spirit of the 1939 California Legislature), suretyship terminology will be used in this Comment. See generally RESTATEMENT OF SECURITY § 82d (1941) which defines surety, principal and creditor as follows:

(1) A surety is the person who is bound on an obligation from which another, by the discharge of a duty, should relieve him.

(2) The principal is the person who should bear the ultimate burden of an obligation unless excused for some reason personal to himself.

(3) The creditor is the person to whom the surety is bound and to whom the principal is under an obligation or other duty.

Id. See also infra note 40 and accompanying text.

4. See infra note 22.

5. A "mortgage" is an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt. R. BOYER, SURVEY OF THE LAW OF PROPERTY 499 (3d ed. 1981).

6. A "deed of trust" is a security device used as an alternative to a mortgage. R. BOYER,
in certain situations. This comment will focus on the issues surrounding the extent of liability and right of reimbursement of guarantors of loans subject to the California antideficiency statutory scheme.

The California antideficiency statutory scheme is California’s legislative response to the disastrous effect of the Great Depression of the early 1930’s on land values. The statutory scheme was created to relieve the plight of borrowers who defaulted on obligations secured by mortgages and other security interests in land. The statutes limit or preclude personal liability of the principal borrower on the secured obligations. The statutory scheme is codified in the California Code of Civil Procedure sections 580a, 580b, 580d and 726.

The California antideficiency statutory scheme contains procedures and limitations on the collection of a debt secured by real property. For example, in some situations the antideficiency statutes bar a creditor from obtaining a deficiency judgment after a foreclosure.

supra note 5, at 510. A deed of trust is a three-party transaction: the borrower or debtor transfers legal title to a trustee to hold the property as security for payment of the debt to the creditor. The deed of trust usually contains a power of sale vested in the trustee authorizing the sale of the property if the debtor defaults on the obligation. Id. at 510-11. See generally Bank of Italy Nat'l Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 655, 20 P.2d 940, 944 (1933) (holding that because a deed of trust serves precisely the same economic function as a mortgage, a deed of trust is subject to all the rules restricting mortgage enforcement).

7. See infra notes 85-87 (discussing guarantor's rights to reimbursement after nonjudicial foreclosure); notes 135-148 (a guarantor is barred from reimbursement on a purchase-money debt); notes 203-209 (a guarantor's right to reimbursement is limited by a fair value determination).


10. See supra note 8 (providing for the specific statutes which form the statutory scheme).


13. See infra notes 70-73 and accompanying text (explanation of California Civil Procedure Code section 580d).


15. See infra notes 70-73 (discussing section 580d); 125-132 (discussing section 580b); 153-162 and 198-202 (discussing section 726); 185-193 (discussing section 580a) and accompanying text.

16. A “deficiency judgment” is a judgment obtained after court proceedings to collect from the defaulting borrower the difference between the debt and the net proceeds received from any foreclosure sale of the real property security. Black’s Law Dictionary 379 (5th ed. 1971).
sale of the real property security. The structure of a loan and the method of recovery upon default by the principal borrower is consequently very important in determining whether or not a creditor will be repaid the full amount of the loan. A creditor may attempt to avoid the effects of the antideficiency legislation by obtaining a personal guarantee from someone other than the principal borrower. Upon default, the creditor can elect to either hold the guarantor liable for the total amount of the debt by suing the guarantor directly on the contract of guarantee, or the creditor can sue the principal borrower directly on the note.

In California, the liability of a guarantor upon the principal borrower’s default is affected by the antideficiency statutory scheme and by the statutes governing suretyship relationships. Under suretyship laws, a guarantor who pays the obligation of the principal debtor has a right to be reimbursed from the principal debtor. A guarantor attempting reimbursement on a debt secured by real property, however, is additionally subjected to the California antideficiency legislation and may not receive full reimbursement. Furthermore, in certain situations, a guarantor may be completely barred from obtaining a deficiency judgment against the principal debtor. A guarantor on a debt secured by real property, therefore, may be liable beyond what was

17. See, e.g., CAL. CIV. PROC. CODE § 580b (West 1976) (stating that a creditor of a loan used for the purchase of real property and secured by a deed of trust on the purchased real property is barred from obtaining a deficiency judgment against the debtor).
18. See R. Bernhardt, supra note 8 at § 4.0 (suggesting how a creditor can structure a loan secured by real property so as to avoid the limitations on obtaining a deficiency judgment against the debtor).
19. Id. See also supra note 2 (discussing definition of a guarantee).
20. California Civil Code section 2807 provides that a guarantor who has assumed liability for the payment of a debt is liable to the creditor immediately upon the default of the principal debtor and without demand or notice. CAL. CIV. CODE § 2807 (West 1974).
21. See CAL. CIV. CODE §§ 2787-2854 (West 1974) (statutes governing sureties and guarantors). Suretyship of the California Civil Code was enacted in 1872. In 1939 these sections of the Civil Code were revised by the California Legislature to abolish the distinction between sureties and guarantors and to make guarantors subject to the laws on suretyship. 1939 Cal. Stat. ch. 453, sec. 10, at 1796. See generally, Cormack & McCarroll, supra note 3, at 371 (showing the factors distinguishing a surety from a guarantor). See also Work of the 1939 California Legislature, 13 S. CALIF. L. REV. 1, 48 (1939) (concluding that there was no substantive purpose behind the distinction between guarantors and sureties).
22. CAL. CIV. CODE § 2848 (West 1974) (stating that a guarantor acquires the rights of the creditor against the principal debtor to the extent of reimbursement for what the guarantor has expended).
23. See id. (the surety is entitled to enforce only the remedies which the creditor then has against the principal debtor).
24. See supra note 17 and accompanying text (according to Civil Code section 2848, this section applies to a guarantor attempting reimbursement against a principal debtor on a purchase-money debt).
anticipated by the guarantor upon executing the guarantee agreement.²⁵

A majority of courts in California hold that a creditor's collection right on a separate guarantee agreement is not limited by the antideficiency statutory scheme unless the guarantee agreement itself is secured by a mortgage on real property.²⁶ Consequently, the guarantor is not protected against liability for deficiency judgments after a foreclosure sale of the real property securing the obligation of the principal debtor.²⁷ In order to protect the purpose and effect of the antideficiency legislation, these decisions grant a guarantor no more rights than what is acquired by subrogation.²⁸ Thus, if a creditor is barred by the antideficiency legislation, a guarantor is likewise barred.

The purpose of this comment is to analyze the position of a guarantor on a debt secured by a mortgage of real property. In particular, this comment will focus on the extent of liability of a guarantor when the principal debtor is afforded certain protections under the California antideficiency statutory scheme. Section I provides a review of the nature of guarantors and the liability of guarantors under California suretyship laws.²⁹ To provide a background of the purpose of the legislation and what protections are afforded the principal debtor, Section II contains a brief description of the antideficiency statutory scheme in California.³⁰ Section II, subsection (ii) provides a discussion of the specific role of a guarantor on an obligation secured by a lien on real property and the effect, if any of the antideficiency legislation.³¹ Section II, subsections (iii) and (iv) contain examples of legislation outside California and proposals of a change in the effect the antideficiency legislation on guarantor liabil-

²⁵. See CAL. CIV. CODE § 2809 (West 1974) (stating that the measure of liability of a guarantor is not to be larger in amount nor more burdensome than that of the principal debtor).
²⁶. See infra note 74-76 (discussing when the effect of antideficiency legislation applies to guarantors).
²⁷. See infra note 87 and accompanying text (discussing the limit of principal debtor's liability after a nonjudicial foreclosure sale).
²⁹. See infra notes 40-50 and accompanying text (discussing nature and general liability of a guarantor).
³⁰. See infra notes 70-73 (discussing section 580d), 125-132 (discussing section 580b), 153-162 and 198-202 (discussing section 726), 185-193 (discussing section 580d) and accompanying text.
³¹. See infra notes 74-124 (discussing guarantor antideficiency protection after nonjudicial foreclosure), 131-148 (discussing section 580b as applied to guarantors), 163-175 (discussing application of section 726 to guarantors), 203-209 (discussing fair value hearing as applied to guarantors) and accompanying text.
ity. Finally, this comment concludes that certain protections granted to guarantors under the California suretyship laws should be recognized within the California antideficiency statutory scheme.

