

No. S213137  
(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**

SUPREME COURT  
**FILED**

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CAROL COKER,  
*Plaintiff and Appellant,*

JUL 24 2014

Frank A. McGuire Clerk  

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Deputy

v.

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

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

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**MOTION FOR JUDICIAL NOTICE;  
SUPPORTING MEMORANDUM; DECLARATION  
OF GINAMARIE CAYA**

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*Attorneys for Defendant and Respondent  
JPMorgan Chase Bank, N.A.*

### **MOTION FOR JUDICIAL NOTICE**

JPMorgan Chase Bank, N.A., for itself and as a successor in interest to Chase Home Financial LLC (“Chase”) hereby moves and requests the Court to take judicial notice under Evidence Code Section 459 of the following documents attached hereto as Exhibits 1-5, respectively:

Exhibit 1: Cal. Sen. Comm. on Banking, Finance, and Insurance, Analysis of S.B. 931 (Apr. 7, 2010);

Exhibit 2: Cal. Sen. Comm. on Judiciary, Bill analysis worksheet for S.B. 931 (2010);

Exhibit 3: Cal. Assem. Comm. on Banking and Finance, Analysis of S.B. 931 (June 21, 2010);

Exhibit 4: Cal. Assem. Judiciary Comm., Bill analysis worksheet for S.B. 931 (2010);

Exhibit 5: S.B. 931, Legislative Counsel’s Digest (as amended in Assembly June 1, 2010).

### **MEMORANDUM OF POINTS AND AUTHORITIES**

A reviewing court may take judicial notice of matters properly noticed by the trial court. Evid. Code §459. No request for judicial notice of documents containing the legislative history, Exhibits 1-5, was made in the trial court. But Exhibits 1-5 are properly subject to judicial notice.

Evidence Code Section 452(c) states that judicial notice may be taken of “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” Subsection (h) allows for judicial notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” Under these sections, a court may take judicial notice of the legislative history of a statute. *See Kaufman & Broad Cmty., Inc. v. Performance Plastering, Inc.*, 133 Cal.

App 4th 26 (2005) (discussing judicial notice of legislative history).<sup>1</sup>

The five exhibits attached to this Motion are all properly subject to judicial notice and each is relevant to an issue in this case. Specifically, these documents are relevant to determine legislative intent regarding the application of Civil Procedure Code Section 580b to short sales. The documents are part of the legislative history of Civil Procedure Code Section 580e, a section that addresses the issue raised by Coker in this case, and are therefore judicially noticeable under Evidence Code Sections 452(c) and (h). *Pearl v. Workers' Comp. Appeals Bd.*, 26 Cal. 4th 189, 198 n.4 (2001) (granting judicial notice of legislative history materials); see also *In re J.W.*, 29 Cal. 4th 200, 211-12 (2002) (noticing committee analysis); *People v. Connor*, 115 Cal. App. 4th 669, 681 n.3 (2004) (committee bill worksheet and documents from legislative committee file).

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<sup>1</sup> These exhibits and the Declaration of Lisa Hampton of the Legislative Intent and Research LLC are attached to Declaration of Ginamarie Caya, attached to this motion. Ms. Hampton's declaration is sufficient to authenticate the documents. *People v. Connor*, 115 Cal. App. 4th 669, 681 n.3 (2004); *Whaley v. Sony Computer Am., Inc.*, 121 Cal. App. 4th 479, 487 (2004).

**CONCLUSION**

For the foregoing reasons, Chase respectfully requests this Court take judicial notice of Exhibits 1-5.

DATED: July 24, 2014.

Respectfully,

ARNOLD & PORTER LLP  
GINAMARIE CAYA

By: *GINAMARIE CAYA*  
GINAMARIE/CAYA

*Attorneys for Defendant and Appellant  
JPMorgan Chase Bank, N.A.*

**DECLARATION OF GINAMARIE CAYA IN SUPPORT OF  
MOTION FOR JUDICIAL NOTICE**

I, Ginamarie Caya, declare as follows:

1. I am an attorney licensed to practice law in the State of California. I am an associate at the law firm of Arnold and Porter, LLP, counsel for JPMorgan Chase Bank, N.A.

2. I have personal knowledge of the contents of this declaration and may competently testify thereto.

3. On or around December 1, 2013, I directed Legislative Research & Intent LLC to obtain a Legislative History Report regarding Code of Civil Procedure Section 580e as added by Statutes of 2010, Chapter 701 §1, S.B. 931 - Ducheny. On December 11, 2013, the Legislative Research & Intent LLC provided me with Historical Documents relating to that statute.

