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BORROWERS, GUARANTORS AND SURETIES: DEALING WITH MULTIPLE PARTIES TO A LOAN

John L. Hosack, Esq., Jason E. Goldstein, Esq. Mr. Joffrey Long and Mr. Rick Rodriguez

Buchalter
12:00 Noon PST
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I. INTRODUCTION

In commercial real estate loans it is increasingly unlikely that a loan will be made by a lender to an individual borrower. Rather, in order to increase the security of the loan, it is common that, at a minimum, there be a guarantor or possibly a co-obligor. In addition, since California is a community property state, consideration must always be given by the lender as to whether an individual borrower or guarantor is married and the rights of the spouse must be considered. Further, it is not likely that the borrower, guarantor, etc. will be an individual person. Rather, it is more probable that the borrower, guarantor, etc. will be a business entity. Finally, it is also possible that the “guaranty” will not be a “traditional” guaranty, but will be a variation (i.e., a loan purchase agreement, a master lease, etc.).

II. THE PRACTICAL IMPACT ON THE LENDER OF THERE BEING **MULTIPLE PARTIES** TO THE LOAN

- 1. Challenges**
- 2. Managing risk**
- 3. Loan Restructuring**
- 4. Best Practices**

III. GUARANTORS, SURETIES AND CO-OBLIGORS

1. Borrower (“Primary Obligor”)
2. Guarantor (“Secondary Obligor”)
3. Surety (“Secondary Obligor”)
4. Co-Obligor (“Borrower,” or “Surety” or “Accommodation Party”)

IV. THIRD PARTY SECURITY

- 1. What Is Third Party Security?**
- 2. What Must Be Executed To Provide Third Party Security?**
- 3. When To Consider Third Party Security?**

V. LOAN PURCHASE AGREEMENTS

- 1. What Is A Loan Purchase Agreement?**
- 2. When To Consider A Loan Purchase Agreement?**
- 3. Guarantor Or Not A Guarantor?**

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CONSTRUCTION LENDING:
AVOIDING PITFALLS

John L. Hosack, Esq., Jason E. Goldstein, Esq., Mr. Joffrey Long and Mr. Rick Rodriguez

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January 23, 2018

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1000 Wilshire Boulevard, Suite 1500
Los Angeles, California 90017

VI. MASTER LEASE ON A BUILDING AS A GUARANTY

- 1. How Is A “Master Lease” A Guaranty?**
- 2. When Should A “Master Lease” Be Considered?**

VII. A SELLER OF ENCUMBERED REAL PROPERTY,
WHICH IS NOT RELEASED FROM LIABILITY WHEN
THE PROPERTY IS SOLD, IS A GUARANTOR

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1. How A Borrower's **Status** Changes When Encumbered Real Property Is Sold Without Satisfying The Secured Loan Or Having It Assumed?
2. Borrower, **Guarantor** And **Surety**?

VIII. STATUTE OF FRAUDS

- 1. What Is It?**
- 2. How Does It Apply To Guarantors/Sureties?**
- 3. What Are The Exceptions?**

IX. THE GUARANTOR'S RIGHTS AND DEFENSES AGAINST THE LENDER (1 of 4)

1. Lack of An Enforceable Guaranty
2. No Consideration
3. Statute of Frauds
4. Statute of Limitations
5. Conditions Precedent To Liability
6. Express Limits on Scope of Guaranty
7. Revocation of Continuing Guaranty
8. Failure to Notify Guarantor of Debt

IX. THE GUARANTOR'S RIGHTS AND DEFENSES AGAINST THE LENDER (2 of 4)

9. Failure to Notify Guarantor of Borrower's Default

10. Failure to notify Guarantor of Adverse Matters

11. Special Disclosures to Consumer Guarantors

12. Material Alteration of Underlying Debt

13. Impairment of Collateral

14. Failure to Notify Guarantor of Foreclosure Sale

IX. THE GUARANTOR'S RIGHTS AND DEFENSES AGAINST THE LENDER (3 of 4)

**15. Failure to Hold Commercially Reasonable
Foreclosure Sale**

16. Release of Co-Guarantors

17. Negligent Loan Administration

18. Other Increases in Scope of Risk

19. Duty to Pursue Borrower First

20. Absence of Borrower Default

21. Borrower Defenses on Underlying Debt

IX. THE GUARANTOR'S RIGHTS AND DEFENSES AGAINST THE LENDER (4 of 4)

22. Intercorporate Guaranty As Fraudulent Transfer

23. Recovery of Preferences

24. Automatic Stay

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X. ONE ACTION AND ANTI-DEFICIENCY RULES DO NOT DIRECTLY APPLY TO THE GUARANTOR

1. Code of Civil Procedure § 580(a)

- Fair value rule limiting a deficiency judgment after a nonjudicial foreclosure sale.