I. THE NATURE AND LIABILITIES OF A GUARANTOR

The courts in California have consistently held that the California antideficiency statutory scheme does not directly apply to guarantors. These holdings are questionable for a number of reasons. Currently the liability of a guarantor is governed by California suretyship legislation and not by the antideficiency legislation. The courts have not yet fully considered the impact the suretyship laws make on the rights of guarantors when the principal debtor's liability is limited or precluded by the antideficiency legislation. Furthermore, the courts have compared the liability of a guarantor to that of a junior lienor on a separately secured note on the same obligation. The general liability

32. See infra notes 149-152 (discussing section 580b), 176-188 (discussing one action rule of section 726), 222-229 (discussing section 580a and section 726 fair value hearing) and accompanying text.
33. See infra notes 239-243 (discussion of conclusion).
34. CAL. CIV. CODE § 2787 (West 1974). Section 2787 defines a guarantor as one who promises to pay the debt or perform the obligation of another when the person ultimately liable, the principal debtor, fails to pay or perform. Id.
35. See, e.g., Bank of America Nat'l Trust & Sav. Ass'n v. Hunter, 8 Cal. 2d 592, 598, 67 P.2d 99, 102-03 (1937) (holding that section 580a is inapplicable to guarantors); Union Bank v. Gradsky 265 Cal. App. 2d 40, 41, 71 Cal. Rptr. 64, 66 (1968) (holding section 580d does not directly apply to guarantors). See also Heckes v. Sapp, 229 Cal. App. 2d 549, 552, 40 Cal. Rptr. 485, 487 (1964) (holding that section 580b was not intended to apply to guarantors); Loeb v. Christie, 6 Cal. 2d 416, 418, 57 P.2d 1303, 1304 (1936) (holding that the guarantee does not bring the creditor within the scope of section 726); Adams v. Wallace, 119 Cal. 67, 71, 51 P. 14, 15 (1897) (holding that a guarantor is outside the one action rule of California Code of Civil Procedure section 776 because the contract of guaranty is separate and distinct from the deed of trust). Contra Titus v. Woods, 45 Cal. App. 541, 546, 188 P. 68, 72 (1920) (holding that if the creditor judicially forecloses on the real property prior to proceeding against the guarantor, the creditor must include the guarantor in the judicial foreclosure action or waive rights against the guarantor, because the one action rule of California Code of Civil Procedure section 726 compels inclusion of the guarantor as a party defendant).
36. See generally Rintala, California's Anti-Deficiency Legislation and Suretyship Law: The Transversion of Protective Statutory Schemes, 17 UCLA L Rev. 245 (1969) (stating that many cases are based on outdated rationale because they do not integrate the 1939 change in suretyship law which abolished the distinction between sureties and guarantors). See also infra notes 131-134 and accompanying text (discussing that section 580b was intended to protect only the purchaser and not a person secondarily liable such as guarantors).
39. See Heckes v. Sapp, 229 Cal. App. 2d 549, 552, 40 Cal. Rptr. 485, 487 (1964) (holding in action by a sold-out junior purchase-money mortgagee against a guarantor, the court stated
of a guarantor will therefore be examined and contrasted to the liability of a guarantor on a loan affected by the antideficiency legislation.

A. The Nature Of A Guarantor

California Civil Code section 2787 defines a guarantor or surety as one who promises to answer for the debt of another or one who pledges, without delivery, property as security to answer for the debt of another.40 A guarantee contract is a three-party relationship that arises when two persons are under an obligation to the same creditor, but the principal debtor alone bears the ultimate burden of the obligation.41 There are effectively two debtors, the principal debtor and the guarantor, and only one person to whom a single performance is due, the creditor.42 Thus, a contract of guarantee has both a primary and a secondary debtor.43

Prior to 1939, a guarantee was considered to be an obligation separate and independent from that of the principal debtor.44 A surety,
in contrast, was bound by the same instrument as the principal debtor.\textsuperscript{45} In 1939, the California Legislature expressly abolished the distinction between a surety and a guarantor.\textsuperscript{46} As applied, the 1939 legislation eliminates the rule that the obligation of the guarantor is completely independent and separate from that of the principal debtor.\textsuperscript{47} All guarantee contracts are now subject to the laws relating to suretyship.\textsuperscript{48} Many trust deed cases decided after 1939, however, have continued to treat guarantors as separate and distinct from sureties.\textsuperscript{49} This change in the nature of a guarantor must be recognized by the courts or the extent of the liability of a guarantor will remain unclear.\textsuperscript{50}

\section*{B. The Liability of a Guarantor Under Suretyship Law}

The contract creating the guarantee relationship determines the extent of liability of a guarantor.\textsuperscript{51} A guarantor's obligation is deemed to be

\textsuperscript{45} Cormack & McCarroll, \textit{supra} note 3, at 371. (Joseph M. Cormack was the author of the successful legislation that abolished the distinction between guarantors and sureties and subject the guarantors to the laws of suretyship).

\textsuperscript{46} \textit{CAL. CIV. CODE} § 2787 (West 1974). Section 2787 as amended by the California Legislature in 1939 expressly states: "The distinction between sureties and guarantors is hereby abolished." 1939 Cal. Stat. ch. 453, sec. 10, at 1796. See Engelman v. Bookasta, 264 Cal. App. 2d 915, 916, 71 Cal. Rptr. 120, 121 (1968) (abolishing the distinction between the nature of a surety and that of a guarantor). See also Ingalls, 43 Cal. App. 2d at 367, 110 P.2d at 1075; Cormack & McCarroll, \textit{supra} note 3, at 376. See generally, Rintala, \textit{supra} note 36, at 245 (an excellent resource for the history and purpose of the anti-deficiency statutory scheme and how it applied to guarantors in the early cases following the 1939 abolition of the distinction between sureties and guarantors). See also American Guar. Corp. v. Stoody, 230 Cal. App. 2d 390, 392-93, 41 Cal. Rptr. 69, 71 (1964) (discussing effect of 1939 amendment of Civil Code section 2787 on guarantees).

\textsuperscript{47} See \textit{supra} note 40 (discussing that the language of the statute does not state that the independent obligation is eliminated; rather, by applying suretyship laws, the guarantor's obligation is effectively eliminated).

\textsuperscript{48} \textit{American Guaranty Corp.}, 230 Cal. App. 2d at 392-93, 41 Cal. Rptr. at 71.

\textsuperscript{49} See generally, Rintala, \textit{supra} note 36, at 263-62. There are three major reasons advanced in post 1939 cases holding the California antideficiency statutory scheme inapplicable to guarantors: (1) that the obligation of the guarantor is "independent" from the obligation of the primary debtor; (2) the obligation of a guarantor is "additional security," ignoring the tripartite nature of a suretyship relation; and (3) a guarantor's obligation on a purchase-money obligation is similar to that of a sold-out junior lienor and is not within the scope of protection of California Code of Civil Procedure section 580(b). \textit{Id.}

\textsuperscript{50} See, e.g., Coast Fed. Sav. & Loan Ass'n v. Crawford, 117 F.2d 913, 915 (9th Cir. 1941) (holding that the real purchaser was named as a guarantor and the maker of the note, the principal debtor, was a "dummy," and granting the purported guarantor protection of section 580b of the California Code of Civil Procedure based on these facts). Security-First Nat'l Bank v. Chapman, 41 Cal. App. 2d 219, 221, 106 P.2d 431, 432 (1940) (holding that a contract of guarantee gives rise to a separate and independent obligation from obligation of principal and holding that the guarantor's liability was based on a contract "separate and independent from that on which the principal debtor was bound, which lead to attempts to circumvent the anti-deficiency statutory scheme).

unconditional unless the terms of the contract of guarantee signify a condition precedent to liability. When a guarantor’s obligation is unconditional, the creditor need not obtain a judgment against the principal debtor nor exhaust any other remedies against the principal debtor before proceeding against the guarantor. Further, the creditor is not obligated to give the guarantor notice of the principal debtor’s default. The guarantor is liable to the creditor immediately upon default of the principal debtor. However, if the creditor proceeds against the guarantor, the guarantor has a statutory right under California Civil Code section 2845 to demand that the creditor first exhaust the remedies against the principal debtor and any security given on the debt before pursing the action against the guarantor.

687, 691-92 (1970) (holding that the terms of the agreement and the circumstances under which the agreement was made determines the nature and extent of the contract). A guarantee contract can be created in various ways. See, e.g., Anderson v. Shaffer, 98 Cal. App. 457, 460, 227 P. 185, 187 (1929) (holding that a wife who promises to pay the husband’s note out of life insurance proceeds if he did not pay prior to his death becomes the guarantor of that promise); Rogers v. Schulenburg, 111 Cal. 281, 284, 43 P. 899, 902-03 (1896) (holding that a third person who writes his name on back of a non-negotiable note becomes a guarantor); Reeves v. Howe, 16 Cal. 152, 153 (1860) (holding that writing your name on the back of a note at the time the note is made makes the signor a guarantor).

The position of the parties to the three-party relationship can change. When a third person assumes a debtor’s debt, the person assuming the debt becomes the principal debtor and the debtor becomes the surety. See Westinghouse Credit Corp. v. Wolfer, 10 Cal. App. 3d 63, 68-69, 88 Cal. Rptr. 654, 657 (1970) (holding that when a purchaser assumes a mortgage of the debtor, the original mortgagor then occupies the position of the surety); Everts v. Matteson, 21 Cal. 2d 437, 447, 132 P.2d 476, 482 (1942) (discussing an agreement wherein a surety later assumes the debt transposes the surety into a principal debtor and the principal into a surety); Tompkins v. Powers, 106 Cal. App. 464, 466, 289 P. 685, 687 (1930) (discussing liability of grantee of a mortgage); Brichetto v. Raney 76 Cal. App. 2d 437, 447, 132 P.2d 476, 482 (1942) (discussing an agreement wherein a surety later assumes the debt transposes the surety into a principal debtor and the principal into a surety).

52. CAL. CIV. CODE § 2845 (West Suppl. 1980). California Civil Code section 2845 (West 1974) provides that surety may require the creditor, subject to section 996.440 of the California Code of Civil Procedure to proceed against the principal or to pursue any other remedy in the creditor’s power which the surety cannot pursue, and which would lighten the surety’s burden. Id. If the creditor neglects to do so, the surety is discharged to the extent the surety is thereby prejudiced. See Bank of America Nat’l Trust & Sav. Ass’n v. McRae, 81 Cal. App. 2d 1, 7, 183 P.2d 385, 386 (1947). Absent a demand, an action may be first maintained...
California Code of Civil Procedure section 2809 provides that the guarantor's obligation is not to be more burdensome nor larger in amount than that of the principal debtor. Section 2809, however, appears to be inconsistently applied to guarantors of debts secured by a deed of trust. For example, when the principal debtor on the guaranteed debt is not liable for a deficiency judgment under the antideficiency legislation and a guarantor is not given similar protection under the statute, the guarantor may be obligated to pay the entire amount of the debt and be precluded from obtaining full reimbursement.

