

***Issue***

When a guarantor provides security for his *own* *guaranty obligation*, is the guarantor entitled to the protection of the antideficiency laws, specifically Code of Civil Procedure sections 726 and 580d?

***Executive Summary***

There is no authority directly on point, but some cases interpreting section 580d have been reluctant to extend its protections to anyone other than the issuer of a secured note. Nevertheless, there are strong statutory and policy arguments to extend both section 726 and 580d to secured guarantors. However, in the absence of any clear precedent, the secured guarantor’s bargaining position vis-à-vis the lender is greatly diminished, even if fact the secured guarantor may ultimately prevail at trial.

***Analysis***

While there does not appear to be any case directly on point, under section 726, the answer appears to be yes. It provides that “[t]here 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 . . . .” In the case of a secured guaranty, the “right” secured is the right to enforce the terms of the guaranty. While it is true that section 726 is intended to benefit the “principal debtor” and does not apply to guarantors, *Schwartz v. Mead* (1931) 116 Cal. App. 606, 612, where the guaranty itself s secured by a deed of trust, it would appear to fall within its scope. Further, if section 726 applies, there should be no issue of waiver because most guarantees waive any rights based on the fact the “*debtor’s* debt is secured by real property.”

The language of section 580d is more restrictive. It provides that “[n]o judgment shall be rendered for any deficiency upon a *note* secured by a deed of trust or mortgage upon real property . . . .” A guaranty is not a “note,” and it has been said that “section 580d, on its face, applies only to debts evidenced by a ‘note.’” *Coppola v. Superior Court* (1989) 211 Cal. App. 3d 848, 866. In *Willys of Marin Co. v. Pierce* (1956) 140 Cal. App. 2d 826, tenants secured performance of their lease with a deed of trust on real property they owned. Part way through the tenancy, the tenants defaulted in payment of rent, whereupon the landlord exercised the power of sale under the deed of trust and took title to the property.

The tenants brought a suit for declaratory relief alleging that under section 580d, the foreclosure extinguished any future obligation to pay rent for the remainder of the term. The landlord filed a claim for *unlawful detainer*. In holding that section 580d was no bar to the unlawful detainer suit, the court relied upon the fact an unlawful detainer suit is to obtain possession, not to recover a money deficiency.

The court added (perhaps in dicta) that a lease is not a “note” as that word is used in section 580d. The court reasoned that other antideficiency statutes, notably Code of Civil Procedure sections 580a, 580b and 726 use the words “debts,” “obligations” or “contracts” which “may be broader than the word ‘note’ used in section 580d.” *Id.* at 831. The court added that “‘[o]bligation’ is a word of broad meaning. In 1940, when section 580d was enacted, the limited term ‘note’ was used. It seems obvious that section 580d does not apply to obligations other than promissory notes.” *Id.*

Despite the use of the word “note” in section 580d, and the court’s seeming unwillingness to expand the use of the word to include other secured “obligations,” there are several possible arguments in favor of finding that section 580d applies to guarantees secured with real property.

First, the security is given to secure the *guarantor’s* own performance, and not to secure the performance of the borrower. Because the security secures the guarantor’s performance, the legislative policies behind the antideficiency statutes come into play. In the event of a nonjudicial foreclosure, section 580d is necessary to ensure that the security satisfies a realistic share of the debt, and that a creditor cannot obtain nonjudicially what it should only be able to do via a judicial foreclosure with a right of redemption.

Second, the language of section 580d states that it does not apply to deeds of trust given to secure “payment of *bonds*.” As one commentator notes, “[t]he bonds referred to in section 580d include not only bonds to raise capital, but also bonds to guaranty performance. If the legislature intended to exclude guaranties from section 580d’s scope by using the word ‘note,’ it is unlike they would have specifically excluded a guaranty in the second paragraph.” Lurie, S., *Application of California Code of Civil Procedure Section 580d to a Guaranty Secured by Real Property*, 28 Cal. W. L. Rev. 51, 54 (1991). In other words, if note only means promissory note and not a guaranty, the second paragraph to section 580d would be superfluous.

Third, since there is only one published case even dealing with a guarantor who provided security, *Indusco Management Corp. v. Roberston* (1974) 40 Cal. App. 3d 456,[[1]](#footnote-1) it seems unlikely that the legislature specifically contemplated a secured guaranty when it drafted section 580d. Nevertheless, courts have looked beyond the words in the statutes to their policies. For example in *Passanisi v. Merit-Mcbride Realtons, Inc.* (1987) 190 Cal. App. 3d 1496, 1508, the court said that:

Section 580d applies by its specific terms only to actions for “any deficiency upon a note secured by a deed of trust” and not to actions based upon other obligations. Nevertheless, the proscriptions of section 580d cannot be avoided through artifice. In determining whether a particular recovery is precluded, we must consider whether the policy behind section 580d would be violated by such a recovery.

In the similar context of section 726, the Supreme Court held that its protections extend to *deeds of trust*, notwithstanding the fact section 726 only mentions “mortgages.” *Bank of Italy National Trust & Savings Ass’n. v. Bentley* (1933) 217 Cal. 644, 657-58. Thus, it is possible to argue that notes does not just mean promissory notes, but should include guarantees that are themselves secured.

1. The court in *Robertson* found that the security provided by the guarantor was security for the note, not for the guaranty itself. The court held that the creditor was estopped from seeking a deficiency against the guarantor when it nonjudicially foreclosed on the security. [↑](#footnote-ref-1)