4. A true and correct copy of Legislative Research and Intent LLC's employee Lisa Hampton's declaration authenticating the Exhibits 1-5 is attached as Attachment A to this declaration.

a. A true and correct copy of Cal. Sen. Comm. on Banking, Finance, and Insurance, Analysis of S.B. 931 (Apr. 7, 2010) is attached to this declaration as Exhibit 1.

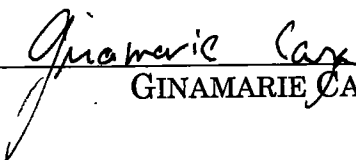
b. A true and correct copy of Cal. Sen. Comm. on Judiciary, Bill analysis worksheet for S.B. 931 (2010) is attached to this declaration as Exhibit 2.

c. A true and correct copy of Cal. Assem. Comm. on Banking and Finance, Analysis of S.B. 931 (June 21, 2010) is attached to this declaration as Exhibit 3.

d. A true and correct copy of Cal. Assem. Judiciary Comm., Bill analysis worksheet for S.B. 931 (2010) is attached to this declaration as Exhibit 4.

e. A true and correct copy of S.B. 931, Legislative Counsel's Digest (as amended in Assem. June 1, 2010) is attached to this declaration as Exhibit 5.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 24th day of July 2014.

  
GINAMARIE CAYA

34582657

**ATTACHMENT A**



## Legislative Research & Intent LLC

1107 9th Street, Suite 220, Sacramento, CA 95814  
(800) 530.7613 · (916) 442.7660 · fax (916) 442.1529  
www.lrihistory.com · intent@lrihistory.com

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### *Authentication of the Records and Table of Contents*

Legislative History Research Report Regarding:  
CALIFORNIA CODE OF CIVIL PROCEDURE § 580e  
*As Added By Statutes of 2010, Chapter 701, § 1, SB 931 – Ducheny*

I, Lisa Hampton, declare that this report includes:

- *Historical documents relating to the above legislation.* These documents were obtained by the staff of Legislative Research & Intent LLC and are true and correct copies of the originals obtained from the designated official, public sources in California unless another source is indicated, with the following exceptions: In some cases, pages may have been reduced in size to fit an 8 ½" x 11" sized paper. Or, for readability purposes, pages may have been enlarged or cleansed of black marks or spots. Lastly, paging and relevant identification have been inserted.

Since 1983 LRI has specialized in the historical research surrounding the adoption, amendment and/or repeal of California statutes, regulations and constitutional provisions pursuant to California Code of Civil Procedure § 1859 which states in pertinent part: "In the construction of a statute the intention of the Legislature ... is to be pursued, if possible ...." Our research and expert witness services have assisted the courts in understanding and applying the underlying purpose of enactments in countless cases, such as *Redlands Community Hospital v. New England Mutual Life Insurance Co*, 23 Cal. App.4th 899 at 906 (1994). LRI also provides similar research for other states and at the federal level. (Formerly Legislative Research Institute and Legislative Research, Incorporated.)

- *A table of contents itemizing the documents.* This table of contents cites the sources of the documents.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that I could and would so testify in a court of law if called to be a witness.

Executed December 11, 2013, in Sacramento, California.

Lisa Hampton, Research Director



**EXHIBIT 1**

SENATE COMMITTEE ON BANKING, FINANCE,  
AND INSURANCE  
Senator Ronald Calderon, Chair

SB 931 (Ducheny)

Hearing Date: April 7, 2010

As Amended: March 25, 2010

Fiscal: No

Urgency: No

**SUMMARY** Would require the holder of a first mortgage or deed of trust that is secured by residential real property to accept, as full payment, the proceeds of a short sale to which it agrees in writing, and would obligate that note holder to fully discharge the remaining amount of the borrower's indebtedness on the deed of trust or mortgage following the sale.

**DIGEST**

Existing law

1. Prohibits a lender from using pursuing a borrower for a deficiency judgment on a purchase money mortgage or deed of trust that is secured by single-family residential real property (Code of Civil Procedure 580b). Note: There is some disagreement among legal professionals about the circumstances under which the purchase money protection provided by CCP 580b applies. However, it is generally believed to provide protection to a purchase money note that becomes the subject of a judicial or nonjudicial foreclosure action or a short sale;
2. Prohibits a lender from pursuing a borrower for a deficiency judgment on a note on which that lender exercised its power of sale through the nonjudicial foreclosure process (Code of Civil Procedure 580d). Note: There is some disagreement among legal professionals about whether this statute additionally applies to notes that become the subject of a judicial foreclosure;
3. Defines a deficiency judgment as a personal judgment against a debtor for a recovery of secured debt, measured by the difference between the debt and the net proceeds received from a foreclosure sale (case law);
4. Defines waste, in the context in which it is used in this bill, as any unlawful act or omission, by the tenant or other person in possession of land, that causes a permanent injury to the inheritance, by injuriously affecting the market value of the property. There must be a permanent diminishment or depreciation in the value of the property for waste to have occurred (case law);
5. Prohibits any person whose interest is subject to the lien of a mortgage from performing any act that will substantially impair the mortgagee's security (Civil Code Section 2929).