A guarantor is liable on a debt even if there exists some personal disqualification of the principal debtor to pay the debt. A guarantor has certain statutory rights to reimbursement for performance of the debt obligation. A guarantor may demand that the principal debtor perform the obligation when the note becomes due and before the guarantor must pay the debt. After a guarantor has satisfied the


57. **CAL. CIV. CODE** § 2809 (West 1974). California Civil Code section 2809 provides as follows:

The obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation.

Section 125(2) of the Restatement of Security provides a rationale of California Civil Code section 2809 as follows:

Where the principal disaffirms a promise because of lack of capacity and returns the consideration, the creditor can hold the surety to his obligation (a) subject to the creditor's duty to deliver the consideration to the surety upon the latter's performance, or (b) reduced by the value of the consideration when returned to the creditor.


58. *See Rinatala, supra* note 36, at 285 (discussing how the guarantor's reimbursement rights are subject to the antideficiency legislation and reimbursement from the principal may be limited by the legislation).


60. **CAL. CIV. CODE** § 2846 (West 1872), California Civil Code section 2846 states that a surety may compel his principal to perform the obligation when due.; *See also* CAL. CIV. PROC. § 1050 (West 1974) (right of action to compel the principal to satisfy the debt).
obligation, the principal debtor is bound to reimburse the guarantor for payment, including necessary costs and expenses. A guarantor also has subrogation rights. Upon making payment on the loan, a guarantor is subrogated to the creditor's right to pursue a judicial or nonjudicial sale of the security. A guarantor is entitled to the benefit of every security for the performance of the obligation held by the creditor whether the guarantor is aware of the security or not. Payment of the debt or a material alteration of the debt discharges the liability of the guarantor.


If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other persons, though they may have been benefited by his act, except as prescribed by the next section.


A surety upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such.

Id.

63. See Union Bank v. Gradsky, 265 Cal. App. 2d 40, 44, 71 Cal. Rptr. 64, 68 (1968). The court stated that one who is neither an intermeddler nor a volunteer and who has paid the obligation of another for which the other is primarily liable, is equally subrogated to all rights and to the security formerly held by the obligee against the principal obligor. Id.

64. Cal. Civ. Code § 2849 (West 1974). Section 2849 provides as follows:

A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not.

Id. See Engleman v. Bookasta, 264 Cal. App. 2d 915, 917, 71 Cal. Rptr. 120, 121 (1968) (holding that a guarantor is entitled to benefit from every security held for the performance of a principal obligation held by a creditor). See also Wiener v. Van Winkle, 273 Cal. App. 2d 774, 786 78 Cal. Rptr. 761, 768-69 (1969) (holding that a continuing guarantee is also subject to section 2845 of the Civil Code as well as all laws relating to suretyship); Bank of America Nat'l Trust & Sav. Ass'n v. Hunter, 8 Cal. 2d 592, 596, 67 P.2d 99, 101 (1937) (holding that a guarantor's liability on a continuing guaranty remains operative until all present or future credits given by the creditor not exceeding a sum stated should be paid).

65. Cal. Civ. Code § 2839 (West 1974) (performance of or offer of performance of the obligation exonerates a guarantor); see also Cal. Civ. Code § 1473 (West 1974) (providing that "full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it"); Cal. Civ. Code § 1485 (West 1974) (providing that "[a]n obligation is extinguished by an offer of performance, made in conformity to the rules herein prescribed, and with the
Since the suretyship laws govern the liability of the guarantor, and the antideficiency legislation governs liability of debtors on debts secured by deed of trust, the position of the guarantor will be explored under each of the California antideficiency statutes. A determination can then be made regarding whether the extent of the guarantor’s liability as defined under the antideficiency legislation is interpreted consistently with the guarantor’s liability as governed by the suretyship statutes.

II. THE GUARANTOR AND ANTIDEFICIENCY LEGISLATION IN CALIFORNIA

A. Background of the California Antideficiency Legislation.

In the 1930’s the California Legislature enacted a statutory scheme restricting the rights and remedies of creditors when debtors defaulted on an obligation secured by a real property mortgage or deed of trust.\(^6\) The California statutory scheme primarily limits the creditor’s remedies in obtaining a deficiency judgment\(^6\) against a principal debtor if the obligation is secured by a real property mortgage or deed of trust.\(^6\) One of the fundamental purposes of this statutory scheme is to preclude creditors from purchasing the real property security at a

\(^6\) See, e.g., Southern Cal. First Nat’l Bank v. Olsen, 41 Cal. App. 3d 234, 239, 240, 116 Cal. Rptr. 4, 8 (1974) (holding that an increase in the rate of interest on an obligation constitutes an alteration sufficient enough to exonerate the surety); Wise v. Clapper, 257 Cal. App. 2d 770, 774, 65 Cal. Rptr. 231, 234 (1968); (holding that an extension of payment time without the surety’s consent is a material alteration of the obligation and discharges the surety); Verdugo Highlands, Inc. v. Security Ins. Co., 240 Cal. App. 2d 527, 530, 49 Cal. Rptr. 736, 740 (1966) (holding that a material alteration is one that works a change in the meaning or legal effect of the contract).

\(^6\) See supra note 16 (defining a deficiency judgment).

foreclosure sale for a nominal amount and recovering a large deficiency judgment against the debtor.69

B. Antideficiency Protection After Non-Judicial Foreclosure Under California Code of Civil Procedure Section 580d.70

1. The Statute

Code of Civil Procedure section 580d provides in part that upon default by a debtor on a note secured by a mortgage or deed of trust on real property, the creditor can elect to foreclose nonjudicially on the real property security by exercising the power of sale clause of the deed of trust.71 Section 580d was enacted as a substitute for the debtor's statutory right of redemption, and to insure that the sale of the real property would satisfy a realistic share of the debt.72 Section 580d, therefore, enables a creditor to elect a remedy that results in immediate non-redeemable title but which limits the creditor's recovery on the note to the amount received by the foreclosure sale. Under section 580d, a creditor who elects to foreclose nonjudicially on the real property security is thereafter barred from bringing a suit for a personal judgment against the debtor for a deficiency judgment.73

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69. See Roseleaf Corp. v. Chierighino 59 Cal. 2d 35, 378 P.2d 97, 27 Cal. Rptr. 873 (1963). Chief Justice Traynor expounded upon the underlying purposes of the California antideficiency legislation and the prohibition imposed by the legislation. Id. See also Rintala, supra note 36, at 251-53 (discussing in detail the Roseleaf decision and discussing the possibility of a creditor obtaining a double recovery by purchasing the real property security at a foreclosure sale for a minimal amount and subsequently obtaining a personal judgment against the principal debtor for the deficient amount).

70. CAL. CIV. PROC. CODE § 580d (West 1976). Section 580d bars a creditor from obtaining a deficiency judgment against a principal debtor if the creditor elects to foreclose nonjudicially on the real property security. Section 580d provides in pertinent part as follows:

No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property hereinafter executed in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in such mortgage or deed of trust[.]

Id. See also Leipziger, supra note 9, at 807-819 (discussing the impact of nonjudicial foreclosure on a creditor secured by real and personal property); Hetland, supra note 9, at 29 (discussing the legislative purpose of California Code of Civil Procedure section 580d and nonjudicial foreclosures).

71. See Hetland, supra note 9, at 29.

72. See id. at 29-31 (discussing the right of redemption of a debtor after judicial foreclosure; a debtor has three months to a year after the sale to pay the debt and redeem the real property security). See generally, CAL. CIV. PROC. CODE §§ 729.040-729.090 (West 1976) (delineating the procedures on redemption rights).

2. Guarantor Antideficiency Protection After Nonjudicial Foreclosure

The judicial opinions in California determining whether a guarantor is afforded antideficiency protection after a creditor elects to proceed by a nonjudicial foreclosure sale of the real property security are diverse. Direct application of California Code of Civil Procedure section 580d is not available to guarantors. Instead, a creditor can elect to sell the real property security by a nonjudicial foreclosure sale, apply the proceeds of the sale to the debt, and subsequently file a suit against the guarantor for a personal judgment for the amount remaining on the debt.

One California appellate court has recognized that the creditor’s exercise of the nonjudicial foreclosure places a guarantor in an inequitable position. In *Union Bank v. Gradsky*, the court attempted to remedy the resultant inequity by applying antideficiency protection for a guarantor through an estoppel theory. Thereafter, the application of the *Gradsky* estoppel theory created controversies among the appellate courts in California.
In *Gradsky*, the California appellate court held for the first time that a guarantor's liability was affected by the antideficiency legislation. The principal debtor, Bess Gradsky, executed a note for $112,500 in favor of Union Bank and a first deed of trust on real property owned by Gradsky for a construction loan. The general contractor executed a guarantee of Gradsky's obligations. Upon default of the note, Union Bank elected to foreclose nonjudicially on the real property security and subsequently filed suit against the guarantor for a deficiency judgment. Under suretyship law, the guarantor has a right to reimbursement from the principal debtor of any amount paid on the debt by the guarantor. In the *Gradsky* situation, the court recognized that the guarantor’s reimbursement rights against the principal debtor were cut off. The court noted that these rights were terminated because the principal debtor was allowed to assert antideficiency protection pursuant to California Code of Civil Procedure section 580d, as a defense against the guarantor’s reimbursement rights granted under suretyship law.

