S213137

No.
(Court of Appeal No. D061720)
(San Diego County Super. Ct. No. 37-2011-00087958-CU-MC-CTL)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CAROL COKER,
Plaintiff and Appellant,

v.

JPMORGAN CHASE BANK, N.A., for itself and as a successor in interest to CHASE HOME FINANCE LLC,
Defendants and Respondents.

Appeal From Judgment And Order Of The Superior Court
For The County Of San Diego
(Hon. Luis R. Vargas, Presiding)

PETITION FOR REVIEW

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ISSUES PRESENTED

(1) Does Civil Code of Procedure section 580b apply after a creditor releases its security, at the borrower's request, to facilitate the borrower's short sale?

(2) Does a borrower's request and acquiescence in a creditor's destruction of its security in connection with a short sale constitute a waiver of rights and defenses by the borrower under Civil Code of Procedure section 726?

INTRODUCTION

This Petition seeks review of issues that "no California [appellate] court has specifically addressed," until now: Do sections 580b and 726's anti-deficiency protections apply to transactions in which the creditor, at the borrower's request, agrees to release its security in property and re-convey the deed of trust to the borrower so that the borrower can sell the property for less that the outstanding balance on the loan?

In the decision below, the Court of Appeal held for the first time that section 580b's anti-deficiency rules apply to short sales[1] of purchase money loans. *Coker v. JP Morgan Chase Bank, N.A.*, 218 Cal. App. 4th 1, 16 (2013). To reach that result, the court found that: (1) when a loan is obtained for the purpose of purchasing real property (a "purchase money loan"), section 580b's anti-deficiency protections apply in connection with any sale of the real property, including short sales, and (2) a borrower's request that a creditor release its

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[1] A short sale occurs when property is sold for less than the amount of the outstanding balance on the loan secured by the property. To accomplish a short sale, the borrower seeks the lender's permission to sell the property directly to a third party for an amount less than the outstanding balance on the loan. If the lender agrees, the lender releases its security interest and reconveys the deed to the borrower. *See, e.g., Bank of Am., N.A. v. Roberts*, 217 Cal. App. 4th 1386, 1398 (2013).

security interest in order to proceed with a short sale does not waive the provisions of the "security first rule" under section 726. *Id.* at 12-15. The court concluded that because borrowers cannot waive the protections of section 580b by contract, an agreement to remain responsible for any deficiency balance remaining on the loan after the short sale is legally unenforceable. *Id.* at 16.

The decision below conflicts in two respects with prior appellate decisions concerning the applicability of California's anti-deficiency protections following the sale of property. Both of these conflicts warrant review by this Court.

First, the Court of Appeal ignored the status of Chase's security interest at the time of the short sale. *Id.* at 11-12. Prior decisions have held that when a borrower asks a creditor to reconvey the deed of trust so that the property may be sold to avoid foreclosure, section 580b's protections do not apply. *See, e.g., Jack Erickson & Assocs. v. Hesselgesser*, 50 Cal. App. 4th 182, 188-89 (1996) ("Appellant, by his conduct, waived the protection of section 580b . . . when he induced respondent to execute a deed of reconveyance and sold the property."); *see also DeBerard Props., Ltd. v. Lim*, 20 Cal. 4th 659, 663 (1999) (creditor that wishes to pursue borrowers for the full balance of the loan may avoid section 580b by destroying the creditor's security interest). That rule applies in this case because, for purposes of the appeal, the court found that Coker affirmatively requested that Chase destroy its security interest and reconvey the deed of trust to her so that she could proceed with a sale of the property. *Coker*, 218 Cal. App. 4th at 6. Nevertheless, the court found that section 580b's protections apply following the short sale. *Id.* at 12-13. Moreover, the Court did not explain how the short sale that Coker participated in differs from the transaction in *Jack Erickson*. This uncertainty about what actions will result in a waiver of section 580b's protection should be resolved so that

borrowers and creditors have guidance about when a waiver of section 580b occurs.

Second, the decision below also conflicts with the Fifth Appellate District's decision in *Bank of America, N.A. v. Roberts*, 217 Cal. App. 4th 1386 (2013) where the court held that where a creditor agrees to the borrower's request to proceed with a short sale, and as a result releases "its lien so the [short] sale of real property could take place," the borrower "*waived* any rights she may have had under [section 726.]" *Id.* at 1398 (emphasis in original).[2] Following this Court's decision in *Security Pacific National Bank v. Wozab*, 51 Cal. 3d 991 (1990), the court reasoned that the creditor's release of its security in the property to effectuate the completion of the sale transformed a secured loan into an unsecured one. *Roberts*, 217 Cal. App. 4th at 1398. Thus, contrary to *Coker*, *Roberts* found that because the transaction required the creditor to release and destroy its security "so that the sale could take place," the borrower's agreed-upon obligation for the deficiency was enforceable under section 726. *Id.* at 1397-98; *but cf. Coker*, 218 Cal. App. 4th at 15.

Resolving these conflicts is important, with far reaching economic and practical implications. Over 200,000 short sales occurred within California in 2009 and 2010 as short sales have gained popularity as an alternative to foreclosure. *See* Senate Banking and Financial Institutions Committee Analysis of SB 412, hearing dated April 6, 2011.[3] To further these sales, creditors commonly required borrowers to agree

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[2] A Petition for Review of the *Roberts* opinion has been filed with this Court and has been assigned the docket number S213011.

[3] *Clarifying Scope of SB 931: Hearing on SB 412 before Senate Banking and Fin. Inst. Comm.* (2011). *Available at* http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_04010450/sb_412_cfa_20110405_150830_sen_comm.html.

to remain personally liable for deficiencies as a condition of their approval of the sale. *See, e.g.*, Senate Rules Committee, SB 931, as amended June 1, 2010.[4] Therefore, for a large percentage of the more than 200,000 borrowers who participated in short sales prior to the enactment of section 580e[5], having certainty regarding whether they are bound to their agreements to remain responsible for their outstanding debt will have direct and significant implications.

Lower courts also need guidance on these issues to resolve a plethora of individual and class actions in both the state and federal courts regarding the legal status of deficiencies on short sales. *See, e.g., Lawyers Title Ins. Corp. v. Dedmore*, California Court of Appeal, First District, Case Nos. A126422, A136676; *Banks v. JPMorgan Chase Bank, N.A.*, Superior Court, County of Alameda, Case No. RG-12614875; *Rex v. Chase Home Finance*, U.S. District Court, C.D. Cal., Case No. SACV 12-0609; *Rahoi v. JPMorgan Chase Bank, N.A.*, U.S. District Court, N.D. Cal., Case No. CV 12-03756-LHK; Assembly Committee on Judiciary, hearing dated June 29, 2010[6] (finding that clarity regarding liability for deficiencies

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[4] *Mortgage: Deficiency Judgments: Hearing on SB 901 before Senate Rules Comm.* (2010). *Available at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0901-0950/sb_931_cfa_20100817_204742_sen_floor.html.