2. Code of Civil Procedure § 580(b)

- Prohibiting a deficiency judgment on a purchase money obligation.

3. Code of Civil Procedure § 580(d)

- Prohibiting a deficiency judgment after a nonjudicial foreclosure.

4. Code of Civil Procedure § 726

- One action and security first rules.

XI. SHOULD THE ONE ACTION AND ANTI-DEFICIENCY RULES DIRECTLY APPLY TO GUARANTORS?

Some Courts Have Said: “Yes.”

- ***Bank of S. Cal. V. Dombrow* (1996) 39 Cal.App.4th 1457 (depublished)**
- ***Talbott v. Hustwit* (2008) 164 Cal.App.4th 148 (concurring opinion)**
- ***Chequers Inv. Assocs., II v. Del Heil* (2001) 2001 Cal.App. Unpub. Lexis 1770 (not certified for publication).**

XII. WHEN A GUARANTOR'S REAL PROPERTY SECURES THE GUARANTY

1. Does The One Form of Action Rule (*Code of Civil Procedure* § 726) Apply?

- Yes.

Security Pacific Nat'l. Bank v. Wozab (1990) 51 Cal.3d 991 and
Bayless v. Ames (1929) 207 Cal. 54

2. Does The Anti-Deficiency Rule (*Code of Civil Procedure* § 580(d)) Apply?

- Unclear.

XIII. WHEN A THIRD PARTY (GUARANTOR) SECURES THE PRINCIPAL OBLIGOR'S LOAN

- 1. No Liability For Loan.**
- 2. Not Liable For A Deficiency Judgment.**
- 3. The One Form of Action Rule (*Code of Civil Procedure* § 726) And The Anti-Deficiency Rule (*Code of Civil Procedure* § 580(d)) **Apply.****

XIV. THE GUARANTOR'S ABILITY TO WAIVE RIGHTS AND DEFENSES

- 1. One Action And Anti-Deficiency Rights And Defenses.**
- 2. Suretyship Rights And Defenses.**
- 3. Election Of Remedy Rights And Defenses.**
- 4. Waivers Authorized By *Code of Civil Procedure* § 2856.**

XV. RESTRICTIONS ON A GUARANTOR'S ABILITY TO WAIVE RIGHTS AND DEFENSES

GUARANTORS RIGHTS AND DEFENSES WHICH CANNOT BE WAIVED

A. Usury And Other Illegality

WRI Opportunity Loans II, LLC v. Cooper (2007) 154
Cal. App. 4th 525

B. Equitable Defenses (i.e., unclean hands)

California Bank & Trust v. Del Ponti (2014)
232 Cal.App. 4th 162

C. Lender's Lack Of Disclosure To A Guarantor

Sumitomo Bank v. Iwasaki (1968) 70 Cal. 2d 81, 85

XVI. WHEN IS THE PURPORTED “GUARANTOR” THE “PRINCIPAL OBLIGOR” AND THE GUARANTY CONSIDERED A “SHAM”?

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Question. **What is it?**

Answer: **When Lender, effectively, considered the guarantor to be the primary obligor.**

Question: **How *Might* You Obtain A “Waiver” Of The “Sham Guaranty” Defense (In Conjunction With An Opinion Of Guarantor’s Counsel)?**

Waiver “Sham Guaranty” Defense. Guarantor acknowledges, agrees, and represents and warrants to Lender that (i) Lender was not involved with, participated in, or advised Borrower or Guarantor with respect to the ownership and/or management structure of Borrower and that such structure was previously and independently created by Borrower and/or Guarantor based upon their own decisions and otherwise based on independent advice obtained by them from their own counsel and consultants, which reasons included separating Guarantor from any liability that may be incurred by Borrower in . . .

XVII. CHALLENGES FOR THE LENDER CREATED BY PARTICULAR TYPES OF ENTITIES

- 1. General Partnerships**
- 2. Limited Partnerships**
- 3. Limited Liability Companies**
- 4. Corporations**
- 5. Trusts (To Be Discussed On Slide 26)**

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XVIII. ACTIVE INVOLVEMENT BY THE LENDER IN STRUCTURING THE ROLES OF THE “PRINCIPAL OBLIGOR” AND THE “GUARANTOR”

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- 1. Underwriting**
- 2. Distinction Between Structuring The Roles Of Principal Obligor And Guarantor And Informing The Borrower Why He/She/It Does Not Qualify.**
- 3. Loss Of “Guarantor” Status?**

XIX. REVOCABLE TRUSTS

1. Frequently Used As Estate Planning Devices.

2. Is A Settlor's Guaranty Of A Loan To A Trust A "True" Guaranty?

- *Torrey Pines Bank v. Hoffman* (1991) 231 Cal.App.3d 308;
- *Cadle Co. II v. Harvey* (2000) 83 Cal.App.4th 927
- *Talbott v. Hustwit* (2008) 164 Cal.App.4th 148.