The *Gradsky* court was willing to face the problem of determining which party, the guarantor or the creditor, was to be ultimately liable for the deficiency resulting from the sale by a nonjudicial foreclosure.
The court recognized several factors in making a decision. First, both the creditor and the guarantor were barred from recovering a personal judgment from the principal debtor after a nonjudicial foreclosure. Second, if the creditor elected to foreclose judicially, that is by bringing suit against both the principal debtor and guarantor and obtaining a court order to foreclose, both the creditor and guarantor would have the right to obtain a deficiency judgment against the principal debtor. Third, the creditor alone had the option of choosing whether to preserve the right to a deficiency judgment against the principal debtor by electing to judicially foreclose. Finally, the creditor had a statutory duty not to impair a guarantor's remedy against the principal. Based on the foregoing factors, the court applied equitable principles of estoppel to protect the guarantor from liability for the deficiency. Under Gradsky, a guarantor is provided indirect antideficiency protection similar to that provided to the debtor by section 580d. Pursuant to Gradsky, when a creditor elects to pursue a remedy which impairs both the security of the note and the possibility of the surety's reimbursement from the principal, the creditor is estopped from pursuing the guarantor for a deficiency following a nonjudicial sale of the security.
A conflict exists among the California Courts of Appeal as to the application of the Gradsky estoppel theory. Some courts refuse to apply the estoppel theory. Other courts disagree over which situations estoppel should apply and what effect a waiver in the guarantee should have on the estoppel.

The facts in the case of Mariners Savings & Loan Association v. Neil are similar to those in Gradsky. The guarantors in Mariners Savings, however, were not granted direct antideficiency protection through section 580d nor indirect protection through application of an estoppel theory. The principal debtor, Mrs. Neil, executed a promissory note secured by a deed of trust on her separate property. Her husband, Mr. Neil, executed a personal guarantee of Mrs. Neil’s note. The action was brought to enforce Mr. Neil’s obligation on the personal guarantee. The court recognized that when Mrs. Neil executed the promissory note and deed of trust, no obligations were imposed on the guarantor, Mr. Neil. Mr. Neil’s obligation on the guarantee was separate and distinct from the primary obligation of his wife.

The court of appeal in Mariners Savings criticized the opinion in Gradsky on the ground that the Gradsky estoppel theory runs contrary to statutory policy by encouraging creditors to bring actions directly against guarantors without first exhausting remedies against the principal debtors or without first resorting to the real property security. The court in Mariners Savings held that the Gradsky rule was more detrimental to the guarantor than being subjected to a judgment for

95. See supra notes 95-124 (discussing the controversy created by the Gradsky decision).
96. See Mariners Sav. & Loan Ass’n v. Neil, 22 Cal. App. 3d 232, 236-37, 99 Cal. Rptr. 238, 241 (1971) (holding that the Gradsky estoppel theory does not apply to guarantors under a nonjudicial foreclosure situation). See also infra notes 135-143 (explaining that the Gradsky estoppel theory does not apply to guarantors of a purchase-money debt).
98. Id.
99. Id. at 234, 99 Cal. Rptr. at 240.
100. Id.
101. Id. at 234, 99 Cal. Rptr. at 239-40.
102. Id. at 236, 99 Cal. Rptr. at 241.
103. Id. at 235, 99 Cal. Rptr. at 241.
104. Id.
105. See Cal. Civ. Code § 2809 (West 1974) (stating that a guarantor’s liability is not to be larger in amount nor more burdensome than that of the principal debtor); Cal. Civ. Code § 2845 (West Suppl. 1988) (stating that a guarantor may require a creditor to proceed against the principal debtor). This policy of the suretyship law runs contrary to the Gradsky estoppel theory. Mariners Sav. & Loan Ass’n, 22 Cal. App. 3d at 236, 99 Cal. Rptr. at 241.

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a deficiency.\textsuperscript{106} The court in \textit{Mariners Savings} held that section 580d did not apply to guarantors, so the guarantor was not granted even indirect antideficiency protection after a nonjudicial foreclosure sale.\textsuperscript{107}

The \textit{Mariners Savings} court also refused to apply an estoppel theory.\textsuperscript{108} The \textit{Mariners Savings} court assumed that the guarantor’s refusal to accept the creditor’s tender of the promissory note and deed of trust implied a waiver of the guarantor’s right to antideficiency protections and a complete disinterest in any reimbursement rights.\textsuperscript{109} Under the authority of \textit{Mariners Savings}, a guarantor who refuses to accept tender of the note and deed of trust cannot claim that a creditor is estopped from obtaining a deficiency judgment from the guarantor.\textsuperscript{110}

In 1983, the California Court of Appeal in the case of \textit{Krueger v. Bank of America}\textsuperscript{111} strengthened application of the \textit{Gradsky} theory and weakened the effect of the \textit{Mariners Savings} opinion.\textsuperscript{112} In \textit{Krueger}, a loan was made by the bank to a corporation for real property development.\textsuperscript{113} The loan was secured by a deed of trust on the real property and a pledge of some stock of a corporation.\textsuperscript{114} The loan was secured by a guarantee executed by both the director and major stockholder of the corporation, Robert Krueger and his wife, Marjorie Krueger.\textsuperscript{115} The corporation experienced financial difficulties and ultimately defaulted on the obligation.\textsuperscript{116} The bank sold some of the pledged shares of stock and commenced a nonjudicial foreclosure on the real property security.\textsuperscript{117} The bank gave the guarantors notice of the nonjudicial foreclosure and notice that if the guarantors failed to act to protect their interests, the guarantors would lose all rights to seek reimbursement from the principal debtor.\textsuperscript{118} The guarantors objected but did not attempt to bar the sale.\textsuperscript{119} After the sale, there remained a balance of $3.5 million due on the loan.\textsuperscript{120}

\begin{footnotes}
\bibitem{Mariners Sav. Loan Ass'n} Marin\textit{ers Sav. & Loan Ass'\textquoteright n}, 22 Cal. App. 3d at 236, 99 Cal. Rptr. at 241.
\bibitem{Id.} \textit{Id.}
\bibitem{Id.} \textit{Id.}
\bibitem{Id.} \textit{Id.}
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\end{footnotes}
The court of appeal agreed with the trial court and found that the guarantors were discharged from further liability on their guarantees and ordered the stock returned to the Kruegers. The appellate court held that the creditor bank was estopped from obtaining a deficiency judgment of the $3.5 million dollars because the creditor elected to conduct a nonjudicial foreclosure sale and thereby destroyed the guarantor's statutory rights to subrogation and reimbursement. The court found that the creditor's notice to the guarantor of the foreclosure sale did not avoid the application of Gradsky, in contrast to the holding of Mariners Savings. The application of equitable principles such as estoppel appears to be consistent with a guarantor's statutory suretyship rights of reimbursement and subrogation and, therefore, appears to be the better rule as protection for guarantors against personal liability for a deficiency judgment.

C. Purchase-Money Antideficiency Protection Under California Code of Civil Procedure section 580b

1. The Statute

Under section 580b of the California Code of Civil Procedure, a principal debtor on a note secured by real property cannot be held personally liable for deficiency judgments on defaults of purchase-money mortgages, whether foreclosure is brought by judicial or nonjudicial action. Section 580b prohibits any personal judgment against a defaulting debtor if a loan is obtained to purchase real property and the mortgage on the real property is given directly to

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121. Id.
122. Id. at 210, 193 Cal. Rptr. at 325-26. See also: CAL. CIV. CODE §§ 2847-48 (West 1974).
124. Id. at 212-13, 193 Cal. Rptr. at 326-27.
125. CAL. CIV. PROC. CODE § 580b (West 1976). California Code of Civil Procedure section 580b provides that a creditor who gives a loan to a debtor for the purchase of residential real property of not more than four units and the debtor gives the creditor a deed of trust on the purchased real property as security for the loan, the creditor is barred from obtaining a deficiency judgment against the debtor. It does not matter if the sale of the real property security is judicial or nonjudicial.
126. Id. See: Rintala, supra note 36, at 245; Leipziger, supra note 9, at 753 (discussing section 580b and guarantor's liability).
the creditor. A loan subject to section 580b is referred to as a purchase-money debt. In a purchase-money mortgage or deed of trust, therefore, the real property security is to be the sole source of recovery of the debt.

2. Section 580(b) as Applied to Guarantors.

In 1963, almost 30 years after the enactment of the California antideficiency legislation, the California Supreme Court in Roseleaf Corp. v. Chierighino, enunciated the purpose of the special treatment given purchase-money debtors granted by section 580b. Chief Justice Traynor stated that section 580b was enacted to place the risk of inadequate security on the purchase money creditor in order to prevent the overvaluation of real property security, to discourage precarious land promotion schemes and to protect defaulting purchasers from large personal liabilities when property values drop in times of a depressed economy. Chief Justice Traynor concluded that section 580b was enacted to serve as a stabilizing factor in land sales. Unfortunately for guarantors, Chief Justice Traynor held that section 580b applied only to a "standard purchase money mortgage transaction." The decisions after Roseleaf have held that section 580b was intended to protect only the purchaser of the real property security, and not the guarantors. In essence, these decisions state that it is a well established rule that the protective provisions of section 580b shield

128 See Rintala, supra note 36, at 245; Leipziger, supra note 9, at 753 (discussing the purpose for the enactment of 580b).
131 Roseleaf, 59 Cal. 2d at 35, 378 P.2d at 97, 27 Cal. Rptr. at 873.
132 Id. at 42, 378 P.2d at 101, 27 Cal. Rptr. at 877.
133 Id.
134 Id.; See also Rintala, supra note 36, at 258. "The 'standard' 580b transaction is one 'in which the vendor of real property retains an interest in the land sold to secure payment of part of the purchase price.' Variations on the standard are subject to 580b only if they come with the purpose of that section." Id.
only the principal debtor and not the guarantor because the guarantor is separately and independently liable to the creditor. A counter argument has been made that the effect of these decisions is to retain the distinction between surety and guarantor.