[5] Civil Code of Procedure section 580e became effective on July 11, 2011. This statute extends the anti-deficiency protections to all short sale transactions regardless of the nature of the loan or the facts surrounding the transaction. However, section 580e does not apply to short sales that occurred prior to its effective date. *See Roberts*, 217 Cal. App. 4th at 1395; *see also Espinoza v. Bank of Am., N.A.*, 823 F. Supp. 2d 1053, 1058 (S.D. Cal. 2011) (holding section 580e is not retroactive).

[6] *Mortgage: Deficiency Judgment: Hearing on SB 931 before Assembly Comm. on Judiciary* (2010). *Available at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0901-0950/sb_931_cfa_20100628_112930_asm_comm.html.

following short sales is needed to address potential litigation against real estate professionals who may not have warned clients about the risk of ongoing liability following short sales). The Court should provide these courts with guidance on whether sections 580b and 726 apply to short sales.

STATEMENT OF FACTS

In order to purchase real property, Carol Coker obtained a $452,000 loan memorialized by a promissory note. *Coker*, 218 Cal. App. 4th at 6. The note was secured by a deed of trust recorded against the property. *Id.* After the loan was originated, the original lender went defunct and Chase Home Finance, LLC acquired the loan. *Id.* JPMorgan Chase Bank, N.A. ("Chase") is the successor in interest to Chase Home Finance. *Id.*

Like hundreds of thousands of other Californians, in late 2009, Coker began to experience financial difficulties and stopped paying on her loan. *Id.*; *see also* Clerk's Transcript ("CT") 145. Eventually, a notice of default and election to sell under the deed of trust was recorded, thereby initiating a non-judicial foreclosure on the property. *Coker*, 218 Cal. App. 4th at 6.

Before Chase could complete the foreclosure process, Coker negotiated a sale of the property whereby she agreed to sell the property for less than the outstanding balance that she owed to Chase. *Id.* Because this type of sale results in the seller paying less than what is owed on the loans secured by the property, this type of sale is commonly referred to as a short sale. *Id.* Under the terms of the agreement between Coker and the third party buyer, Coker was required to obtain Chase's agreement to release its security interest in the property so that the short sale could proceed. *Id.*; *see also* CT at 46, 197 (short sale agreement conditioned on Chase's agreement to release its lien). Coker therefore contacted

Chase and requested that Chase release its security interest so that the short sale could proceed. *Id.*

In granting conditional approval for the short sale, Chase acknowledged that the short sale agreement between Coker and the buyer required that the property be lien free at the time of the sale's closing. CT at 46. Chase further stated that as a condition for its release of its security interest, Coker had to agree to be responsible for any deficiency balance remaining on the loan after application of the short sale proceeds. *Id.*; *see also Coker*, 218 Cal. App. 4th at 6. Coker accepted these conditions and proceeded with the short sale. *Coker*, 218 Cal. App. 4th at 6.

After the short sale closed, Coker received a letter demanding payment of the unsatisfied portion of the loan. *Id.* In response, Coker filed a complaint for declaratory relief. *Id.* at 7. Chase's demurrer was sustained without leave to amend. *Id.* The court subsequently entered judgment, dismissing the first amended complaint with prejudice as to Chase. *Id.* Coker timely appealed. *Id.*

On appeal, the Court of Appeal held that section 580b applies "after any sale, not just a foreclosure" of a purchase money loan, including short sales. *Id.* at 11-12. The court dismissed Chase's argument that "580b does not apply when a borrower acquiesces in a lender's relinquishment of its security interest." *Id.* at 13. With respect to section 726, the court held that absent the commencement of a judicial action a borrower cannot waive section 726's protection and that section 726 is irrelevant to the issues presented by this case because the sale of the property was not dependent on a section 726 action. *Id.* at 14-15.

REASONS FOR GRANTING REVIEW

I.

REVIEW IS NECESSARY TO CLARIFY HOW AND WHEN CALIFORNIA'S ANTI-DEFICIENCY LAWS WILL APPLY WHEN A BORROWER AFFIRMATIVELY REQUESTS HER CREDITOR DESTROY ITS SECURITY.

The Court of Appeal's holdings that section 580b applies and section 726 does not apply when a borrower affirmatively requests her creditor release its security interest in order to accommodate a short sale transaction conflicts with prior appellate decisions and therefore review is necessary to secure uniformity of decisions. Further, given the importance of clarity with respect to California's anti-deficiency statutes for hundreds of thousands of borrowers, as well as their creditors, review should be granted to settle the important issues raised in this case.

A. Issue One: Under What Circumstances, If Any, Will A Borrower's Promise To Remain Liable For Any Deficiency In Exchange For Her Creditor's Agreement To Acquiesce To A Short Sale Be Enforceable Under Section 580b?

Section 580b provides that a creditor may not obtain personal judgments against a borrower for any outstanding amounts owed on a loan (referred to as the deficiency) after the sale of a property secured by a "purchase money loan." *Brown v. Jensen*, 41 Cal. 2d 193, 198-99 (1953); *DeBerard Props., Ltd.*, 20 Cal. 4th at 664. For purposes of section 580b, the defining feature of a "purchase money loan" is that the property securing the loan is the same property that the loan funds were used to purchase. *Roseleaf Corp. v. Chierighino*, 59 Cal. 2d 35, 41 (1963).

In the decision below, the Court of Appeal found that section 580b's anti-deficiency protections apply following any sale of property acquired by a purchase money loan, including

short sales. *Coker*, 218 Cal. App. 4th at 12-13. In reaching this decision, the Court concluded that "section 580b does not address a specific mode of sale. Instead, it focuses on a particular type of loan: the purchase money loan." *Id.* at 11. Therefore, under the Court's reasoning, once a purchase money loan has been made, section 580b will apply to any sale of the property acquired with the proceeds of the loan. *Id.* at 13.

This holding is at odds with previous appellate decisions that have found that section 580b does not apply when a creditor's security interest is destroyed prior to the sale of the property even when it was originally acquired through a purchase money loan. *See, e.g., Jack Erickson & Assoc.*, 50 Cal. App. 4th at 188-89 (580b inapplicable after borrower asked creditor to execute a deed of reconveyance and sold the secured property); *see also DeBerard Props., Ltd.*, 20 Cal. 4th at 663 (creditor who does not want to be restricted to the proceeds obtainable through the exhaustion of the security may avoid this result by destroying the security); *In re Prestige Ltd. P'ship-Concord*, 234 F.3d 1100, 1117-18 (2000) (580b does not apply when the security interest has been lost due to a violation of section 726).