This bill

1. Would provide that no judgment shall be rendered for any deficiency under a note secured by a first deed of trust or first mortgage for a dwelling of not more than four units, in any case in which the trustor or mortgagor (i.e., the borrower) sells the dwelling for less than the remaining amount of the indebtedness due at the time of sale, with the written consent of the holder of the first deed of trust or first mortgage;
2. Would provide that written consent of the holder of the first deed of trust or first mortgage to that short sale would obligate that holder to accept the sale proceeds as full payment, and to fully discharge the remaining amount of the indebtedness on the first mortgage or deed of trust;
3. Would expressly *not* limit the ability of the holder of a first deed of trust or first mortgage to seek damages or use existing rights and remedies against the trustor or mortgagor or a third party, if the trustor or mortgagor commits fraud, with respect to the sale of, or waste, with respect to, the real property that secures the first deed of trust or first mortgage.

COMMENTS

1. Purpose of the bill To ensure that a borrower is no worse off financially after a short sale than after a foreclosure.
2. Background A short sale is a real estate transaction in which a lender allows a borrower to sell his or her home for less than the full amount the borrower owes on their mortgage. For example: John owes his mortgage lender \$275,000. John's mortgage lender agrees to let John sell his house for \$225,000, with the understanding that the lender receives all of the proceeds from the house sale. John avoids foreclosure. John's lender loses out on \$50,000 in principal to which it was entitled under the provisions of John's mortgage, but the lender avoids the costs of foreclosure, and has one less bank-owned property on its hands. It is also likely, given the current housing environment, that John's lender nets a greater return through a short sale of the property than the lender would have received, if it had taken back the property through nonjudicial foreclosure and subsequently sold it to a third party.

Short sales have begun to increase in popularity among both lenders and borrowers, since California's mortgage troubles first became apparent in early 2007. According to the California Association of Realtors, there were approximately 90,000 short sales in California during 2009, up from only a few thousand in 2008, and a negligible amount in 2007.

Some of the advantages of short sales are summarized above. One of the other key advantages: negative equity is wiped out. The new property owner is not saddled with a mortgage worth far more than the house; if the new owner even

holds a mortgage (some short sales are paid fully in cash), the size of that mortgage is in line with the fair market value of the property.

However, as short sales have become more popular, lenders have become more creative in what they require from borrowers, as a condition of agreeing to the short sale. 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 (to agree, in other words, to a sort of hybrid short sale, where the lender temporarily agrees to accept less than the amount they are owed on the mortgage, but reserves the right to pursue that borrower for the full amount at some point in the future).

These types of agreements are morally repugnant to some, and are legally questionable in cases where the property being sold secures a purchase-money mortgage. They can also place certain borrowers in the unexpected position of being worse off financially, following a short sale, than they would have been if they had simply walked away from their home and let their lender foreclose. An explanation of the logic and mathematics behind these unexpected scenarios is provided below.

3. How Can A Short Sale Be Worse For A Borrower Than A Foreclosure? A quick primer on recourse loans, nonrecourse loans, and deficiency judgments is necessary to answer this question. Four different scenarios then follow, to demonstrate the operation of existing law and the way in which this bill would interact with existing law.

California Code of Civil Procedure Section 580b and case law provide that original purchase money loans are non-recourse. A non-recourse loan is one on which the borrower is not personally liable. If the borrower defaults on a non-recourse loan, the lender can seize the collateral securing the note, but the lender's recovery is limited to the collateral. If the value of the collateral is insufficient to cover the outstanding loan balance, the difference between the value of the collateral and the unpaid principal balance of the loan becomes a loss for the lender.

Some borrowers (particularly those who purchased homes during the boom years of the early to mid 2000s) took out both a first mortgage and a second mortgage when they purchased their homes. If both loans were taken out at the time of purchase, both are purchase money loans, and both are considered non-recourse.

Refinanced loans are typically recourse in nature (the one exception is a scenario in which the borrower refinances a purchase money loan with the same lender and takes out no additional money, other than money to pay closing costs). Thus, in most cases, if a borrower refinances one or more of their purchase money loans, the refinanced mortgage(s) are considered recourse loans. Recourse loans give the lender the right to pursue a debtor's personal assets, to collect the unpaid principal balance of the loan.