In the post-\textit{Roseleaf} decision of \textit{Bauman v. Castle}, the court held that the California antideficiency legislation protects only the purchase-money debtors and does not protect guarantors of the debt. The

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137. \textit{See Stephenson v. Lawn}, 155 Cal. App. 2d 669, 671, 318 P.2d 132, 134 (1957) (holding sections 580b and 580d deal solely with obligation of principal debtor). Relying directly on Hatch, 19 Cal. 2d at 254, 120 P.2d at 869 the leading case on “additional” security, the Stephenson court ruled that section 580b was intended to protect only the principal. \textit{Id.} The creditors in Stephenson sold certain realty, taking a promissory note secured by a second deed of trust, which note the creditors transferred to the plaintiff for value by special indorsement, assigning the deed of trust. \textit{Id.} Subsequently, the property was sold under the power of sale contained in the first deed of trust. \textit{Id.} The court found the action on the second deed of trust was not one against the party primarily liable but one against the indorsers and hence on a separate and distinct obligation; therefore, the antideficiency scheme did not apply. \textit{Id. See also Katz v. Haskell}, 19 Cal. App. 2d 144, 154, 16 Cal. Rptr. 453, 458 (1961). The court in Katz relied directly on \textit{Leob v. Christie}, 6 Cal. 2d 416, 57 P.2d 1303 (1936) in holding that section 580b was inapplicable to guarantors. \textit{Id.} Section 580b provided that no deficiency judgment should lie “in any event” after any sale of real property for failure of the purchaser to complete his contract of sale or under a deed of trust or mortgage given to secure payment of the balance of the purchase price of the real property. \textit{Id.} The statute did not state that a deficiency judgment should lie “against any purchaser.” \textit{Id.} The court in Katz however found the provision of the statute to be inapplicable to guarantors since (1) the transaction between the guarantor and assignees was for cash and did not create a purchase-money obligation based on credit; (2) there was no vendor-vendee relationship in the sense that the deed of trust was given for the full purchase price of the property and (3) it had earlier been settled that the provisions of the statute had to do solely with actions for recovery of deficiency judgments on the principal obligation after sale under a deed of trust, as distinguished from an indorser’s or guarantor’s obligation. \textit{Id. See also}, \textit{Heckes v. Sapp}, 229 Cal. App. 2d 549, 552-53, 40 Cal. Rptr. 485, 487-88 (1964). The court held that the guarantor did not fit within the purpose of section 580b as exposed in \textit{Roseleaf} and therefore was not afforded protection under section 580b. \textit{Id.} In \textit{Roseleaf}, the court held that in order for the guarantor to protect against a deficiency judgment under section 580b, the guaranty must not be a variation on the “standard” section 580b transaction. Roseleaf v. Chierighino, 59 Cal. 2d 35, 42-43, 27 Cal. Rptr. 873, 378 P.2d 97, 104-105 (1963). In \textit{Heckes}, the guarantor was sued upon their guaranty of a purchase-money note given by a corporation for the purchase of land and secured by the deed of trust. Heckes v. Sapp, 229 Cal. App. 2d at 549, 40 Cal. Rptr. at 485 (1964). The guarantors were sole shareholders of the corporation and also its officers and directors. \textit{Id.} The guarantors argued that they were protected against a deficiency judgment by the provisions in section 580b in the event after any sale of real property for failure of the purchaser to complete his contract of sale or under the deed of trust. \textit{Id.} The guarantors in \textit{Heckes} prevailed in the lower court but the court of appeal, in reversing the judgment, pointed out (1) the purposes of the antideficiency statutory scheme was to discourage sale of overvalued land and to prevent aggravation of the downturn in depression times and those purposes are served when the relief granted by the legislation is confined to the purchaser-debtor’s obligation which is secured by the purchased property, and (2) a guaranty is simply additional security for the obligor’s debt and (3) since additional security can be realized upon default notwithstanding the antideficiency judgment legislation, in order to achieve consistency, and guarantor’s obligation must also be enforceable. \textit{Id.}


139. \textit{Bauman}, 15 Cal. App. 3d at 994, 93 Cal. Rptr. at 568.

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court did not apply the Gradsky estoppel theory because the Bauman court believed the nonpurchase-money nature of the debt in Gradsky was the primary consideration of the court in that case. According to the Bauman court, a deficiency judgment following a sale of real property under a purchase-money deed of trust is absolutely prohibited by section 580b. Section 580b was held applicable to both judicial and nonjudicial foreclosure. Thus, the court found that the creditor's election to foreclose nonjudicially does not prejudice a guarantor, and does not provide an equitable basis for applying estoppel.

In Consolidated Capital v. Khaloghli the court held that a guarantor is not afforded antideficiency protection on a purchase-money obligation. The court in Khaloghli reasoned that to allow such protection to a guarantor on a purchase-money obligation would render a guarantee inconsequential and a legal impossibility. The court in Khaloghli found that a creditor on a purchase-money obligation will be unable to collect the entire amount of the debt if the proceeds from the foreclosure sale do not satisfy the debt and a guarantor is not liable for the deficient amount remaining on the debt after the sale. Further, the court found that a guarantor is not prejudiced because the guarantor is liable for the full amount of the guarantee regardless of whether it is on a purchase-money debt. Consequently, the creditor is only barred from collecting any deficiency amount from the principal debtor.

3. Proposal For Interpretation of Section 580b.

The Bauman and Consolidated Capital decisions focus on the creditor's interest rather than on the three-party nature of a suretyship relationship. The rules governing suretyship, however, are not the

140. Id.
141. CAL. CIV. PROC. CODE § 580b (West 1976).
142. Id.
143. Bauman, 15 Cal. App. 3d at 994, 93 Cal. Rptr. at 568.
146. Id. at 113, 227 Cal. Rptr. at 882. "A guaranty of a purchase money mortgage would be rendered nugatory at the outset if it were so protected because an effective guaranty would become a legal impossibility." Id.
147. Id. at 113-14, 227 Cal. Rptr. at 882.
148. See id. at 115, 227 Cal. Rptr. at 883 (expressly stating that the Bauman opinion grants a guarantor a right to obtain a judgment in subrogation against a debtor).
149. See Rintala, supra note 36, at 270-71 (stating that cases which hold that section 580b does not apply to guarantors are based on reasonings which do not reflect the true nature of
same as those governing the rights and liabilities of the parties with respect to property-secured obligations. An incorporation of suretyship law and antideficiency legislation may shift the risk of inadequate security to the purchase-money creditor and away from the guarantor. However, should the courts allow a creditor to foreclose against the real property security, obtain a deficiency judgment against the guarantor and allow the guarantor in turn to be reimbursed from the principal debtor the purpose and effect of section 580b will be defeated. Such a system would allow to be accomplished in two steps what is forbidden in one.

Since the rights and liabilities of each party to a purchase money loan are set at the inception of the loan and guarantee, and not at the time of default as found in Gradsky, it may be sound practice for a creditor to inform the guarantor of the limitations upon the guarantor's right to reimbursement. A suggested method of informing a guarantor of these limitations is to devise a separate guarantee contract disclosing these limitations to be used for purchase money obligations alone.

A creditor owes a guarantor a duty of good faith and fair dealing. The creditor has a duty not to misrepresent or conceal relevant facts so as to induce or permit the guarantor to enter or continue in a relationship of false impression as to the nature of a risk. Accord-
ingly, the creditor has the duty to inform a guarantor on a purchase-money obligation of the liability which may be imposed upon the guarantor and the limited reimbursement rights of the purchase-money obligation.152

Disclosure of the limitations upon the guarantor's reimbursement rights on the purchase money obligation may act as a balance among the competing interests of the parties involved. The protective provisions of section 580b remain as a shield for the debtor. The guarantor is informed from the inception of the guarantee of the full extent of possible liability and limitations upon reimbursement. Additionally, the creditor has some protection against liability on the duty to inform the guarantor of the liabilities imposed by the guarantee contract.

to believe that these facts are unknown to the surety and has a reasonable opportunity to communicate them to the surety, failure of the creditor to notify the surety of such facts is a defense to the surety.

Id. The court in Sumitomo also relied on the case of American Nat'l Bank v. Donnellan, 170 Cal. 9 (1915). Id. In Donnellan, sureties were solicited by the lender to guaranty a debt incurred by their son. The lender sued the sureties when the borrower defaulted; the sureties defended on a number of grounds including positive misrepresentations and concealment of significant facts and circumstances known to the lender's president at the time he solicited the securities. Donnellan, 170 Cal. 9, at 12. The lender had not disclosed to the sureties at the time of solicitation that the debt had already been incurred. Id. When in fact the debt was a stock gambling debt in which an officer of the bank was jointly interested and that the debt had exceeded the amount of the guaranty. Id. In Donnellan, the court held that the undisclosed facts were sufficient to justify the avoidance of the guaranty. Id. Although the Supreme Court in Sumitomo did not find the lender to be a fiduciary of the surety and that there was no general obligation to disclose matters affecting the surety's risk, the Court did conclude that the relationship of the parties and the nature of the risks involved may impose a duty on the creditor to disclose relevant information voluntarily or suffer the exoneration of the guarantor's liability. Sumitomo, 70 Cal. 2d 81, at 85-86 n.3, 447 P.2d at 959 n.3, 73 Cal. Rptr. at 567 n.3. If the creditor knows or has reason to believe that the guarantor is unaware that the risk involved is beyond what is reasonably expected, the duty to disclose falls on the creditor. Id. When the creditor solicits the guarantor there is no protective assumption that the surety obtained all relevant information prior to entering into the relationship. Id. at 88-89, 447 P.2d at 960, 73 Cal. Rptr. at 568.