For instance, in *Jack Erickson*, the borrower obtained a purchase money loan secured by a property that the borrower hoped to develop as an investment. *Jack Erickson & Assoc.*, 50 Cal. App. 4th at 184. The borrower ran into financial difficulties and, on the eve of foreclosure, asked the creditor to release its lien in exchange for a guarantee that the borrower would be personally responsible for the outstanding balance on the loan. *Id.* The creditor agreed to the sale and released its lien. *Id.* The creditor then proceeded to obtain a personal judgment against the borrower for the outstanding loan balance. *Id.*

On appeal, the borrower argued that because of the purchase money nature of the loan, section 580b barred the award of a personal judgment. *Id.* at 185. The Court of Appeal dismissed this argument, finding that the borrower had waived the protection of section 580b when the borrower "induced the [creditor] to execute a deed of reconveyance and sold the property." *Id.* at 189. The court reasoned that by leaving the creditor without a security interest, the borrower through his actions had transformed the note to an unsecured purchase money note, which was not subject to section 580b. *Id.* The argument that the borrower "could extinguish the security interest, sell the property to a third party, and invoke section 580b to shift the loss of the ill-fated project" to the creditor was expressly rejected by the court. *Id.*

The underlying concept behind *Jack Erickson* is straightforward: when a borrower requests that the creditor destroy the security in the loan, "demanding reconveyance of the security and then demanding that the creditor resort to the security . . . [is] mutually inconsistent." *Sec. Pac. Nat'l Bank v. Wozab*, 51 Cal. 3d 991, 1005 (1990); *see also DeBerard Props., Ltd.*, 20 Cal. 4th at 663 (creditor who does not want to be restricted to the proceeds obtainable through the exhaustion of the security may avoid this result by destroying the security). This concept has been adopted by other courts which have held that once a borrower takes steps to destroy the creditor's security interest, the borrower can no longer limit her creditor to the security to satisfy the outstanding debt. For instance, in *Goodyear v. Mack*, 159 Cal. App. 3d 654 (1984), the Court found that the borrowers destroyed the creditor's security interest, thereby losing the protection of section 580b, when they sought a reconveyance of the deed of trust in exchange for providing the creditor with new security. *Id.* at 659, *disapproved on other grounds by DeBerard*, 20 Cal. 4th at 671.

Likewise, in *Rahoi v. Chase*, Case No. 12-CV-03756-LHK, slip op. (N.D. Cal. June 6, 2013), Judge Koh, after conducting a thorough analysis of the relevant California law, held that in requesting a short sale, the borrowers "arguably destroyed" the secured purchase money nature of the loan and therefore lost the protection of section 580b. *Rahoi*, slip op. at 23. While ultimately section 580b was found to apply under the particular circumstances of the short sale in *Rahoi*, (*see id.* at 23-24), under *Rahoi*'s reasoning, the same would not necessarily be true for the short sale at issue here.

Based on the current confusion in the various decisions regarding the impact of the destruction of the security at a borrower's request on the availability of section 580b's protections, the Court should grant review to clarify when and how a borrower's request that her creditor release its security to facilitate a short sale will result in the loss of section 580b's anti-deficiency protections.

B. Issue Two: Does A Borrower Who Asks Her Creditor To Release Its Security Interest Waive Her Rights Under Section 726?

In *Coker*, the Court of Appeal limited a borrower's waiver of rights under section 726 to two specific circumstances. *First*, the court held that a section 726 waiver only applies where a borrower fails to raise the security first rule and insist on foreclosure *after* an action has been initiated by the creditor. *Coker*, 218 Cal. App. 4th at 15 (distinguishing *Scalese v. Wong*, 84 Cal. App. 4th 863, (2000), on the grounds that "there was no analogous judicial process".) *Second*, the court held the issue of waiver of section 726's protections is irrelevant in the context of short sales because there is no need to force the sale through section 726. *Id.* (holding that it was unnecessary to force a sale through section 726, and therefore section 726 was not important to the analysis of this

case.) Both of these holdings have strayed from the holdings in prior decisions addressing the applicability of section 726.

Section 726 sets forth what is referred to as the "one action" or "security first" rule. That one form of action is a foreclosure action, and, under the operation of section 726, a borrower has the right to require that her creditor exhaust the security (*i.e.* foreclose on the property) before looking to the borrower to personally satisfy any outstanding obligations on the loan. *See Wozab*, 51 Cal. 3d at 997; *Shin v. Superior Court*, 26 Cal. App. 4th 542, 545 (1994). Further, a "secured creditor can only bring one lawsuit to enforce its security interest and collect it debt." *Nat'l Enters. Inc. v. Woods*, 94 Cal. App. 4th 1217, 1232 (2001).

Section 726 has two fundamental purposes: "(1) preventing a multiplicity of lawsuits against the debtor, and (2) requiring exhaustion of the security before resort to a debtor's unencumbered assets." *Wozab*, 51 Cal. 3d at 1005. As a result, "the operation of section 726 is in large part within the control of the debtor." *Id.* at 1004. "If a secured creditor brings an action on the debt before foreclosing the security, the debtor can interpose section 726 as an affirmative defense," so as to require "the creditor to exhaust the security before [it] may obtain money judgment against the debtor." *Id.* at 1004-05. "If the debtor does not raise the statute as an affirmative defense, the creditor's action on the debt is allowed to proceed to judgment." *Id.* at 1005. In such a case, however, the creditor is precluded from thereafter foreclosing on the security," because it "is deemed to have elected his remedy." *Id.*

Similarly, debtors may also waive the protections afforded by section 726. *See id.* (*cited and discussed in Scalese*, 84 Cal. App. at 870.) Among other ways, "a debtor can waive the protection of section 726 by failing to insist that the creditor first proceed against the security" (*Wozab*, 51 Cal. 3d at

1005), or by consenting to an arrangement in which the beneficiary of the trust deed relinquishes the security without retiring the note. *Roberts*, 217 Cal. App. 4th at 1398. Where the parties have waived their respective rights, "the principles enunciated by our Supreme Court were not limited to any particular type of loan, whether purchase money or a refinance." *Scalese*, 84 Cal. App. 4th at 870.

Coker's holding that a section 726 waiver only applies where a borrower fails to raise the security first rule and insist on foreclosure *after* an action has been initiated by the creditor is at odds with *Wozab*. In that case, this Court held that when a creditor improperly seized funds from the borrowers' account instead of first attempting to exhaust the security, the creditor lost its right to seek the collateral to satisfy the debt but the underlying debt was not destroyed. *Wozab*, 51 Cal. 3d at 1006. And according to this Court in *Wozab*, the effect of section 726 works independently of any judicial action taken by the creditor. *Id.* at 1000-02. The Court should clarify when and how the protections of section 726 can be waived without the commencement of a judicial action.

Similarly, the Court of Appeal's holding that section 726 has no bearing on whether Coker's promise to remain liable for the deficient balance is enforceable misses the fundamental premise of section 726, and, thus, diverges from other decisions. *Coker*, 218 Cal. App. 4th at 15. Specifically, section 726 is the mechanism by which a borrower can protect herself from her creditor unilaterally destroying its security. *Wozab*, 51 Cal. 3d at 1004-05. This is important to a borrower because once a creditor's security interest is destroyed, other protections that arise through these interrelated statutes, such as section 580b's protections, are jeopardized. *See, e.g., DeBerard Props., Ltd.*, 20 Cal. 4th at 663 (destruction of security will avoid the creditor from being

limited to the security under 580b). A borrower who does not wish to lose these protections can prevent a waiver from occurring by not taking actions that will destroy the security and by raising section 726 when her creditor attempts to act unilaterally. *Wozab*, 51 Cal. 3d at 1004-05; *Roberts*, 217 Cal. App. 4th at 1397-98.