California also has what is known as the "one form of action rule," which is found

in Section 726(a) of the Code of Civil Procedure. The one form of action rule is complex and embodies a variety of related, but distinct rules and principals, all of which have been litigated. However, for purposes of explaining the impact of this bill, the one form of action rule may generally (and simply) be described as follows. Under the one form of action rule, a lender may take only one action to collect on a mortgagè or deed of trust. Thus, if a lender chooses to foreclose, that lender may not pursue the borrower in court to collect the difference between the foreclosure price and the loan amount; the lender's "one form of action" was foreclosure.

<p>Scenario 1 (the problem this bill is attempting to fix): Borrower has first deed of trust for \$300,000 and second deed of trust for \$90,000. <b>Both loans are recourse loans, due to a refinancing.</b></p>	
<p><u>Foreclosure Scenario:</u> Holder of first deed of trust forecloses; holder of second deed of trust takes no action and becomes a sold-out junior lienholder.</p>	<p><u>Short Sale Scenario:</u> Holder of first deed of trust agrees to a short sale for fair market value of \$250,000, but states in its approval letter that it reserves the right to pursue the borrower for the difference between what the property fetches at sale and the outstanding, unpaid principal balance of the loan. Holder of second deed of trust agrees to the short sale (Note: the holder of the second deed of trust must agree to the short sale, before it may go forward).</p>
<p>Impact on the borrower: When the holder of the first deed of trust forecloses, it has no further ability to pursue any deficiency under the one form of action rule. Because the second deed of trust is a recourse loan, the sold out junior lienholder may pursue the borrower for a deficiency judgment of \$90,000.</p>	<p>Impact on the borrower: The holder of the first deed of trust may pursue the borrower for \$50,000 (the difference between the \$300,000 the borrower owes on the note and the \$250,000 the sale generates). Because the second deed of trust is a recourse loan, the sold-out junior lienholder may pursue the borrower for a deficiency judgment of \$90,000</p>
<p>Net result: Borrower has \$90,000 in personal liability.</p>	<p>Net result: Borrower has \$140,000 in personal liability and is worse off financially under a short sale.</p>

<p>Scenario 2 (another example of the problem this bill is trying to fix): Borrower has first deed of trust for \$300,000 and second deed of trust for \$90,000. <b>Both loans are purchase money loans and thus non-recourse.</b></p>	
<p><u>Foreclosure Scenario:</u> Holder of first deed of trust forecloses.</p>	<p><u>Short Sale Scenario:</u> Holder of first deed of trust agrees to a short sale for fair market value of \$250,000, but states in its approval letter that it reserves the right to pursue the borrower for the difference between what the property fetches at sale and the outstanding, unpaid principal balance of the loan.</p>

<p>Scenario 2 (another example of the problem this bill is trying to fix): Borrower has first deed of trust for \$300,000 and second deed of trust for \$90,000. <b>Both loans are purchase money loans and thus non-recourse.</b></p>	
<p>Impact on the borrower: When the holder of the first deed of trust forecloses, it has no further ability to pursue any deficiency under the one form of action rule. The holder of the second deed of trust becomes a sold-out junior lienholder but lacks any recourse against the borrower, because the loan is non-recourse.</p>	<p>Impact on the borrower: The holder of the first deed of trust may attempt to pursue the borrower for \$50,000 (the difference between the \$300,000 the borrower owes on the note and the \$250,000 the sale generates). The question of whether such an action is prohibited by CCP 580b has not yet been litigated, and is thus unresolved. The holder of the second deed of trust agrees to the short sale and becomes a sold-out junior lienholder, but lacks any recourse against the borrower, because the loan is non-recourse.</p>
<p>Net result: Borrower has \$0 in personal liability.</p>	<p>Net result: Borrower may have \$50,000 in personal liability and could be worse off under a short sale.</p>

