

**Anti-Deficiency Statutes  
and the One Form of Action Rule  
in Real Estate and Bankruptcy  
– The Basics –**

**Contra Costa County Bar Association**

**MCLE Spectacular, Program No. 8**

**Friday, November 8, 2024, 2:00 pm – 3:30 pm**

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## From Black's Law Dictionary (11th ed. 2019)

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- **JUDGMENT . . .**

- **deficiency judgment.** (1865) A judgment against a debtor for the unpaid balance of the debt if a foreclosure sale or a sale of repossessed personal property fails to yield the full amount of the debt due. — **Also termed “deficiency decree”.**

**Deficiency Judgment Amount = (Loan Balance + Allowed Costs) – (Greater of either (1) Foreclosure Sale Price or (2) Fair Value).**





## But, wait . . .

- Didn't that definition merely state that a lender/judgment creditor is entitled to get paid the entire amount that it is owed?!?
  - How is that even a bad thing?
  - If it turns out (maybe many years after the loan was made) that the collateral pledged by the borrower isn't worth enough to cover the then outstanding loan balance, why shouldn't the lender be allowed to get a judgment for the difference?
  - After all, plaintiffs get judgments all the time, and they can enforce them against multiple different assets of the defendant if necessary!

# RECENT CHANGES IN THE LAWS:

- 1. The “OLD” law was that a purchase money loan on a personal residence was non-recourse, but to, qualify, the loan proceeds must have actually been used to pay the purchase price to the seller, and any other loans (including refinances of that original purchase money loan) were NOT considered to be purchase money and were therefore potentially full recourse.
  - A. The “NEW” law says that any portion of a refinance loan that is traceable to refinance of the original purchase money loan is also treated as a purchase money loan.
- 2. The “OLD” law said that a Lender could consent to a “Short Sale” of secured property without cancelling the underlying debt.
  - A. The “NEW” law says that a lender whose loan is secured by a personal residence that consents to a short sale gives up the right to recover a deficiency.



From Toch's Law Dictionary (1st ed. 2024)

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- **Recourse Debt vs. Non-Recourse Debt**

- Recourse Debt means that the lender might be able to get a deficiency judgment against the Borrower – if the amount of the debt exceeds the value of the secured property;
- Non-Recourse Debt means that the lender can never get a deficiency judgment against the Borrower – or to put it another way – the lender's remedies against the Borrower are limited to foreclosure of the secured property only

# What's the difference between a judicial foreclosure and a non-judicial foreclosure?

- A “judicial foreclosure” is court supervised; while
- A “non-judicial foreclosure” is not court supervised – It is usually done by a foreclosure trustee . . .



He's supervising.



When deciding whether or not to allow a “deficiency judgment”, should it matter whether or not the real property that was pledged for the “loan”:

- (i) is the Borrower’s personal residence; or
- (ii) is an income producing property or is a property that is held for investment?!?; and/or
- (iii) was sold at a non-judicial foreclosure sale (where maybe, it was even purchased by the lender itself), without any court supervision?

# Well, let's look at three different types of situations:

- Borrower borrows money from a Lender (no sale is involved), which Borrower promises to repay to the Lender over time together with interest. Borrower signs a promissory note and pledges collateral to the Lender (e.g. the lien of a deed of trust encumbering real property owned by the Borrower);
- Purchaser/Borrower borrows money from a Lender (Bank) and uses that money to purchase real property from a Seller (who is not also the lender).
  - The Seller receives payment in full of the purchase price at the close of escrow;
  - The Purchaser/Borrower receives a grant deed to the property from the Seller; and
  - The Lender (Bank) receives a deed of trust and a promise to repay the loan amount with interest to Lender over time from the Purchaser/Borrower; and
- Purchaser/Borrower purchases real property from a Seller/Lender and receives a grant deed to the real property from the Seller/Lender at closing, but, instead of paying cash at the closing, Purchaser/Borrower promises to pay the Seller/Lender the purchase price with interest over time and delivers a promissory note and a deed of trust. (No third-party lender is involved.)



# Historical Context

- **Common Law Background:**

- **Historically, a mortgagee had three remedies available after a mortgagor defaulted:**

- A suit in equity to foreclose on the secured property;
    - An action at law to collect on the underlying debt by obtaining a money judgment; and/or
    - An action at law for ejectment to obtain possession of the premises.

- California Code of Civil Procedure (“CCP”) §726 is a vestige from the great depression era with declining property values, where a “mortgagee was able to purchase the subject real property at [a] foreclosure sale at a depressed price far below its normal fair market value and thereafter to obtain a double recovery by holding the debtor for a large deficiency.” *Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1396.