Once the suretyship relationship has been created, a creditor owes a guarantor under a continuing guarantee the same duty of disclosure throughout the entire relationship because each extension of credit creates a new suretyship contract. Id. at 93, 447 P.2d at 962, 73 Cal. Rptr. at 570.

152. Id. See also Flick & Replansky, Liability of Banks To Their Borrowers: Pitfalls and Protections, 103 201 Banking L.J. 220 (1986). When a lender structures a loan, a determination is made as to whether or not and how the loan will be secured. A primary consideration in determining which route to take is the law limiting the collectability of deficiency judgments when a debt is secured by real property and what procedures to take to attempt to circumvent the antideficiency legislation. It is possible to obtain a guarantee on the obligation executed by someone other than the principal debtor. Id. Due to the rise in potential liabilities facing lenders today it is prudent for a lender to be well versed in the antideficiency schemes and the surety laws. Id.
C. The "One Action" Rule of California Code of Civil Procedure section 726.\textsuperscript{153}

1. The Statute

A debt secured by a real property mortgage or deed of trust is subject to the one-action rule of section 726 of the Code of Civil Procedure.\textsuperscript{154} Section 726 subdivision (a) provides for only one form of action for the recovery of any debt secured by real property.\textsuperscript{155} The creditor must bring in one action both a claim for judicial foreclosure and a claim for a deficiency judgment in the event the foreclosure sale fails to produce enough money to satisfy the debt.\textsuperscript{156} Section 726 bars an independent action by the creditor on a note secured by real property.\textsuperscript{157} Code of Civil Procedure section 726 is also a security-first rule as a creditor must foreclose on the real property security of the debt before seeking a personal judgment against the principal debtor.\textsuperscript{158} In situations in which the antideficiency rules completely prohibit deficiency judgments, section 726 becomes a security-only rule.\textsuperscript{159} For example, when the antideficiency legislation precludes a personal judgment against the principal debtor for payment of a deficiency, the one form of action rule effectively precludes all actions against that principal debtor other than foreclosure.

The "one-action" rule has both an affirmative defense and sanction aspect.\textsuperscript{160} When the creditor brings an action solely on the note rather

\textsuperscript{153} CAL. CIV. PROC. CODE § 726(a) (West Supp. 1988). Section 726(a) provides in part, "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property, which action must be in accordance with the provisions of this chapter." \textit{Id.}

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id.}

\textsuperscript{156} See generally, R. Bernhardt, supra note 8, at §§ 4.1-4.4 (discussing the procedure for inclusion of all necessary parties).

\textsuperscript{157} \textit{Id.} at § 4.4.

\textsuperscript{158} See Winklemen v. Sides 31 Cal. App. 2d 387, 404- 405, 88 P.2d 147, 158-59 (1939) (discussing security-first principal described as converting the debtor's promise to pay from an absolute to a conditional obligation; promise is not to unconditionally pay the note but to pay any deficiency remaining if the sale of the property is not enough to satisfy the debt).

\textsuperscript{159} See, e.g., CAL. CIV. PROC. CODE § 580b (West 1976) (bars deficiency judgment against the principal debtor on a purchase-money debt), § 580d (bars a deficiency judgment against the principal debtor after a nonjudicial foreclosure sale of the real property security). See generally R. Bernhardt, supra note 8, at § 4.2-4.15 (discussing the application of sections 580b and 580d).

\textsuperscript{160} See generally Arnold, supra note 66, at 1-9 (1987) (discussing the continued effect of the "sanction aspect" of section 726).
than foreclosing on the real property security, the principal debtor can assert California Code of Civil Procedure section 726 as an affirmative defense to compel inclusion of the real property security in the action.\textsuperscript{161} If section 726 is not raised as an affirmative defense, the creditor is still precluded from bringing a subsequent separate action for a personal judgment against the debtor because a creditor must exhaust all security given for the debt in one action or be barred from bringing a subsequent action by section 726.\textsuperscript{162} Section 726 consequently was created to compel exhaustion of all real property security before entry of a personal deficiency judgment against the debtor.

2. California Code of Civil Procedure section 726 as Applied to Guarantors

California courts have assumed without much discussion that the guarantor is not afforded antideficiency protection directly under section 726 of the California Code of Civil Procedure.\textsuperscript{163} To one commentator on this subject, this assumption does not consider the impact suretyship law has upon guarantors.\textsuperscript{164} In 1915, in Martin v. Becker,\textsuperscript{165} the California Supreme Court held that section 726 was designed for the benefit of the primary debtor because section 726 had no application unless the action brought directly affected rights under a mortgage contract.\textsuperscript{166} In Murphy v. Hellman Commercial,\textsuperscript{167} a California appellate court asserted that because the one-action rule of section 726 is for the benefit of the principal debtor only, the section is inapplicable to parties such as guarantors who are secondarily liable.\textsuperscript{168} In the case of Adamo v. Wallace,\textsuperscript{169} the California Supreme Court asserted that a guarantor is outside the one-action rule because

\begin{itemize}
  \item 161. Salter v. Ulrich 22 Cal. 2d 263, 268 (1943).
  \item 162. Stockton Sav. and Loan Soc'y v. Harrold, 127 Cal. 612, 614, 60 P. 165, 166 (1900).
  \item 163. See Martin v. Becker, 169 Cal. 301, 305, 146 P. 665, 667 (1915) (holding that section 726 was designed for the benefit of the primary debtor, and is one which has no application whatsoever unless the action which is brought directly affects his rights under the mortgage contract).
  \item 164. See Rintala, supra note 36, at 267 (discussing that the courts do not integrate the true nature of the three-party relationship of a guarantee contract when determining the liability of a guarantor).
  \item 165. 169 Cal. 301, 146 P. 665, (1915).
  \item 166. Martin, 169 Cal. at 305, 146 P. at 667.
  \item 167. 43 Cal. App. 579, 185 P. 485 (1919).
  \item 168. Murphy, 43 Cal. App. at 381, 185 P. at 486.
  \item 169. 119 Cal. 67, 51 P. 14 (1897).
\end{itemize}
the contract of guaranty is separate and distinct from the deed of trust. The 1939 statutory assimilation of guarantors and sureties makes these propositions questionable.

As recognized in *Gradsky*, a creditor has three alternatives to collect on the debt secured by real property. First, a creditor can judicially foreclose on the real property security, and, in the same action, obtain a personal deficiency judgment against the principal debtor or guarantor. Second, a creditor can elect to foreclose nonjudicially on the real property security and subsequently obtain a deficiency judgment against the guarantor. Finally, a creditor can bring an action against the guarantor for the total amount of the debt without including the principal debtor.

3. Proposal For Interpretation of the One Action Rule of Section 726.

Under the 1939 statutory changes in suretyship law, a guarantor is no longer a party who is secondarily liable on the obligation. Instead, absent a waiver, a guarantor on an debt secured by a deed of trust is currently granted rights similar to those granted a principal debtor under section 726. A guarantor can demand that the creditor first

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172. See Union Bank v. Gradsky, 265 Cal. App. 2d 40, 41, 71 Cal. Rptr. 64, 65 (1968) (discussing the alternatives a creditor can use to collect on a debt secured by real property).


174. See *Gradsky*, 265 Cal. App. 2d at 41, 71 Cal. Rptr. at 65 (discussing the application of a nonjudicial foreclosure). See also supra notes 88-94 and accompanying text (discussing the *Gradsky* decision).


176. See supra notes 46-50 (discussing the legislative abolishment of the distinction between sureties and guarantors).

177. See Cal. Civ. Code § 2845 (West Supp. 1988) (guarantor has rights similar to the debtor by compelling the creditor to first exhaust all remedies for the debt against the principal
exhaust remedies against the principal debtor and all available security, thereby indirectly subjecting the creditor to section 726. 178 A guarantor who has performed on the obligation has reimbursement rights against the principal debtor. 179 Under section 726, the principal debtor has the right to compel a creditor to include the guarantor as a defendant in the creditor's action against the real property security and principal debt, in order that all claims against the security, including a reimbursement claim, be brought in one action. 180

Furthermore, a guarantor's liability is to be equal to and not more burdensome than the liability of the principal debtor. 181 A guarantor, however, may be liable for a personal deficiency judgment after foreclosure of the real property security while the principal debtor may be protected from the same liability. A creditor is precluded from obtaining a deficiency against the principal debtor if the principal debtor is not named in the foreclosure lawsuit. 182 The guarantor, however, can be held liable for the entire debt and then be precluded from subsequently obtaining total reimbursement from the principal debtor. 183 This preclusion occurs because the guarantor is subject to the antideficiency limitations on collection. 184

Although a contract of guarantee is separate and distinct from a mortgage or deed of trust, the courts in California may not be willing to change the rule prohibiting guarantors from asserting the one action


178. CAL. CIV. CODE §§ 2845 and 2849 (West 1974). See Weiner, 273 Cal. App. 2d at 779-80, 78 Cal. Rptr. at 768-69. There is no longer a distinction between a surety and a guarantor. Id. Such holding abolishes the rule in contracts that the obligation of the principal and that of the guarantor are entirely independent obligations. Id. A continuing guaranty is now a form of suretyship obligation and is subject to all provisions of law relating to suretyship. Id. Thus, the guaranty agreement is subject to sections 2845 and 2849 of the California Civil Code. Id. But see Matthew v. Hinton, 234 Cal. App. 2d 736 (1965). The parties who signed the trust deed as "trustor" attempted but failed in their assertion that their position was of surety and not of principal obligors. Id. The court, in defining surety law, stated that in the tripartite relationship of a suretyship, the surety, if call on to pay the debt, may indemnify himself by an action against the primary debtor but nevertheless contracts for a primary liability. Id.