<p>Scenario 3 (how this bill would work, if enacted): Borrower has first deed of trust for \$300,000 and second deed of trust for \$90,000. <b>Both loans are recourse loans, due to a refinancing.</b></p>	
<p><u>Foreclosure Scenario:</u> Holder of first deed of trust forecloses.</p>	<p><u>Short Sale Scenario:</u> Holder of first deed of trust agrees to a short sale for fair market value of \$250,000 and must accept that value as full payment.</p>
<p>Impact on the borrower: When the holder of the first deed of trust forecloses, it has no further ability to pursue any deficiency under the one form of action rule. The holder of the second deed of trust becomes a sold-out junior lienholder. Because the second deed of trust is a recourse loan, the sold out junior lienholder may pursue the borrower for a deficiency judgment of \$90,000.</p>	<p>Impact on the borrower: When the holder of the first deed of trust agrees in writing to the short sale, it has no further recourse to pursue any deficiency against the borrower. The holder of the second deed of trust becomes a sold-out junior lienholder. Because the second deed of trust is a recourse loan, the sold-out junior lienholder may pursue the borrower for a deficiency judgment of \$90,000.</p>
<p>Net result: Borrower has \$90,000 in personal liability</p>	<p>Net result: Borrower has \$90,000 in personal liability and is not worse off after a short sale.</p>

<p>Scenario 4 (another example of how this bill would work, if enacted): Borrower has first deed of trust for \$300,000. <b>The loan is a recourse loan, due to a refinancing.</b></p>	
<p><u>Foreclosure Scenario:</u> Holder of first deed of trust forecloses.</p>	<p><u>Short Sale Scenario:</u> Holder of first deed of trust agrees to a short sale for fair market value of \$250,000 and must accept that value as full payment.</p>
<p>Impact on the borrower: When the holder of the first deed of trust forecloses, it has</p>	<p>Impact on the borrower: When the holder of the first deed of trust agrees in writing to</p>

Scenario 4 (another example of how this bill would work, if enacted): Borrower has first deed of trust for \$300,000. <b>The loan is a recourse loan, due to a refinancing.</b>	
no further ability to pursue any deficiency under the one form of action rule and CCP 580d.	the short sale, it has no further recourse to pursue any deficiency against the borrower.
Net result: Borrower has \$0 in personal liability.	Net result: Borrower has \$0 in personal liability and is not worse off under a short sale.

4. Support The Housing Opportunities Collaborative is supporting this bill, for the reasons stated above. The Collaborative notes that a short sale appears as "settled debt" on a borrower's credit report and helps a homeowner feel like they took responsibility for their mortgage obligation, rather than simply walking away. Yet, for many homeowners (see scenarios above), a short sale can result in greater personal liability than a foreclosure.

According to the Housing Opportunities Collaborative, many real estate licensees who assist homeowners with short sales are not fully aware of how the various scenarios work, and some short sellers are likely to be surprised in years to come, when collection agencies and attorneys attempt to collect or obtain judgments corresponding to the personal liability the short sellers incurred. The Housing Opportunities Collaborative asserts that short sales prevent the vacancies that often follow foreclosures, keep the real estate market moving, and save banks millions in foreclosure costs and costs associated with REO properties. They also observe that on several occasions, homeowners with non-purchase money loans have been surprised and torn by the financial outcomes that can result from a short sale. After learning of these outcomes, "many decide that a short sale just isn't the smart decision."

5. Opposition None received.
6. Prior and Related Legislation
  - a. SB 1178 (Corbett): Would give certain refinanced loans non-recourse status. Pending on the Senate Floor.

**POSITIONS**

Support

Housing Opportunities Collaborative

Oppose

None received

Consultant: Eileen Newhall (916) 651-4102

**EXHIBIT 2**



SENATE COMMITTEE ON JUDICIARY  
Ellen M. Corbett, Chair

BACKGROUND INFORMATION REQUEST

Please forward the following information to the Committee, Room 2187 in the Capitol, **WITHIN SEVEN (7) CALENDAR DAYS OF RECEIPT** (by e-mail or hand delivery). Use additional pages as necessary and please attach copies of any relevant supplemental or additional background materials. Please call the Committee Assistant at 651-4113 if you have any questions.

Measure: SB 931

Author: Senator Ducheny

Staff person to contact (phone number, cell number and email address):  
Nadia Leal-Carrillo, 916-651-4040, 626-641-0910, nadia.leal@sen.ca.gov.

1. Origin of the bill:

- a. Who is the source of the bill? What person, organization, or governmental entity requested introduction? Please provide contact information.

This is an author sponsored bill. We are working closely with Shanna Welsh, attorney, who brought the issue to our attention. She has been working closely with organizations like the Housing Opportunities Collaborative in San Diego hosting home clinics advising distressed home owners. Shanna can be contacted for additional information or technical question on this bill.

- b. Has a similar bill been introduced in this or any previous legislative session? If so, please identify the bill number and year. None that our office is aware of.

- c. Has there been an interim committee report or informational hearing on the bill or its subject matter? If so, please identify the report or informational hearing and attach any related information.  
N/A

2. Describe in detail existing law on this issue.

Please see the attached fact sheet and supporting memos on the bill.

3. What does your bill do? Please describe in detail.

Please see the attached fact sheet for SB 931.

