

**“AFTER A FORECLOSURE CAN A LENDER  
COME AFTER MY OTHER ASSETS”?  
THE IMPACT OF CALIFORNIA ANTI-DEFICIENCY LAW**

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I am often asked by homeowners facing foreclosure whether their other properties and assets are also at risk once the foreclosure is completed. This article summarizes the California law on point, and in particular the significant restrictions on a lender’s ability to seek such recovery.

The first issue is whether the lender is foreclosing judicially or non-judicially. Most California foreclosures are non-judicial – processed outside of court by a foreclosure trustee. This method is favored since it is much faster and more cost effective, generally completed in less than six months. If the lender forecloses non-judicially, Code of Civil Procedure section 580d provides that the foreclosure is the lender’s sole remedy, and it cannot seek a deficiency judgment. In other words, even if the value of the property is substantially less than the loan balance, the non-judicial foreclosing lender is legally precluded from seeking to recover anything beyond the property itself, and the borrower’s other assets are safe.

In the rare situation in which a lender forecloses judicially, going through a full lawsuit to establish its claim, it may under certain circumstances recover a deficiency judgment, which it can enforce from other assets. However, even through a judicial foreclosure, a deficiency judgment is only available for a non-“purchase money” loan. A purchase money loan is defined by Code of Civil Procedure section 580b as a loan from which the proceeds were used to purchase residential property consisting of one to four units (i.e. up to a fourplex) occupied in whole or in part by the purchaser. Under the new Homeowner’s Bill of Rights, a refinance on or after January 1, 2013 of a purchase money loan maintains its purchase money status. If additional funds are advanced as part of the refinance, the original amount remains purchase money and the advance is not.

After any foreclosure of a purchase money loan including a judicial foreclosure, the foreclosing lender is again precluded from pursuing other assets.

The remaining anti-deficiency issue concerns the ability of a junior lienholder (such as the holder of a second trust deed) to seek a deficiency judgment if the senior lienholder forecloses. This junior lienholder did not itself foreclose so it is not subject to the CCP section 580d restriction described above. The purchase money protection of CCP section 580b still applies to the junior lienholder so no deficiency is available from a purchase money junior lien even if the junior lienholder did not itself foreclose. Its junior loan is eliminated if the senior lender forecloses. But if the junior loan was not purchase money, such as a later line of credit, then when the senior lender forecloses, the holder of the second is known as a “sold out junior lienholder” and it is permitted to sue the borrower for the full amount of its now unsecured loan.

In recent binding decisions from courts of appeal such as Simon v. Superior Court, a further exception to this right has been created. Specifically, if the lienholder who foreclosed also was the holder of the junior deed of trust at the time of the foreclosure, then it is not permitted to sue on its junior deed of trust. If the same lender originated both loans but assigned the junior loan to someone else prior to the foreclosure, this exception does not currently apply (see Cadlerock Joint Venture v. Lobel) and the current holder of the junior loan can sue the borrower.

So to summarize, the borrower’s other assets are safe and exempt from lenders’ claims if the lender non-judicially forecloses or if the loan was used to purchase residential property of up to a fourplex and the borrower lives in it or if the same entity holds both the foreclosed loan and the junior loan at the time of the foreclosure. The other assets are at risk from a judicially foreclosing lender if the loan was made for other purposes such as a line of credit or a loan to finance a remodel. They are also at risk from a non-foreclosing junior lienholder if the senior lienholder forecloses and the junior loan was not used for the purchase of the property or if the property is not occupied by the owner. It is important to note that the lender cannot avoid these restrictions by merely waiving its security and attempting to sue directly on its loan (CCP section 726(a)).

Effective in 2011, the legislature added the first new anti-deficiency legislation since the Great Depression in the form of Code of Civil Procedure section 580e. As since amended, it now provides that in the case of a short sale of a dwelling of not more than four units, where the owner is not a corporation or government agency, the holder of a deed of trust who approved the short sale cannot pursue a deficiency judgment, and must treat the short sale amount as payment in full. This statute does not prevent the holder of a deed of trust from suing for damages for fraud or waste to the property. This statute cannot be waived by the borrower, so the borrower and lien holder cannot contract around it.

This is a general overview and your situation may involve other exceptions or special circumstances. Feel free to call our office to make an appointment if you would like to discuss it further.

*Lawrence Dreyfuss is president of The Dreyfuss Firm, a professional law corporation located in Irvine, California. He is a 1974 graduate of UCLA and a 1977 graduate of The UCLA School of Law, and has more than 35 years civil litigation experience. He handles cases throughout California in state and federal trial and appeals courts concerning real property transactions and non-disclosures, secured lending and foreclosures, title problems, partition of jointly owned property, broker liability, contract disputes, and numerous other business and real estate issues. Mr. Dreyfuss has received the highest possible ratings (AV) for legal expertise and ethics from Martindale Hubbell, the preeminent national resource for attorney evaluations.*

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