179. CAL. CIV. CODE § 2847 (West 1974).

180. See supra note 21-25 and accompanying text (discussing generally reimbursement rights of the guarantor).

181. See supra note 21-25 and accompanying text (discussing generally reimbursement rights of the guarantor).

182. CAL. CIV. CODE § 2809 (West 1974). See also supra notes 60-64 and accompanying text (discussing application of reimbursement rights of the guarantor).


184. See supra note 21-25 and accompanying text (discussing generally reimbursement rights of the guarantor).
rule in the creditor's claim against the guarantee. The courts, however, must recognize that the guarantor's reimbursement rights may be cut off or limited by the creditor's election of remedies and by the antideficiency legislation. Furthermore, under suretyship law a guarantor can demand that the creditor first exhaust remedies against the principal debtor thereby indirectly subjecting the creditor to the antideficiency legislation. The protections afforded guarantors by suretyship law should be considered when the principal debtor is granted protections under the antideficiency scheme. If the courts do not grant a guarantor the one action rule protection of 726, then the courts should consider affording a guarantor protection from being personally liable on a deficiency judgment in any amount exceeding the fair value of the real property security.

E. Fair Value Limitation of California Code of Civil Procedure sections 580a and 726.

1. The Statutes

California Code of Civil Procedure section 580a provides that a fair value hearing must follow a nonjudicial foreclosure sale of the real property security. The purpose of the hearing is to limit the amount

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185. See Union Bank v. Gradsky, 265 Cal. App. 2d 40, 47, 71 Cal. Rptr. 64, 69 (1968) (discussing how the guarantor's reimbursement rights are cut off by the creditor's election of nonjudicially foreclosing on the real property security).
186. See CAL. CIV. CODE § 2849 (West 1974).
187. See supra notes 57-59 (discussing that the guarantor liability should be equal to that of principal); 60-64 (discussing the guarantors' rights of reimbursement and subrogation) and accompanying text.
188. See CAL. CIV. CODE § 2809 (West 1974) (stating that the measure of liability of a guarantor is to be no larger and not more burdensome than that of the principal debtor).
189. CAL. CIV. PROC. CODE § 580a (West Supp. 1988). Section 580a provides in pertinent part as follows:
Whenever a money judgment is sought for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, the plaintiff shall set forth in his complaint the entire amount of the indebtedness which was secured by said deed of trust or mortgage at the time of sale, the amount for which such real property or interest therein was sold and the fair market value thereof at the date of sale and the date of such sale. . . . Before rendering any judgment the court shall find the fair market value of the real property, or interest therein sold, at the time of sale. The court may render judgment for not more than the amount by which the entire amount of the indebtedness due at the time of sale exceeded the fair market value of the real property or interest therein sold at the time of sale with interest thereon
personally recoverable from the debtor on a secured obligation.\textsuperscript{190} The creditor's recovery is limited to the amount received at the foreclosure sale as determined at a subsequent fair value hearing.\textsuperscript{191} Therefore, the creditor is prohibited from obtaining a deficiency judgment against the debtor in an action subsequent to the nonjudicial foreclosure.\textsuperscript{192} The difference between the amount of the debt still owing and the fair market value of the encumbered property received at the foreclosure sale will be absorbed by the creditor.\textsuperscript{193}

The validity of section 580a is questionable since the passage of section 580d of the California Code of Civil Procedure.\textsuperscript{194} Section 580d completely bars recovery of deficiency judgments against a principal debtor following a nonjudicial foreclosure sale.\textsuperscript{195} Despite the passage of section 580d, section 580a has not been repealed. Consequently, commentators believe there must be some purpose being served by section 580a.\textsuperscript{196} One of the theories articulated in

\textit{Id.} from the date of the sale; provided, however, that in no event shall the amount of said judgment, exclusive of interest after the date of sale, exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured by said deed of trust or mortgage. Any such action must be brought within three months of the time of sale under such deed of trust or mortgage. No judgment shall be rendered in any such action until the real property or interest therein has first been sold pursuant to the terms of such deed of trust or mortgage, unless such real property or interest therein has become valueless.

\textsuperscript{190} See Roseleaf v. Chierghino, 59 Cal. 2d 193, 195–96 259 P.2d 245, 246-47 (1953) (discussing the purpose of section 580b); Rintala, \textit{supra} note 36, at 251-53 (discussing the Roseleaf decision).

\textsuperscript{191} \textit{CAL. CIV. CODE} § 2849 (West 1974).

\textsuperscript{192} \textit{Id.}

\textsuperscript{193} \textit{Id.}

\textsuperscript{194} See, Arnold, \textit{supra} note 66, at 18. Section 580a of the California Code of Civil Procedure references default of an “obligation for the payment of which a deed of trust . . . was given” as contrasted with the term “note” used in section 580d. This distinction suggests that 580a might be available to protect a guarantor in an action for a deficiency on the obligation after nonjudicial foreclosure. \textit{Id.} A guarantor's liability is an “obligation” and not liability on the note. \textit{Id.} \textit{Cf.}, Bank of America Nat'l Trust & Sav. Ass'n v. Hunter, 8 Cal. 2d 592, 598, 67 P.2d 99, 104 (1937) (stating that section 580a does not apply to guarantors); Security-First Nat'l Bank v. Chapman, 41 Cal. App. 2d 219, 221, 87 P.2d 724, 725 (1939) (stating that section 580a is inapplicable to guarantors).

\textsuperscript{195} California Code of Civil Procedure section 580d was enacted in 1940. 1940 Cal. Stat. ch. 29, sec. 2, at 84.

support of the continued validity of section 580a is that a guarantor should be afforded the protection of a fair value hearing if the creditor elects to foreclose nonjudicially and subsequently brings a suit against the guarantor for a deficiency judgment. 197

Similarly, Code of Civil Procedure section 726 provides for a fair value limitation on a deficiency judgment if the creditor elects to judicially foreclose on the real property security. 198 The statutory language of section 726 limits a deficiency judgment to the lesser of the amount by which the unpaid debt exceeds the fair value of the (recognizing the rule set in Hunter); National Bank of Los Angeles v. Chapman, 41 Cal. App. 2d 219, 221, 106 P.2d 431, 432 (holding that the antideficiency statutes apply to principal obligations); Engelman v. Gordon, 242 Cal. App. 2d 510, 513, 51 Cal. Rptr. 627, 629 (1966) (applying the statutes to principal obligations); Mariners Savings & Loan Association v. Neil, 22 Cal. App. 232, 236, 99 Cal. Rptr. 238, 241 (1971) (distinguishing the guarantor's liability). But see Arnold, supra note 66, at 18-19. Despite the rulings in Hunter, Everts v. Matteson, and Mariners v. Neil, it remains unclear whether a creditor can avoid the fair value defense when a guarantor is named as a defendant because there are several reasons in favor of granting the guarantor a right to a fair value hearing. Id. The reasons are based on the express language of section 580a and on the principles of suretyship law. Id. There are no judicial decisions inconsistent with what has been held by the California Supreme Court. Id. There are, however, arguments to be made in favor of granting a guarantor protection of the fair value hearing. Id. A nonjudicial foreclosure sale is nonredeemable by the guarantor. Id. Therefore, the guarantor should at least be granted a fair value hearing to preclude a creditor from purchasing the real property at its own foreclosure sale for a low price and then holding the guarantor personally liable on the remaining amount owing on the obligation. Id. Furthermore, the express language of section 580a provides for a fair value hearing "[w]henever a money judgment is sought for the balance due upon an obligation ...." Id. The other statutes in the antideficiency scheme specifically refer to collection on a "note" secured by a real property mortgage or deed of trust. The use of the word "obligation" in section 580a makes it possible that a creditor can obtain a post nonjudicial foreclosure deficiency judgment against a guarantor. Id. 197. See supra note 194 (discussing the validity of section 580a). See also Passanisi v. Merit McBride Realtors, Inc., 190 Cal. App. 3d 1496, 1508-09, 236 Cal. Rptr. 59 (1987). Beneficiary's judgment for attorney's fees incurred in defeating an attempt to enjoin a trustee's sale was held not to be barred by California Code of Civil Procedure section 580d. Id. The court held that the specific statutory language applied only to actions for "any deficiency upon a note secured by a deed of trust and not to actions based on other obligations, (emphasis added)." Id.

198. CAL. CIV. PROC. CODE § 726(b) (West Supp. 1988). Section 726(b) provides for a fair value hearing on the sale of the real property security on a nonpurchase-money obligation when the real property is sold by a judicial foreclosure action as follows:

In the event that a deficiency is not waived or prohibited and it is decreed that any defendant is personally liable for the debt, then upon application of the plaintiff filed at any time within three months of the date of the foreclosure sale and after a hearing thereon at which the court shall take evidence and at which hearing either party may present evidence as to the fair value of the property or the interest therein sold as of the date of the sale.