- Without the restrictions of CCP §726(a), a secured creditor could avoid most of the statutory limitations on deficiency judgments by ignoring the security and obtaining a judgment on the note, and then perhaps executing on the same property. However, this strategy is barred by §726(a) because any monetary recovery after foreclosure is classified as a deficiency judgment.

# Multiplicity of Actions

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- A fundamental purpose CCP §726 was to provide a debtor protection against a multiplicity of actions and is treated as the main purpose of CCP §726(a). *In re Kearns* (B.A.P. 9th Cir. 2004) 314 B.R. 819, 823
- However, multiplicity of actions was equally inconvenient for lenders, who frequently found it necessary to seek multiple remedies to obtain complete relief.
- At common law, multiplicity of action was regard as vexatious to the mortgagee rather than mortgagor due to the former having to bring a multiplicity of actions due to the separation between law and equity. *The Myth of Strict Foreclosures*, U Chi L Rev 575 (1937).



**CCP §726.**

(a) 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 or an estate for years therein, which action shall be in accordance with the provisions of this chapter. In the action the court may, by its judgment, direct the sale of the encumbered real property or estate for years therein (or so much of the real property or estate for years as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, the expenses of levy and sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, the sum for attorney's fees as the court shall find reasonable, not exceeding the amount named in the mortgage.

(b) The decree for the foreclosure of a mortgage or deed of trust secured by real property or estate for years therein shall declare the amount of the indebtedness or right so secured and, unless judgment for any deficiency there may be between the sale price and the amount due with costs is waived by the judgment creditor or a deficiency judgment is prohibited by Section 580b, shall determine the personal liability of any defendant for the payment of the debt secured by the mortgage or deed of trust and shall name the defendants against whom a deficiency judgment may be ordered following the proceedings prescribed in this section. In the event of waiver, or if the prohibition of Section 580b is applicable, the decree shall so declare and there shall be no judgment for a deficiency. 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 real property or estate for years therein sold as of the date of sale, the court shall render a money judgment against the defendant or defendants for the amount by which the amount of the indebtedness with interest and costs of levy and sale and of action exceeds the fair value of the real property or estate for years therein sold as of the date of sale. In no event shall the amount of the judgment, exclusive of interest from the date of sale and of costs exceed the difference between the amount for which the real property or estate for years therein was sold and the entire amount of the indebtedness secured by the mortgage or deed of trust. Notice of the hearing shall be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for the hearing. Upon application of any party made at least 10 days before the date set for the hearing the court shall, and upon its own motion the court at any time may, appoint one of the probate referees provided for by law to appraise the real property or estate for years therein sold as of the time of sale. The probate referee shall file the appraisal with the clerk and the appraisal is admissible in evidence. The probate referee shall take and subscribe an oath to be attached to the appraisal that the referee has truly, honestly and impartially appraised the real property or estate for years therein to the best of the referee's knowledge and ability. Any probate referee so appointed may be called and examined as a witness by any party or by the court itself. The court shall fix the compensation, in an amount as determined by the court to be reasonable, but the fees shall not exceed similar fees for similar services in the community where the services are rendered, which may be taxed and allowed in like manner as other costs.

Deficiency Judgment = Loan Balance + Allowed Costs – Greater of either (1) Foreclosure Sale Price or (2) Fair Value.

# Rabobank vs. Beardsley

(2015 Bankr. Lexis 2898, 2015 WL5121080)

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- Creditor is in 3<sup>rd</sup> position
- Property not worth enough to pay all liens
- Senior lender fails to foreclose
- Debtor files bankruptcy
- What should junior do?
  - Get relief from stay & do judicial foreclosure???
  - File motion to value lien in bankruptcy to get paid as unsecured creditor?
  - Cannot retain lien and get paid as unsecured creditor
- Concurring Opinion is instructive regarding overlaps with CCP §726



## Disalvo v. Disalvo

221 B.R. 769 (BAP 9<sup>th</sup> cir 1998)

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- Family Law and Bankruptcy context
- Wife got equalizing payment of \$100K Secured by Note and Deed of Trust
- She did Debtor's Examination and got \$83 then Husband filed BK
- Wife sues for non-discharge and Court rules debt is dischargeable and her violation of CCP 726 costs her the security AND underlying debt.
- Overturned on appeal – per CA law, loss of lien only is proper remedy

In Re Bell 28 B.R. 9 (BAP 9<sup>th</sup> Cir. 1983).