3. Probate Code § 18000

XX. SPOUSES AND COMMUNITY PROPERTY

- 1. Community Property**
- 2. Is The Borrower Married?**
- 3. *Family Code Section 910(a)* (community property is generally liable for a debt incurred by either spouse)**

XXI. THE LENDER SHOULD DELIVER COPIES OF ALL DOCUMENTS TO THE TITLE INSURER BEFORE THE LOAN IS CLOSED

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1. Best Practices

2. Protect Yourself From Exclusions From Coverage 3(a) (created, suffered, assumed, agreed) and 3(b) (matters not known to the insurer, etc.)

XXII. CONCLUSION

Presenters

John L. Hosack—*Presenter*

John L. Hosack is a Shareholder in the firm's Litigation Practice Group in Los Angeles and a member of the firm's Mortgage Banking Group. Mr. Hosack represents mortgage brokers, secured lenders and property owners at trial and on appeal in real property disputes including, broker liability, lender liability, fraud, breaches of contract, mechanic's liens, stop notices, judicial foreclosures, receiverships, escrow claims and title insurance claims. His transactional practice includes commercial real property loan documentation, loan workouts, REO sales and foreclosures. He is an Affiliate Member of the California Mortgage Association and a member of the Los Angeles Mortgage Association, a Fellow of the American College of Real Estate Lawyers and a Fellow of the American College of Mortgage Attorneys. He is the author of "California Title Insurance Practice (First Ed., Calif. Cont. Ed. Bar), the first book on title insurance, and is a past Chair of the ABA's Title Insurance Litigation Committee.



John L. Hosack
Shareholder
Los Angeles Office

Jason E. Goldstein—*Presenter*

Jason Goldstein is a Shareholder in the Firm's Litigation Practice Group in Irvine and Chairman of the Firm's Mortgage Banking Group. Mr. Goldstein specializes in real property related claims, litigation and private money, including defending lenders, brokers and servicers in court (negligence, fraud, TILA, RESPA, HBOR, wrongful foreclosure, lender/servicer liability, etc.) and before government agencies. Mr. Goldstein also regularly prosecutes misappropriation of trade secret claims, judicial foreclosures and conducts general civil litigation. He is a fellow of the American College of Mortgage Attorneys, an affiliate member of the California Mortgage Association and a member of the California MBA.



Jason E. Goldstein
Shareholder
Irvine Office

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Joffrey Long —Presenter

Joffrey Long is President of Southwest Mortgage, a lender/broker that makes, arranges, and services both non-consumer purpose and consumer purpose real estate loans, including those made with institutional lender funds and loans made with private investor funds. He has been licensed as a real estate broker and active in real estate lending since 1979.

He is a member of the California Mortgage Association (CMA) Education Committee, a Past CMA Education Chair and Past CMA President. He has been a member of CMA's Board of Directors since 2001.

Mr. Long frequently serves as an expert witness, providing mortgage expert witness reports, declarations and expert testimony. He has testified in numerous depositions, arbitrations and trials relating to real estate lending, loan servicing, loan brokerage and trust deed investment matters.



Joffrey Long
President
Southwest Mortgage

Rick Rodriguez

Mr. Rodriguez is the founder and principal of Rodriguez and Associates Advisory Group ("R&A"), a Los Angeles based consultancy firm that has provided a unique array of services to its clients since 1992. For the past 24 years, R&A has successfully formulated creative workout and loan restructure resolutions to complex multi-party debtor-creditor transactions in judicial and non-judicial settings.

Having spent approximately 20 years as a banker, primarily with Security Pacific National Bank, Mr. Rodriguez has personal experience in due diligence, loan administration and workout of all types of loans, from consumer credit to large commercial complex syndicated credits. Mr. Rodriguez is a seasoned expert witness in banking, finance and real estate matters who testifies at jury trials, bench trials, arbitration proceedings, and mediation sessions; both by deposition and declaration. Mr. Rodriguez has testified equally for plaintiffs and defendants.



Rick Rodriguez
Principal
Rodriguez Associates
Advisory Group