Id. See generally Arnold, supra note 66, at 16-18 (discussing that the language in section 726 was changed from "fair market value" to "fair value" to protect a debtor against a large deficiency judgment during economically depressed times of low property market values).
real property security,\( ^{199} \) or the difference between the amount for which the property was sold and the entire amount of the indebtedness.\( ^{200} \) After a judicial foreclosure sale, the creditor must request a fair value hearing during which the court determines whether the real property was sold for a fair value.\( ^{201} \) Therefore, a debtor can be held personally liable only for the amount of the difference between the amount of the indebtedness and the fair value of the property at the time of the sale.\( ^{202} \)

2. Fair Value Hearing Requirement As Applied To Guarantors

Although there are no judicial decisions directly holding that the fair value provision of section 726 does not apply to guarantors, there are appellate court decisions that hold an action on a guarantee to be outside the scope of section 726.\( ^{203} \) A creditor may maintain an action on a guarantee without foreclosing on the real property security.\( ^{204} \) Such action on the guarantee, however, does not bring the creditor under the limitations set forth in section 726 of the California Code of Civil Procedure.\( ^{205} \) The California Supreme Court in the decision of Loeb v. Christie\( ^{206} \) expressly stated that a creditor did not violate the suretyship statutory provision that a guarantor’s obligation is not to be more burdensome than that of the principal debtor when the creditor sought recovery against a guarantor prior to foreclosing on the real property security.\( ^{207} \) Both the principal debtor and guarantor are liable for the entire debt.\( ^{208} \) The creditor’s recovery, not the obligation to pay, is subject to certain limitations and procedures.\( ^{209} \)

\( ^{199} \) CAL. CiV. PROC. CODE § 726(b) (West Supp. 1988)

\( ^{200} \) Id. See also Arnold, supra note 66 at 16 (discussing the applicability of the antideficiency scheme in the Eighties).

\( ^{201} \) See supra note 198.

\( ^{202} \) See supra notes 198-199 (discussing fair value hearings).


\( ^{204} \) See Loeb, 6 Cal. 2d at 419, 57 P.2d at 1305.

\( ^{205} \) Id.

\( ^{206} \) 6 Cal. 2d 416, 57 P.2d 1303 (1936).

\( ^{207} \) Loeb, 6 Cal. 2d at 418, 57 P.2d at 1304.

\( ^{208} \) Id.

\( ^{209} \) Id.
In contrast with the California decisions, the courts in New York have uniformly held that a guarantor is entitled to the benefit of a New York statute which authorizes a setoff based on a fair market value in determining deficiency. In Kline v. Samuels, a New York court concluded that the New York Legislature intended to limit deficiency judgments against guarantors and held that the action brought against the guarantor of a debt secured by a mortgage on realty was clearly within the meaning of the statute. The court noted that the guarantor belonged to the class noted in the statute as those “directly or indirectly or contingently liable” for the indebtedness.

Significantly contrary to California law, however, as the New York court explains, the applicable New York antideficiency statutes temporarily remained in effect from late 1933 to July 1, 1934. The courts in New York were to protect the purpose and effect of their emergency antideficiency legislation which temporarily stayed actions against those liable on mortgage debts and to prevent foreclosure. To further protect the purpose of these antideficiency statutes, New York cases have held that guarantees made on mortgage debts subsequent to executing were protected by the same emergency antideficiency statutes.


211. New York Civil Practice Act § 1038-b enacted 1933 N.Y. Laws ch. 794, sec. 2 (West 1934) (Executive Session).  

212. 264 N.Y. 144, 190 N.E. 324 (1934).  

213. Id. at 146, 190 N.E. at 326.  

214. Id.  

215. Id. at 145, 190 N.E. at 325.  

216. Id. at 146, 190 N.E. at 326 (so long as the interest and taxes were paid).  

In addition, a Connecticut court held that a guarantor is entitled to the benefit of a statute providing a setoff based on a fair market value after a foreclosure of the security given on the debt.\textsuperscript{218} The court reasoned that when collateral security is given or property assigned for protection of a debtor, the effect must benefit not only the immediate parties to the security but to others entitled to the debt.\textsuperscript{219} Thus, the court found that absent a statute stating that a guarantor is not a proper party to a foreclosure suit, a guarantor is entitled to have the value of the security applied to satisfy the debt.\textsuperscript{220} A guarantor is also entitled to the credit allowed to the principal debtor as determined by a fair value hearing.\textsuperscript{221}

4. Proposal as to Interpretation of the Fair Value Hearing of Sections 580a and 726.

The language of the antideficiency legislation in California is not as broad as that in New York.\textsuperscript{222} In California a principal debtor is not personally liable for a deficiency judgment if the creditor elects to nonjudicially foreclose.\textsuperscript{223} Furthermore, a principal debtor is never liable for a deficiency judgment over and above the fair value of the real property.\textsuperscript{224} However, although the New York rule was temporary, it appears to be the better rule and is consistent with the purpose of a fair value hearing and well within the spirit of the suretyship laws.

Under the suretyship statutes, a guarantor has a statutory right to subrogation and reimbursement from the principal debtor.\textsuperscript{225} Never-
theless, the guarantor is subrogated only to the value of the security and not to the deficiency remaining beyond the value of the security and the amount still owing on the C underlying obligation. The guarantor’s right to reimbursement is also subjected to the antideficiency statutory limitations applicable to the creditor. The one action rule of section 726 precludes direct action against the principal for reimbursement. Reimbursement to the guarantor for any deficiency paid after foreclosure on the real property security is subject to the fair value limitation of 726 or completely prohibited by section 580d. Thus, the better rule would seem to afford to a guarantor a fair value hearing to maintain the equity of liability between the principal debtor and guarantor.

CONCLUSION

The antideficiency legislation does not directly protect a guarantor from personal liability for the indebtedness remaining after the real property security has been sold at foreclosure. Although the antideficiency legislation, except for section 726, was enacted primarily in response to the devastating effect of the Depression on land owners, this legislation remains as a protection against overvaluation of real property security and as an economic stabilizer in land sales. The statutory scheme places the risk of a depressed market on the creditor rather than the debtor. However, the courts in California consistently have held that the California antideficiency statutory scheme does not directly apply to a guarantor on the debt secured by real property.

A review of suretyship law as applied to guarantors has revealed that a guarantor should be afforded protections similar to those

226. See id. § 2848. See also supra notes 60-65 and accompanying text (discussing reimbursement rights of the guarantor).
227. See Rintala, supra note 36, at 285 (discussing how guarantor’s reimbursement rights are subject to the antideficiency statutes).
228. See Union Bank v. Gradsky, 265 Cal. App. 2d 240, 245, 71 Cal. Rptr. 64, 67 (1968) (discussing that the guarantor is subject to the antideficiency legislation upon reimbursement suits against the principal debtor) citing Anheuser-Busch, Inc. v. Starley, 26 Cal. 2d 347, 351, 170 P.2d 448, 450, 166 A.L.R. 423 (1946); March v. Barnei, 121 Cal. 419, 423, 53 P. 933, 935 (1898).
229. See supra note 153 (discussing section 726 one action rule).
231. See supra notes 75 (discussing CAL. CIV. PROC. CODE § 580d); 134-135 (discussing CAL. CIV. PROC. CODE § 580b); 163 (discussing CAL. CIV. PROC. CODE § 726); 203 (discussing CAL. CIV. PROC. CODE § 726 fair value hearing).
granted to a principal debtor by the antideficiency legislation. In 1939, the California Legislature abolished the distinction between sureties and guarantors.\textsuperscript{232} The purpose behind this change was to grant all guarantors the rights of a surety, and to clarify the position of a surety where there are defenses on behalf of the principal debtor.\textsuperscript{233} As a result of the 1939 changes in suretyship law, a guarantee is no longer a contract or obligation separate and independent from that of the principal debtor.\textsuperscript{234} A guarantor is part of the three-party relationship with the creditor and debtor. Accordingly, the rights and liabilities of the guarantor are affected by the actions and by the contract between the creditor and the debtor.

The policy of the antideficiency scheme and suretyship law favor granting a guarantor a fair value hearing on the real property security after foreclosure. Accordingly, a debtor will never be liable for a deficiency judgment over and above the fair value of the real property security, and the liability of a guarantor will be no more burdensome than that of the principal debtor. Accordingly, a fair value hearing will keep overvaluation to a minimum and the risk of a depressed market on the creditor and not the guarantor.

A guarantor is currently granted no direct protection against a deficiency judgment on a purchase-money debt. If the grantor can be indemnified by the principal for the deficiency, the purpose of section 580b is defeated. Consequently, there should be a statement in the contract of guarantee informing the guarantor of liability for purchase-money obligations and the limitations on the guarantor’s reimbursement rights.

This Comment has shown the inconsistencies in determining the extent of guarantor liability on an obligation secured by real property. The judicial opinions have not afforded a guarantor protections similar to those afforded to the principal debtors under the California antideficiency statutory scheme. Furthermore, the courts have not fully integrated the 1939 inclusion of guarantors under the statutory suretyship statutes and are therefore treating guarantee contracts as obligations independent of that of the principal debtor. While the California antideficiency legislation was enacted to protect principal debtors from personal liabilities on debts secured by real property,

\textsuperscript{232} See Comment, Guaranty and Suretyship, 18 Calif. L. Rev. 21 (1939) (discussing the similarities of sureties and guarantor).

\textsuperscript{233} Id.

\textsuperscript{234} See Rintala, supra note 36, at 289 (discussing the suretyship laws as applied to guarantors).
the courts must recognize similar protections to guarantors under suretyship law.

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