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- Debtor files for Bankruptcy and Secured Creditor files Motion for relief From Stay in order to foreclose.
- Bankruptcy Court allows trial on amount of Debt and Creditor ends up with Money Judgment against Debtor
- On appeal: this violated CCP 726 – only remedy is judicial foreclosure to get money judgment. Cannot get both judgment AND retain lien with right of sale.



## CREDITOR ACTIONS IN BANKRUPTCY HAVE CONSEQUENCES

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- Creditors need to take heed and think carefully about filing “actions” that ultimately have consequences. For example – a secured creditor with lien “passes through” the bankruptcy – no need to “do” anything. But filing a proof of claim, or filing a motion for relief from stay, or an action to deem a debt non dischargeable – all may end up as an “action” which will impact the continued viability of the lien.

## CCP §580d.

(a) Except as provided in subdivision (b), no deficiency shall be owed or collected, and no deficiency judgment shall be rendered for a deficiency on a note secured by a deed of trust or mortgage on real property or an estate for years therein executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust.

(b) The fact that no deficiency shall be owed or collected under the circumstances set forth in subdivision (a) does not affect the liability that a guarantor, pledgor, or other surety might otherwise have with respect to the deficiency, or that might otherwise be satisfied in whole or in part from other collateral pledged to secure the obligation that is the subject of the deficiency.

(c) This section does not apply to a deed of trust, mortgage, or other lien given to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Financial Protection and Innovation or which is made by a public utility subject to the Public Utilities Act (Part 1 (commencing with Section 201) of Division 1 of the Public Utilities Code).



## CCP §580b

(a) Except as provided in subdivision (c), no deficiency shall be owed or collected, and no deficiency judgment shall lie, for any of the following:

(1) After a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract of sale.

(2) Under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property or estate for years therein.

(3) Under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan that was used to pay all or part of the purchase price of that dwelling, occupied entirely or in part by the purchaser. For purposes of subdivision (b), a loan described in this paragraph is a “purchase money loan.”

(b) No deficiency shall be owed or collected, and no deficiency judgment shall lie, on a loan, refinance, or other credit transaction (collectively, a “credit transaction”) that is used to refinance a purchase money loan, or subsequent refinances of a purchase money loan, except to the extent that in a credit transaction the lender or creditor advances new principal (hereafter “new advance”) that is not applied to an obligation owed or to be owed under the purchase money loan, or to fees, costs, or related expenses of the credit transaction.

(c) The fact that no deficiency shall be owed or collected under the circumstances set forth in subdivisions (a) and (b) does not affect the liability that a guarantor, pledgor, or other surety might otherwise have with respect to the deficiency, or that might otherwise be satisfied in whole or in part from other collateral pledged to secure the obligation that is the subject of the deficiency.

**CCP §580b. Contract of sale; deed of trust or mortgage; credit transaction; chattel mortgage; no deficiency to be owed or collected and deficiency judgments prohibited; exception for liability of guarantor, pledgor, or other surety.**

- But see: Spangler v. Memel (1972) 7 Cal.3d 603, 498 P.2d 1055, 102 Cal.Rptr. 807 (YES, THERE IS A RIGHT TO DEFICIENCY JUDGMENT upon seller's subordination of purchase money mortgage to construction loan/deed of trust, with change of use)
- Then see: Boyle v. Sweeney (1989) 207 Cal.App.3d 998, 255 Cal.Rptr. 153 (Crucial distinction under this section is not between commercial and residential land uses, but is between standard purchase money transactions and variations on standard transaction.)



- **And, Re Both CCP §580b and §580d:**

**“Reverse piercing the corporate veil”) see:**

- Cadle Co. II v. Harvey (2000) 83 Cal.App.4th 927, 100 Cal.Rptr.2d 150; and
- California Bank & Trust v. Lawlor (2013) 222 Cal.App.4th 625, 166 Cal.Rptr.3d 38

**CCP §580e. Deficiency collection and judgment following short sale with consent of trustee or mortgagee prohibited; circumstances; exception for fraud; on-application of section; waivers void and against public policy.**



CCP §580e.

(a) (1) No deficiency shall be owed or collected, and no deficiency judgment shall be requested or rendered for any deficiency upon a note secured solely by a deed of trust or mortgage for a dwelling of not more than four units, in any case in which the trustor or mortgagor sells the dwelling for a sale price less than the remaining amount of the indebtedness outstanding at the time of sale, in accordance with the written consent of the holder of the deed of trust or mortgage, provided that both of the following have occurred:

(A) Title has been voluntarily transferred to a buyer by grant deed or by other document of conveyance that has been recorded in the county where all or part of the real property is located. [ & ] (B) The proceeds of the sale have been tendered to the mortgagee, beneficiary, or the agent of the mortgagee or beneficiary, in accordance with the parties' agreement.