It is on this point that *Roberts* and *Coker* part company. *Coker* disagrees with *Roberts*' fundamental premise that a short sale results in a knowing waiver of rights under section 726 where both parties consent to a release of the security to effectuate a sale. *Compare Coker*, 218 Cal. App. 4th at 15, *with Roberts*, 217 Cal. App. 4th at 1397-98. *Coker* holds that notwithstanding the borrower's consent to release the security in return for liability on the deficiency, the waiver of rights under section 726 is limited to situations where the borrower keeps the property instead of selling it short to satisfy a portion of the underlying debt. *Coker*, 218 Cal. App. 4th at 15. *Roberts*, on the other hand, holds that section 726 waiver applies to a short sale that occurred ***before*** the creditor commenced the action to collect the deficiency as a personal debt under section 726. *Roberts*, 217 Cal. App. 4th at 1398. In short, *Coker* holds that no waiver occurs where the borrower short sells the property as part of a transaction with the lender to satisfy a portion of the loan amount, while *Roberts* holds the borrower waives her rights under section 726 because she agreed and acquiesced in the release of the security so that the short sale "could take place."[7] The Court should therefore grant review to resolve the conflict of

[7] The fact that the original loan in *Coker* was secured as purchase money, while the loan in *Roberts* was a home equity loan secured by a second deed of trust, makes no difference when determining waiver of those protections under section 726: "[t]he principles enunciated by our Supreme Court were not limited to any particular type of loan, whether purchase money or a refinance." *Scalese*, 84 Cal. App. 4th at 870.

whether a borrower's request that her creditor release its security to facilitate a short sale results in a waiver of section 726 rights by the borrower.

II.

CLARIFYING THE EXTENT TO WHICH A BORROWER REMAINS LIABLE FOR DEFICIENCIES FOLLOWING SHORT SALES WILL IMPACT HUNDREDS OF THOUSANDS OF BORROWERS.

In the last six years, California has experienced a significant increase in the number of borrowers who have become unable to meet the financial obligations owed on purchase money loans. *See, e.g.*, Senate Banking and Financial Institutions Committee Analysis of SB 931, as amended June 1, 2010, at 3 (finding that foreclosures are an ongoing problem in California with almost 28,000 foreclosure proceedings initiated in one month alone).[8] When a borrower becomes unable to meet her financial obligations under the terms of the loan, and loan modification is not a viable option, a short sale is often an alternative to foreclosure. *Id.*

In many instances, a short sale instead of a foreclosure is a preferable outcome for both the borrower and the creditor. From the borrower's perspective, a short sale may hurt the borrower's credit less than a foreclosure. *See* Assembly Committee on Judiciary, June 29, 2010 hearing on SB 931, at 4.[9] Further, proceeding with a short sale "helps the [borrower] feel like they took responsibility for the obligation

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[8] *Analysis of SB 931: Hearing before Senate Banking and Fin. Inst. Comm.* (2010). *Available at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0901-0950/sb_931_cfa_20100630_17245_sen_comm.html.

[9] *Analysis of SB 931: Hearing before Assembly Comm. on Judiciary* (2010). *Available at* http: //www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0901-0950/sb_931_cfa_20100628_112930_asm_comm.html.

to pay the money back, rather than just walking away." *Id.* From the creditor's perspective, a short sale may be preferable to a foreclosure because it allows the creditor to avoid the costs of foreclosure and the expenses that arise if the property ends up becoming bank owned. *Id.* 2.

Despite the numerous advantages offered by short sales, prior to the enactment of section 580e there was little to no agreement amongst legal practitioners about how California's existing anti-deficiency laws, including sections 580b and 726, apply to these sales. *See, e.g.*, Senate Rules Committee Bill Analysis, SB 931 as amended June 1, 2010, at 2 ("There is some disagreement among legal professionals about the circumstances under which the purchase money protection provided by CCP 580b applies."); Assembly Committee on Judiciary, June 29, 2010 hearing on SB 931, at 1 (same); *see also Rahoi v. JPMorgan Chase Bank, N.A.*, U.S.D.C. Case No. 12-CV-03756-LHK, slip op. at 11 (N.D. Cal. June 6, 2013), ("the Court notes that there is relatively little case law concerning whether section 580b precludes a lender from seeking a deficiency judgment following a short sale"). This is because prior to 2007, short sales were virtually unknown in California. *See* Senate Banking and Finance Institutions Committee Analysis of SB 412, as amended March 21, 2011.[10] However, since 2007 there has been a steady rise in the number of short sales, with a few thousand occurring in 2008, approximately 90,000 occurring in 2009 and approximately 110,00 short sales occurring in 2010. *Id.*

A significant percentage of the more than 200,000 short sales that occurred prior to the passage of section 580e involve contracts, such as the one at issue here, where the

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[10] *Analysis of SB 412: Hearing before Senate Banking and Fin. Inst. Comm.* (2011). *Available* at http: //www.leginfo.ca .gov/pub/11-12/bill/sen/sb_0401-0450/sb_412_cfa_20110405 _150830_sen_comm.html

creditor conditioned its agreement to the short sale based on the borrower's promise to remain responsible for the outstanding balance on the loan. *See, e.g.*, *Coker*, 218 Cal. App. 4th at 6; *Roberts*, 217 Cal. App. 4th at 1390; Senate Rules Committee 4[11] ("Several lenders are now requiring borrowers to agree that the lender may pursue them for the difference between the sales price of their home and their unpaid mortgage balance.") In reliance on these promises, creditors agreed to short sales where the creditors received as little as ten percent or less of what borrowers owed on the loan. *See, e.g.*, *Roberts*, 217 Cal. App. 4th at 1390 (borrower owed $250,000 and creditor agreed to short sale based on the receipt of $27,000 and the promise by the borrower to remain responsible for the outstanding balance); *Rahoi*, slip op. at 2 (borrowers owed $240,000 and creditor agreed to short sale based on the receipt of $8,500 and a promise by the borrower to remain responsible for the outstanding balance); *Rex v. Chase Home Fin., LLC*, 905 F. Supp. 2d 111, 114 (2012) (borrowers owed more than $56,000 and creditor agreed to short sale based on the receipt of $3,000 and the promise by the borrowers to remain responsible for the outstanding balance). Creditors and borrowers alike therefore need clarity about whether a borrower's promise of continued responsibility for the outstanding balances on loans will be enforceable.