4. What is the problem or deficiency in current law which this bill seeks to remedy? Please describe in detail.

Please see the attached fact sheet and the two memos on SB 931 prepared by Shanna Welsh.

5. Please summarize any studies, reports, statistics or other evidence showing that the problem exists and that the bill will address the problem.

Please see the attached news articles and short sale statistics.

6. Please identify similar or related federal legislation or statutes and any bills or existing laws you are aware of in other states.

None that our office is aware of.

7. Please identify and describe any relevant state and/or federal court decisions.  
None that our office is aware of.
8. Are the issues addressed by the bill the subject of pending litigation?  
If yes, please indicate the case citation and include relevant documents.  
N/A
9. Please identify parties that may have concerns in opposition to the bill, describe those concerns, and state your response to those concerns. CA Mortgage Association and the CA Bankers Association have concerns with the bill that are being addressed by the following amendment:  
  
"If the trustor or mortgagor commits either fraud with respect to the sale of, or waste with respect to, the real property that secures the first deed of trust or first mortgage, this section shall not limit the ability of the holder of the first deed of trust or first mortgage to seek damages and use existing rights and remedies against the trustor or mortgagor or any third party for fraud or waste."  
  
This language will ensure that existing exemptions covered by case law are preserved under SB 931.  
  
This language will be amended into the bill on March 25, 2010.
10. Please attach copies of letters of support or opposition from any group, organization, or governmental agency who has contacted you either in support or opposition to the bill as soon as possible, but no later than 5 p.m. of the Tuesday one week prior to the hearing.
11. If you plan substantive amendments to this bill prior to the hearing, please explain briefly the substance of the amendments. **PLEASE NOTE COMMITTEE POLICY ON AUTHOR'S AMENDMENTS.**
12. Please list the witnesses you plan to have testify.  
Shanna Welsh, Attorney at Law and California Realtor.

**COMMITTEE POLICY ON AUTHOR'S AMENDMENTS**

**AUTHOR'S AMENDMENTS MUST BE SUBMITTED IN LEGISLATIVE COUNSEL FORM TO THE COMMITTEE ASSISTANT NO LATER THAN 1:00 P.M. OF THE THURSDAY TWO WEEKS PRIOR TO THE SCHEDULED COMMITTEE HEARING.**

**IF THIS DEADLINE IS NOT MET BY THE AUTHOR, YOUR BILL WILL BE PUT OVER TO ALLOW THE COMMITTEE MEMBERS AND THE PUBLIC SUFFICIENT TIME TO REVIEW AN ANALYSIS THAT REFLECTS THE AMENDED VERSION OF THE BILL. THE AUTHOR WILL BE RESPONSIBLE FOR OBTAINING ANY NECESSARY RULE WAIVERS TO HEAR THE BILL AT A SUBSEQUENT HEARING. THANK YOU.**

PLEASE RETURN THIS FORM TO: SENATE COMMITTEE ON JUDICIARY  
Phone (916) 651-4113  
Fax (916) 445-8390  
e-mail to: Roseanne.Moreno@sen.ca.gov

Please send a copy of this completed form and any attachments to the  
Committee's Minority Policy Consultant, Mike Petersen (651-1501;  
mike.petersen@sen.ca.gov).

**EXHIBIT 3**

Date of Hearing: June 21, 2010

ASSEMBLY COMMITTEE ON BANKING AND FINANCE  
Mike Eng, Chair  
SB 931 (Ducheny) – As Amended: June 1, 2010

SENATE VOTE: 31-0

SUBJECT: Mortgages: deficiency judgments

SUMMARY: Provides that in the case of a short sale on residential real property, the holder of the first mortgage or deed of trust shall fully discharge any remaining borrower's indebtedness following the sale when the sale has been agreed to in writing. Additionally, that nothing shall limit the ability of the holder of the first deed of trust or first mortgage to seek damages, or use existing rights or remedies in those cases where the homeowner has committed fraud or waste in connection with the sale of the real property.