(2) In circumstances not described in paragraph (1), when a note is not secured solely by a deed of trust or mortgage for a dwelling of not more than four units, no judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage for a dwelling of not more than four units, if the trustor or mortgagor sells the dwelling for a sale price less than the remaining amount of the indebtedness outstanding at the time of sale, in accordance with the written consent of the holder of the deed of trust or mortgage. Following the sale, in accordance with the holder's written consent, the voluntary transfer of title to a buyer by grant deed or by other document of conveyance recorded in the county where all or part of the real property is located, and the tender to the mortgagee, beneficiary, or the agent of the mortgagee or beneficiary of the sale proceeds, as agreed, the rights, remedies, and obligations of any holder, beneficiary, mortgagee, trustor, mortgagor, obligor, obligee, or guarantor of the note, deed of trust, or mortgage, and with respect to any other property that secures the note, shall be treated and determined as if the dwelling had been sold through foreclosure under a power of sale contained in the deed of trust or mortgage for a price equal to the sale proceeds received by the holder, in the manner contemplated by Section 580d.

(b) A holder of a note shall not require the trustor, mortgagor, or maker of the note to pay any additional compensation, aside from the proceeds of the sale, in exchange for the written consent to the sale.

(c) If the trustor or mortgagor commits either fraud with respect to the sale of, or waste with respect to, the real property that secures the deed of trust or mortgage, this section shall not limit the ability of the holder of the deed of trust or mortgage to seek damages and use existing rights and remedies against the trustor or mortgagor or any third party for fraud or waste.

(d) (1) This section shall not apply if the trustor or mortgagor is a corporation, limited liability company, limited partnership, or political subdivision of the state. (2) This section shall not apply to any deed of trust, mortgage, or other lien given to secure the payment of bonds or other evidence of indebtedness authorized, or permitted to be issued, by the Commissioner of Financial Protection and Innovation, or that is made by a public utility subject to the Public Utilities Act (Part 1 (commencing with Section 201) of Division 1 of the Public Utilities Code).

(e) Any purported waiver of subdivision (a) or (b) shall be void and against public policy.

- CCP §580a. Action for deficiency judgment after foreclosure or trustee's sale; complaint; appraisal; deficiency computed on basis of fair market value; limitation of action; necessity of sale.



**CCP §580a.** – Similar to CCP 726(a) – Nonjudicial foreclosure sale

- In the context of a nonjudicial foreclosure sale, **CCP §580a** requires that a creditor:
  - File a compliant within the 3-month period after the date of the foreclosure sale; and
  - A similar hearing and determination of fair market value must be held.
- Upon the application of either party made at least 10 days before the time of trial the court shall, and upon its own motion the court at any time may, appoint one of the probate referees provided for by law to appraise the property or the interest therein sold as of the time of sale. The referee shall file his or her appraisal with the clerk and that appraisal shall be admissible in evidence. The referee shall take and subscribe an oath to be attached to the appraisal that he or she has truly, honestly and impartially appraised the property to the best of his or her knowledge and ability. Any referee so appointed may be called and examined as a witness by any party or by the court itself. **CCP §580a.**

- **CCP §580c. Mortgage foreclosure or trustee's sale; liability for actual costs and reasonable fees.**
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## CCP §580c.

In all cases where existing deeds of trust or mortgages are judicially foreclosed, unless a different amount is set up in the mortgage or deed of trust, and in all cases of mortgages and deeds of trust executed after this act takes effect, the mortgagor or trustor may be required to pay only such amount as trustee's or attorney's fees for processing the judicial foreclosure as the court may find reasonable and also the actual cost of publishing, recording, mailing and posting notices, litigation guarantee, and litigation cost of suit.

# Conclusion and Take-Aways:

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- Thank You

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With nearly 40 years of experience as a Real Property and Land Use Attorney, Randy brings to Hoge Fenton vast experience in intricate land use, permitting, entitlements, and environmental review. Randy's practice also centers on acquisitions, financing, development, and leasing of commercial real property, property ownership disputes, lien claims, and related title insurance coverage issues. He has represented high-level real estate developers and property owners in connection with all aspects of real property development, finance, and property tax issues.

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Darya Druch has been a bankruptcy attorney since 1988 in all aspects of bankruptcy, representing Debtors Creditors and Trustees. For the last 20 years been focused mostly on consumer and small business bankruptcy filings.



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