In light of these facts, it is not surprising that multiple individual and class actions have been brought in connection with creditors' attempts to recover deficiency balances following short sales. Currently, there are multiple actions pending seeking to pursue various claims related to creditors'

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[11] *Mortgage: Deficiency Judgments: Hearing on SB 901 before Senate Rules Comm.* (2010). *Available at* http: //www .leginfo.ca.gov/pub/09-10/bill/sen/sb_0901-0950/sb_931_cfa _20100817_204742_sen_floor.html.

efforts to collect on deficiencies. *See, e.g., Lawyers Title Ins. Corp. v. Dedmore*, California Court of Appeal, First District, Case Nos. A126422, A136676; *Banks v. JPMorgan Chase Bank, N.A.*, Superior Court, County of Alameda, Case No. RG-12614875; *Rex v. Chase Home Finance*, U.S. District Court, C.D. Cal., Case No. SACV 12-0609; *Rahoi v. JPMorgan Chase Bank, N.A.*, U.S. District Court, N.D. Cal., Case No. CV 12-03756-LHK; *Dahlgren v. JPMorgan Chase Bank, N.A.*, U.S. District Court, S.D. Cal., Case No. 12-CV-2361-GPC. There is also an ongoing risk that real estate professionals who provided advice concerning the legal implications of a short sale will be sued by borrowers who entered into these transactions without understanding the legal ramification of the transactions. *See* Assembly Committee on Judiciary, hearing dated June 29, 2010, 4 (finding that clarity regarding liability for deficiencies following short sales is needed to address potential litigation against real estate professionals who may not have warned clients about the risk of ongoing liability following short sales). The Court should take this opportunity to provide the state and federal courts with guidance on whether and how sections 580b and 726 apply to short sales.

CONCLUSION

Because the question of whether a borrower who participated in short sales remains personally liable for the deficiency on the loan impacts hundreds of thousands of borrowers, and because there are currently conflicts within the case law about whether and when such personal liability can arise, the Court should grant review.

DATED: September 3, 2013.

Respectfully,

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By _____
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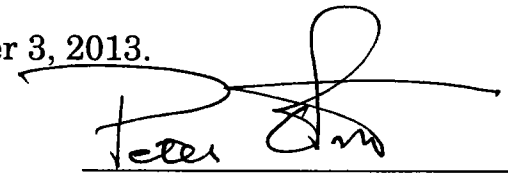
CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.504(d)(1)

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used, I certify that the attached Petition For Review contains 5,173 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: September 3, 2013.



PETER OBSTLER

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Filed 7/23/13

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CAROL COKER, Plaintiff and Appellant, v. JP MORGAN CHASE BANK, N.A., et al., Defendants and Respondents.	D061720 (Super. Ct. No. 37-2011-00087958-CU-MC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Luis R. Vargas, Judge. Reversed and remanded with directions.

Stilwell & Associates and Andrew R. Stilwell for Plaintiff and Appellant.

AlvaradoSmith, John M. Sorich, S. Christopher Yoo and Jenny L. Merris for Defendants and Respondents.

Housing and Economic Rights Advocates, Elizabeth S. Letcher; National Housing Law Project and Kent Qian as Amici Curiae on behalf of Plaintiff and Appellant.

In this appeal we are asked to determine a question of first impression. Do the anti-deficiency protections in Code of Civil Procedure[1] section 580b apply to a borrower after she, with the approval of her lender, sells her residence to a third party for a price that is less than the outstanding balance owed the lender on the borrower's mortgage loan, which was obtained to purchase the residence? We conclude that section 580b's protections do apply in this situation.

Here, we are faced with an all too familiar and unfortunate fact pattern in the wake of the collapse of the residential real estate market in 2008. A borrower obtained a mortgage loan to buy a house. The loan was secured by a deed of trust recorded against the residence. After property values fell and the economy declined, the borrower was no longer able to make payments on her loan, and the mortgage lender began the nonjudicial foreclosure process. To avoid foreclosure, the borrower agreed to sell her house to a third party. However, the sale price was less than the amount the borrower owed on her loan. The mortgage lender agreed to the sale, but, as a condition of approval, stated that the borrower would be responsible for any deficiency, i.e., the difference between the outstanding balance on the loan and the money received by the lender after the sale to the third party.

After the sale, the mortgage lender pursued the borrower for the deficiency. In response, the borrower filed a complaint for declaratory relief seeking a judicial declaration, among other things, that section 580b prohibits the lender from obtaining a

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1 Statutory references are to the Code of Civil Procedure unless otherwise specified.

deficiency judgment after the sale. The mortgage lender demurred to the complaint, and the superior court sustained the demurrer without leave to amend finding section 580b applies only after a foreclosure. The court subsequently entered judgment dismissing the borrower's complaint with prejudice.

The borrower appeals, arguing that the court incorrectly interpreted section 580b in finding that it does not prevent a lender from seeking a deficiency judgment after a sale of the property to a third party. We agree and thus reverse the judgment and remand this matter to the superior court with directions.

FACTUAL[2] AND PROCEDURAL BACKGROUND

Carol Coker was the owner of certain real property located at 2732 Second Avenue, #D-3, San Diego, California. To purchase the property, she obtained a $452,000 loan memorialized by a promissory note. The note was secured by a deed of trust recorded against the property.

The original lender was Valley Vista Mortgage Corporation, a company that went defunct. Chase Home Finance was the successor in interest to Valley Vista, and the alter ego, subsidiary, successor in interest, or a division of JP Morgan Chase Bank, N.A. (Chase Bank).

Coker stopped paying on the loan and a notice of default and election to sell under the deed of trust was recorded. Coker subsequently negotiated a sale of the property to a

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2 Because we are reviewing a judgment of dismissal following an order sustaining a demurrer, we assume the facts alleged in the first amended complaint are true if they are not contrary to law or to a fact of which we may take judicial notice. (See *Terminals Equipment Co. v. City and County of San Francisco* (1990) 221 Cal.App.3d 234, 238.)

third party, but the sale price was less than the outstanding balance under the loan. Thus, Coker asked Chase Bank to agree to the sale.

Chase Bank approved the sale subject to several conditions, one of which stated that the amount of the sale proceeds paid to Chase Bank was for the release of Chase Bank's security interest only, and Coker was still responsible for any deficiency balance remaining on the loan after application of the proceeds received by Chase Bank.

The sale closed and Chase Bank received the agreed upon proceeds from the sale. A grant deed was recorded evidencing the transfer of the property from Coker to the buyer. In addition, Chase Bank executed and recorded a substitution of trustee and full reconveyance of Coker's deed of trust.

After the sale closed, Allied International Credit, Inc., on behalf of Chase Bank, sent Coker a collection letter demanding Coker pay $116,686.89 based on the unsatisfied portion of the loan. In response, Coker filed a complaint for declaratory relief, which she later amended. The first amended complaint listed three causes of action for declaratory relief. These causes of action alleged sections 580b and 580e as well as the common law prohibited Chase Bank from collecting a deficiency based on the loan.

Chase Bank demurred to the first amended complaint. The superior court sustained the demurrer without leave to amend, finding: (1) section 580b only applied after a property was sold by judicial or nonjudicial foreclosure; (2) section 580e was not applicable because it did not apply retroactively; and (3) there was no common law anti-deficiency protections. The court subsequently entered judgment, dismissing the first amended complaint with prejudice as to Chase Bank.

Coker timely appealed.