EXISTING LAW

- 1) Prohibits a lender from pursuing a borrower for a deficiency judgment on a purchase money mortgage or deed of trust that is secured by single-family residential real property (Code of Civil Procedure 580b). Note: There is some disagreement among legal professionals about the circumstances under which the purchase money protection provided by CCP 580b applies. However, it is generally believed to provide protection to a purchase money note that becomes the subject of a judicial or nonjudicial foreclosure action or a short sale.
- 2) Prohibits a lender from pursuing a borrower for a deficiency judgment on a note on which that lender exercised its power of sale through the nonjudicial foreclosure process (Code of Civil Procedure 580d). Note: There is some disagreement among legal professionals about whether this statute additionally applies to notes that become the subject of a judicial foreclosure.
- 3) Defines a deficiency judgment as a personal judgment against a debtor for a recovery of secured debt, measured by the difference between the debt and the net proceeds received from a foreclosure sale (case law).
- 4) Defines waste, in the context in which it is used in this bill, as any unlawful act or omission, by the tenant or other person in possession of land, which causes a permanent injury to the inheritance, by injuriously affecting the market value of the property. There must be a permanent diminishment or depreciation in the value of the property for waste to have occurred (case law).
- 5) Prohibits any person whose interest is subject to the lien of a mortgage from performing any act that will substantially impair the mortgagee's security.

FISCAL EFFECT: None

COMMENTS:

According to the author:

The purpose of this proposed legislation is primarily to protect distressed homeowners who have non-purchase money recourse loans on residential property (1-4 units), when the fair market value of the subject property is less than the balance of the first deed of trust. The legislation will make sure that these homeowners do not incur a higher dollar amount of liability after a short sale than they would otherwise have after a foreclosure sale. For many homeowners in the group described above, a short sale would result in greater personal liability.

Before proceeding further with the overview of this bill it is necessary to provide some context to this subject by defining some key concepts and terms.

- 1) Short Sale: A transaction in which a lender allows the property securing the loan to be sold for less than the remaining mortgage amount due and accepts the proceeds as full payment of the loan.
- 2) Purchase Money: If the loan securing the property was obtained to purchase the residential property in which all or part of the property is owner occupied, the loan is considered a "purchase money loan."
- 3) Non-recourse loan: A loan in which the borrower is not liable for any outstanding balance if the borrower defaults. Typically, purchase money loans are non-recourse.
- 4) Recourse loan: A loan in which the borrower is liable for any outstanding balance leftover if the borrower defaults. Refinance loans are typically recourse loans, except in the case of where the borrower refinances the purchase money loan with the same lender and takes out no additional money.
- 5) "One form of action rule": Simply stated, this rule provides, under Section 726(a) of the Code of Civil Procedure that a creditor may only choose one action to collect on a mortgage or deed of trust. For example, if the lender forecloses, they may not pursue the borrower in court for the difference between the foreclosure price and the loan amount.

Background.

Foreclosures continue to be an on-going problem in California and across the nation. In April of 2010, almost 28,000 notices of default were filed in California. While this is a decrease of 16% over the previous month, homeowners continue to face difficulties in a weak economy. In many cases a short sale is an option that is better for both the borrower and lender, as foreclosure is rarely a win-win situation for anyone. While federal efforts continue to attempt to mitigate foreclosures through loan modifications, it is accepted logic that not every borrower in trouble would benefit, or be able to afford a loan modification. In these cases, a short sale may be the best option. Even the federal efforts aimed at loan modification acknowledge the role of short sales. The U.S. Treasury Department announced, in March of 2010 the Home Affordable Foreclosure Alternatives Program (HAFA). HAFA provides incentives to borrowers, servicers, and investors who agree to short sale or deed in lieu instead of foreclosures, if a borrower is not

eligible for the Home Affordable Modification Program. HAFA requires that the short sale agreement must include an agreement that once the HAFA short sale is complete that borrowers are released from all further liability under the first mortgage.

However, and in spite of the use of short sales as a loss mitigation strategy, a disincentive exists under CA law that could, and may have up this point, forced borrowers into foreclosure in order to avoid the potential for additional debt that could occur under a short sale. Due to vagueness in current law a borrower with a non-purchase money loan could become liable for debt under a short sale, where a foreclosure would not result in any additional debt. Additionally, evidence suggests that some lenders are using language in short sale contracts that states that borrowers would be liable for any difference between the sales price and the amount owed. This language is sometimes specific, while at other times, vague enough to create legal confusion.

This bill seeks to clear up any legal confusion between purchase money and non-purchase money loans in regards to short sales by simply providing that the lender may not pursue the borrower for any deficiency that may occur as a result of the short sale when the holder of the note has provided written consent of such agreement.

Based on information provided to the committee, the following are various scenarios of how borrowers are effected under current law and how this bill would effect them once enacted.