DISCUSSION

I

STANDARD OF REVIEW

" 'On appeal from [a judgment] of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.' " (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) In reviewing the complaint, "we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) "A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.)

II

COKER'S ASSERTIONS

Coker asserts the superior court erred in sustaining the demurrer without leave to amend because: (1) a demurrer is inappropriate for declaratory relief actions; (2) section 580b does not require a foreclosure; (3) section 580e does not have to be applied retroactively; and (4) she did or could have adequately pled a claim for estoppel.

Here, we focus on Coker's section 580b argument. Coker maintains section 580b does not require a foreclosure and its anti-deficiency protection applies to a sale like the

one at issue here. Chase Bank disagrees, contending section 580b only applies after a foreclosure. In making its argument, Chase Bank relies on the text of both sections 580b and 580d. As we explain below, we conclude that section 580b applies to any loan used to purchase residential real property (purchase money loan) regardless of the mode of sale. As such, section 580b's anti-deficiency protections prohibit a deficiency judgment following any sale of the subject real property. Because we conclude the superior court incorrectly interpreted section 580b and sustained the demurrer in error, we do not reach any of the other issues Coker raises.

III

FORECLOSURES, SHORT SALES, AND DEFICIENCY JUDGMENTS

California recognizes two types of foreclosure. The first and more common is a nonjudicial foreclosure. "In a nonjudicial foreclosure, also known as a 'trustee's sale,' the trustee exercises the power of sale given by the deed of trust." (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1236.) "Nonjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, '[n]either appraisal nor judicial determination of fair value is required,' and the debtor has no postsale right of redemption." (*Ibid.*) The recording of a notice of default begins the nonjudicial foreclosure process, which concludes with the trustee's sale. (See Civ. Code, §§ 2924, subd. (a)(1); 2924g.) The creditor, however, may not seek a deficiency judgment following the trustee's sale. (See § 580b; *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 43-44 (*Roseleaf*).) This prohibition exists even if the loan was not a purchase money loan. (See § 580d.)

A judicial foreclosure requires the foreclosing party to file a lawsuit. In that action, the plaintiff must establish the subject loan is in default and the amount of default. (*Arabia v. BAC Home Loans Servicing, L.P.* (2012) 208 Cal.App.4th 462, 470.) While a judicial foreclosure typically is more costly and time consuming than a nonjudicial foreclosure and the borrower retains the right of redemption, the plaintiff may seek a deficiency judgment in certain circumstances. (*Id.* at p. 471.) "The amount of the deficiency judgment will be the difference between the fair market value of the property at the time of the foreclosure sale (as determined by the court) and the amount of indebtedness." (*Ibid.*) Nevertheless, the plaintiff may not recover a deficiency judgment after judicially foreclosing on a purchase money loan. (See §§ 580b, subd. (a)(3); 726, subd. (b).)

Thus, section 580b prohibits a deficiency judgment following a foreclosure on a purchase money loan. (See *Budget Realty, Inc. v. Hunter* (1984) 157 Cal.App.3d 511, 513 (*Budget Realty*).) Section 580d further extends this anti-deficiency protection to include any loan secured by a deed of trust recorded against residential real property after a nonjudicial foreclosure. (*National Enterprises, Inc. v. Woods* (2001) 94 Cal.App.4th 1217, 1226.) However, here, it is undisputed that there was no foreclosure, either judicial or nonjudicial. Instead, Coker sold the property to a third party, with Chase Bank's consent, for less than what Coker owed on the loan. This is what is commonly known as a "short sale" because the sale price is less than the balance of the outstanding debt secured by the deed of trust. (See 1 Bernhardt, Mortgages, Deeds of Trust, and Foreclosure Litigation (Cont. Ed. Bar 4th ed. 2011) Debtor Strategies, § 7.21A, p. 532.)

In California, short sales are becoming increasingly more common, increasing from a few thousand in 2008 to approximately 90,000 in 2009. (See Com. on Judiciary, Analysis on Sen. Bill 931 (2009-2010 Reg. Sess.) as amended March 25, 2010, p. 1.) Because short sales have only recently become prevalent in California, it is not surprising that there is no reported California case determining if section 580b's anti-deficiency protections extend to a short sale involving real property secured by a deed of trust based on a purchase money loan. We therefore must answer this novel question.

IV

SECTION 580B

A. Statutory Interpretation

In construing statutes, we determine and effectuate legislative intent. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007; *People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30, 40.) To ascertain intent, we look first to the words of the statutes. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387; *Woodhead, supra*, at p. 1007.) "Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible." (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844.)

B. The Interpretation of Section 580b

Section 580b is part of a collection of anti-deficiency statutes created by the Legislature during the Great Depression. Section 580b states in relevant part: "No deficiency judgment shall lie in any event . . . [¶] [a]fter a sale of real property . . . for failure of the purchaser to complete his or her contract of sale. . . . [¶] . . . [¶] [u]nder a

deed of trust or mortgage on a dwelling . . . given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling." It was amended in 1963 to add, among other things, a clause extending section 580b to the kind of real property at issue in this case, namely "a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling, occupied entirely or in part by the purchaser." (See *Barash v. Wood* (1969) 3 Cal.App.3d 248, 251; Stats. 1963, ch. 2158, § 1, p. 4500.)

Section 580b addresses purchase money loans and establishes that they are non-recourse loans under California law. "In a nonrecourse loan . . . , the borrower has no personal liability and the lender's sole recourse is against the security for the obligation." (*Aozora Bank, Ltd. v. 1333 North California Boulevard* (2004) 119 Cal.App.4th 1291, 1295.) "Section 580b prohibits a deficiency judgment after any sale of real property under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price. Thus in the event of a default in payment under a purchase money debt owed to the vendor and secured by the property purchased, the vendor can only look to the security for the recovery of the debt." (*Budget Realty, supra*, 157 Cal.App.3d at p. 513, fn. omitted.)

In interpreting section 580b, we recognize that it, like other components of the anti-deficiency statutes, "has been liberally construed to effectuate the specific legislative purpose behind it. . . . '[T]he courts have exhibited a very hospitable attitude toward the legislative policy underlying the anti-deficiency legislation and have given it a broad and

liberal construction that often goes beyond the narrow bounds of the statutory language.' " (*Prunty v. Bank of America* (1974) 37 Cal.App.3d 430, 436.) Indeed, our high court has consistently rejected any interpretations that undermine the purpose of the statute. (See e.g., *DeBerard Properties v. Lim* (1999) 20 Cal.4th 659, 663 (*DeBerard*) [rejecting interpretation that would allow creditor to "circumvent" section 580b and thus "flout" its "purpose"].)

The Legislature passed section 580b for "two reasons": (1) to "stabilize[] purchase money secured land sales [prices] by [preventing] overvaluing the property"; and (2) ensure "purchasers as a class are harmed less than they might otherwise be during a time of economic decline" because "if property values drop . . . , the purchaser's loss is limited to the land that he or she used as security in the transaction." (*DeBerard*, *supra*, 20 Cal.4th at p. 663.)

These two public policy goals are achieved by shifting the risk of falling property values to the lender. As our Supreme Court explained: "Section 580b places the risk of inadequate security on the purchase money mortgagee. A vendor is thus discouraged from overvaluing the security. Precarious land promotion schemes are discouraged, for the security value of the land gives purchasers a clue as to its true market value. [Citation.] If inadequacy of the security results, not from overvaluing, but from a decline in property values during a general or local depression, section 580b prevents the aggravation of the downturn that would result if defaulting purchasers were burdened with large personal liability. Section 580b thus serves as a stabilizing factor in land sales." (*Roseleaf*, *supra*, 59 Cal.2d at p. 42.)

With the text and purpose of section 580b in mind, we see nothing in section 580b that leads us to believe it only applies after a foreclosure sale as Chase Bank urges. Section 580b's plain language does not limit the mode of sale: "No deficiency judgment shall lie in any event . . . after a sale of real property." (§ 580b.) There is no language modifying the term "sale." Moreover, the use of the phrase "in any event" further indicates that the Legislature intended section 580b to apply to all sales. Put differently, section 580b does not address a specific mode of sale. Instead, it focuses on a particular type of loan: the purchase money loan. (See *Prunty v. Bank of America*, *supra*, 37 Cal.App.3d at p. 435; *Budget Realty, supra*, 157 Cal.App.3d at p. 513; § 580b.) The plain language of section 580b therefore supports an interpretation that its protections apply after any sale, not just a foreclosure.

While no California court has specifically addressed whether section 580b applies to a short sale involving a purchase money loan, courts have consistently held that a foreclosure is not a prerequisite to trigger section 580b's protections. (See *Frangipani v. Boeker* (1998) 64 Cal.App.4th 860, 862-865 [holding that § 580b barred beneficiary of "junior purchase money trust deed" from collecting deficiency where property was "not foreclosed" because beneficiary "cancel[ed] the notice of foreclosure"]; *Venable v. Harmon* (1965) 233 Cal.App.2d 297, 302 [holding that § 580b applied to prevent a deficiency judgment after the defendants tendered the property to the plaintiffs and "the fact that there has not been a prior sale is of no moment"].)

Our interpretation that section 580b applies to all sales of property encumbered by a deed of trust securing a purchase money loan is further buttressed by California's

newest anti-deficiency statute: section 580e.[3] Section 580e bars deficiencies where there is 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 . . . ." (§ 580e, subds. (a)(1).)[4] Section 580e expands the anti-deficiency protection found in section 580b by prohibiting a deficiency judgment arising out of a short sale approved by the creditor of any mortgage loan, not just purchase money loans. Unlike section 580b, however, section 580e only applies to a specific mode of sale: the short sale. (See § 580e.)

Moreover, the legislative history of section 580e (introduced as Senate Bill No. 931) shows the Legislature knew section 580b applied to short sales. For example, the section of the Senate Floor Analyses devoted to "[e]xisting law" states that section 580b "provide[s] protection to a purchase money note that becomes the subject of a . . . short sale." (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business of Sen. Bill No. 931 (2009-2010 Reg. Sess.) as amended June 1, 2010, p. 2.)

In addition, the legislative history of section 580e reveals that it was enacted to extend anti-deficiency protections beyond the purchase money loans covered by section 580b to include nonpurchase money loans. As the Assembly Floor Analysis expressly

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3 The Legislature passed section 580e in 2010 and amended it in 2011. (See Stats. 2010, ch. 701 (Sen. Bill No. 931) § 1, p. 4069; Stats. 2011, ch. 82 (Sen. Bill No. 458) § 1, pp. 1954-1955.)

4 Section 580e also has several other provisions not relevant here.

states: "According to the author . . . [t]he purpose of this proposed legislation is primarily to protect distressed homeowners who have non-purchase money recourse loans on residential property. . . ." (Assem. Floor Analysis, 3d reading of Sen. Bill No. 931 (2009-2010 Reg. Sess.) as amended June 1, 2010 (Assem. Floor Analysis), p. 2.) The Legislature further made clear that Senate Bill No. 931 "seeks to clear up any legal confusion between purchase money and non-purchase money loans in regards to short sales . . . ." (Assem. Floor Analysis, *supra*, p. 3.)

We are not persuaded by Chase Bank's argument that section 580d[5] somehow supports its contention that section 580b only applies after a foreclosure. The phrase "in any event after a sale" in section 580b stands in stark contrast to section 580d, which applies only where the real property "has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust." (See § 580d; *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 237 [section 580d "precludes a judgment for any loan balance left unpaid after the lender's nonjudicial foreclosure under a power of sale in a deed of trust . . . on real property."].) Put differently, section 580d clearly states that it applies only after a trustee's sale, but section 580b contains no similar limiting language.

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5 Section 580d provides in relevant part: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter 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."

In summary, we conclude the plain language of section 580b, its purpose (as consistently determined by California courts), and the language of other anti-deficiency statutes makes clear that section 580b applies to the short sale here.

C. The Security First Rule

In reply to Housing and Economic Rights Advocates and National Housing Law Project's amicus curiae brief,[6] Chase Bank argues that section 580b does not apply when a borrower acquiesces in a lender's relinquishment of its security interest.[7] In other words, if a borrower waives the "security first rule" of section 726, section 580b is not applicable.

Section 726 and the statutory scheme of which it is part require a secured creditor to proceed against the security before enforcing the underlying debt. (*Walker v. Community Bank* (1974) 10 Cal.3d 729, 733-734.) This security first rule "is hornbook

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6 Housing and Economic Rights Advocates and National Housing Law Project requested this court to take judicial notice of Chase Bank's petition for a writ of mandate in *JP Morgan Chase Bank, N.A. v. Superior Court* (Mar. 20, 2013, A137471). They request judicial notice of this petition because Chase Bank admits the interpretation of section 580b is of "great importance to California's loan mortgage lenders, investors, and borrowers." We are aware of the importance of this issue without reading Chase Bank's petition for writ of mandate in an unrelated case that was denied by our colleagues in the First District. Housing and Economic Rights Advocates and National Housing Law Project also request we take judicial notice of portions of the legislative history of sections 580b and 580e. We can consider the legislative history of statutes without taking judicial notice of that legislative history. (Cf. *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) We therefore deny the request to take judicial notice.

7 Chase Bank did not make any such argument in its respondent's brief. Only after the amicus brief attributed this argument to Chase Bank did Chase Bank explain its position in reply.

law in California and warrants no extended discussion." (*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 999.)

Relying on *Scalese v. Wong* (2000) 84 Cal.App.4th 863 (*Scalese*), Chase Bank asserts Coker was required to invoke the security first rule of section 726 and had to insist that Chase Bank foreclose on her home before the protections of section 580b applied. In *Scalese*, the appellants purchased a five-unit apartment building (apartment) and assumed a note and a deed of trust securing that note. The note was for a purchase money loan. (*Id.* at pp. 865-866.) The appellants made payments on the note, but then wanted to pay the note off early. The respondent would not accept a pay off and the appellants refused to make monthly payments. Ultimately, the respondents brought suit for specific performance and judicial foreclosure. In their answer, the appellants did not raise an affirmative defense under section 726. (*Id.* at pp. 866-867.)

The trial court found that the intent of the original parties to the note was that there was no right to prepayment and the appellants were bound by that intent. Next, the court required the respondent to select between its remedies, either to have a judgment for damages under the cause of action for specific performance or a judicial foreclosure. (*Scalese*, *supra*, 84 Cal.App.4th at pp. 866-867.) The respondent opted for specific performance. The appellants did not object, nor did they demand that respondent be forced to exhaust the security under section 726. The court awarded judgment in favor of the respondent for all accumulated monthly installments, plus interest and attorney fees and costs. (*Scalese*, *supra*, at p. 867.)

On appeal, the appellants argued that the respondent's sole remedy was under section 580b and the award for damages was incorrect. The court disagreed, noting that the appellants could have raised section 726 as a defense many times (requiring the respondent to foreclose), but neglected to do so. The court further determined that the respondent waived its right to have the apartment serve as security for the note while the appellants gave up their right to have the security exhausted before becoming personally liable for any shortfall. Under the facts presented, the court concluded section 580b "never [came] into play." (*Scalese*, *supra*, 84 Cal.App.4th at p. 870.) The court emphasized that the results were equitable and its affirmance of the trial court placed the parties where they would have been absent the appellants' breach of contract. (*Id.* at pp. 870-871.)

In arguing *Scalese*, *supra*, 84 Cal.App.4th 863 is applicable here, Chase Bank overlooks several critical distinctions. *Scalese* did not involve a short sale. Instead, the Court of Appeal properly characterized the dispute in *Scalese* as a breach of contract caused by the parties' disagreement regarding whether the note allowed an early pay off. (*Id.* at pp. 870-871.) Because the appellants refused to pay on the note, the respondent brought suit seeking a judicial foreclosure, or in the alternative, specific performance. Although the appellants could have invoked the security first rule, they neglected to do so at any time during the litigation. The Court of Appeal therefore affirmed the trial court's award of damages based on the missed payments under the note.

In contrast, there was no analogous judicial process here. Chase Bank was pursuing a nonjudicial foreclosure when Coker approached the bank about the possibility

of a short sale. After the short sale was completed, Coker brought suit to prevent Chase Bank for recovering the deficiency. There was no similar deficiency at issue in *Scalese*, *supra*, 84 Cal.App.4th 863. Indeed, the damages awarded to the respondent could not be characterized as a deficiency.

In addition, the appellants retained ownership of the apartment in *Scalese*, *supra*, 84 Cal.App.4th 863. Thus, if the Court of Appeal determined that section 580b applied, the appellants would have received a windfall. They would have owned the apartment free and clear without any liability on the note. In holding section 580b was not applicable, the court was reaching an equitable result where the appellants owned the apartment but were personally liable for the missed payments on the note, and the respondent had given up its security interest in the apartment. (*Scalese*, *supra*, 84 Cal.App.4th at pp. 870-871.) Here, Coker no longer owns her residence having sold the property to a third party with Chase Bank receiving the proceeds of that sale.

Chase Bank also overemphasizes the importance of section 726 in connection with section 580b beyond the facts in *Scalese*, *supra*, 84 Cal.App.4th 863. Section 580b only applies after a sale of the subject property. (See § 580b.) In *Scalese*, the only possible sale would have occurred if the respondent proceeded with the judicial foreclosure. If the appellants had invoked section 726, they could have forced a sale of the property and the protections of section 580b would have been triggered. As such, the appellants' waiver of section 726 became critical to the court's analysis of whether section 580b protections applied. Under the facts in *Scalese*, section 726 was the only mechanism by which a sale could occur. By not raising the affirmative defense of section 726, the appellants assured

there would be no sale. Without a sale, section 580b's protections did not apply in *Scalese*. Here, there is no such impediment to the application of section 580b because a short sale occurred.[8]

Finally, we are aware that Chase Bank's reliance on *Scalese*, *supra*, 84 Cal.App.4th 863 is simply another variant of its argument that section 580b only applies after a foreclosure. We therefore reject Chase Bank's argument for the reasons discussed in section IVB above.

D. Waiver

Chase Bank additionally contends that section 580b does not apply because Chase Bank required Coker agree to be liable for any deficiency after the short sale as a condition of approving the sale. However, because we determine that section 580b applies to the short sale at issue here, the parties could not agree to waive the anti-deficiency protection. (See *Lawler v. Jacobs* (2000) 83 Cal.App.4th 723, 736-737 ["Appellants' waiver of antideficiency protection and coterminous promise to remain personally liable on the note are void as contrary to [section] 580b and public policy."]; *Palm v. Schilling* (1988) 199 Cal.App.3d 63, 76 ["[T]here never can be a 'subsequent' contractual waiver of section 580b."].)

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8 Similarly, Chase Bank's reliance on *In re Prestige Limited Partnership-Concord* (2000) 234 F.3d 1108 is misplaced. In that case, the Ninth Circuit stated that in a "situation, where the security has been lost due to a violation of [section] 726 and, consequently, there has not been and can never be a sale of the property, [section] 580b does not apply." (*Prestige*, *supra*, at p. 1117.) Here, it is undisputed that a sale occurred and the loan that existed at the time of the sale was a purchase money loan.

E. Conclusion

"The explicit language of section 580b brooks no interpretation other than that deficiency judgments are prohibited by a purchase money mortgagee so long as a purchase money mortgage or deed of trust is in effect on the original real property." (*Palm v. Schilling*, *supra*, 199 Cal.App.3d at p. 76.) There is no dispute that the loan in place at the time of the short sale was a purchase money loan. Section 580b applies after a sale of the property, and there is no requirement in the statute that a foreclosure must occur to trigger its protections. Further, those protections cannot be waived. (See *Lawler v. Jacobs*, *supra*, 83 Cal.App.4th at pp. 736-737.)

Simply, section 580b applies to the short sale that the lender approved here.[9] As such, the superior court erred when it sustained Chase Bank's demurrer without leave to amend.

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9 Although we have used the term "lender" throughout this opinion to refer to the entity that owns the security interest at issue (here, the promissory note secured by the deed of trust) and has the ultimate authority to consent to the short sale, we are mindful that a variety of terms might be used to describe the appropriate entity (e.g., owner of the promissory note, investor, trustee of a trust comprised of pooled or securitized loans). Our holding here applies equally to any entity that has the authority to approve a short sale of a "dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling, occupied entirely or in part by the purchaser."

DISPOSITION

The judgment is reversed. This matter is remanded to the superior court with instructions to enter an order overruling Chase Bank's demurrer to the first amended complaint. Coker is to recover her costs of appeal.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.

PROOF OF SERVICE

I am over eighteen years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero Center, 10th Floor, San Francisco, CA 94111-4024.

On September 3, 2013, I served the following document(s):

PETITION FOR REVIEW

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Dated: September 3, 2013

Joanne Caruso