Scenario 1 (the problem this bill is attempting to fix): Borrower has first deed of trust for \$300,000 and second deed of trust for \$90,000. <b>Both loans are recourse loans, due to a refinancing.</b>	
<b>Foreclosure Scenario:</b> Holder of first deed of trust forecloses; holder of second deed of trust takes no action and becomes a sold-out junior lienholder.	<b>Short Sale Scenario:</b> Holder of first deed of trust agrees to a short sale for fair market value of \$250,000, but states in its approval letter that it reserves the right to pursue the borrower for the difference between what the property fetches at sale and the outstanding, unpaid principal balance of the loan. Holder of second deed of trust agrees to the short sale (Note: the holder of the second deed of trust must agree to the short sale, before it may go forward).
Impact on the borrower: When the holder of the first deed of trust forecloses, it has no further ability to pursue any deficiency under the one form of action rule. Because the second deed of trust is a recourse loan, the sold out junior lienholder may pursue the borrower for a deficiency judgment of \$90,000.	Impact on the borrower: The holder of the first deed of trust may pursue the borrower for \$50,000 (the difference between the \$300,000 the borrower owes on the note and the \$250,000 the sale generates). Because the second deed of trust is a recourse loan, the sold-out junior lienholder may pursue the borrower for a deficiency judgment of \$90,000
Net result: Borrower has \$90,000 in personal liability.	Net result: Borrower has \$140,000 in personal liability and is worse off financially under a short sale.

Scenario 2 (another example of the problem this bill is trying to fix): Borrower has first deed of trust for \$300,000 and second deed of trust for \$90,000. <b>Both loans are purchase money loans and thus non-recourse.</b>	
<u>Foreclosure Scenario:</u> Holder of first deed of trust forecloses.	<u>Short Sale Scenario:</u> Holder of first deed of trust agrees to a short sale for fair market value of \$250,000, but states in its approval letter that it reserves the right to pursue the borrower for the difference between what the property fetches at sale and the outstanding, unpaid principal balance of the loan.
Impact on the borrower: When the holder of the first deed of trust forecloses, it has no further ability to pursue any deficiency under the one form of action rule. The holder of the second deed of trust becomes a sold-out junior lienholder but lacks any recourse against the borrower, because the loan is non-recourse.	Impact on the borrower: The holder of the first deed of trust may attempt to pursue the borrower for \$50,000 (the difference between the \$300,000 the borrower owes on the note and the \$250,000 the sale generates). The question of whether such an action is prohibited by CCP 580b has not yet been litigated, and is thus unresolved. The holder of the second deed of trust agrees to the short sale and becomes a sold-out junior lienholder, but lacks any recourse against the borrower, because the loan is non-recourse.
Net result: Borrower has \$0 in personal liability.	Net result: Borrower may have \$50,000 in personal liability and could be worse off under a short sale.

Scenario 3 (how this bill would work, if enacted): Borrower has first deed of trust for \$300,000 and second deed of trust for \$90,000. <b>Both loans are recourse loans, due to a refinancing.</b>	
<u>Foreclosure Scenario:</u> Holder of first deed of trust forecloses.	<u>Short Sale Scenario:</u> Holder of first deed of trust agrees to a short sale for fair market value of \$250,000 and must accept that value as full payment.
Impact on the borrower: When the holder of the first deed of trust forecloses, it has no further ability to pursue any deficiency under the one form of action rule. The holder of the second deed of trust becomes a sold-out junior lienholder. Because the second deed of trust is a recourse loan, the sold out junior lienholder may pursue the borrower for a deficiency judgment of \$90,000.	Impact on the borrower: When the holder of the first deed of trust agrees in writing to the short sale, it has no further recourse to pursue any deficiency against the borrower. The holder of the second deed of trust becomes a sold-out junior lienholder. Because the second deed of trust is a recourse loan, the sold-out junior lienholder may pursue the borrower for a deficiency judgment of \$90,000.
Net result: Borrower has \$90,000 in personal liability	Net result: Borrower has \$90,000 in personal liability and is not worse off after a short sale.

Scenario 4 (another example of how this bill would work, if enacted): Borrower has first deed of trust for \$300,000. <b>The loan is a recourse loan, due to a refinancing.</b>	
<u>Foreclosure Scenario:</u> Holder of first deed of trust forecloses.	<u>Short Sale Scenario:</u> Holder of first deed of trust agrees to a short sale for fair market value



Scenario 4 (another example of how this bill would work, if enacted): Borrower has first deed of trust for \$300,000. <b>The loan is a recourse loan, due to a refinancing.</b>	
	of \$250,000 and must accept that value as full payment.
Impact on the borrower: When the holder of the first deed of trust forecloses, it has no further ability to pursue any deficiency under the one form of action rule and CCP 580d.	Impact on the borrower: When the holder of the first deed of trust agrees in writing to the short sale, it has no further recourse to pursue any deficiency against the borrower.
Net result: Borrower has \$0 in personal liability.	Net result: Borrower has \$0 in personal liability and is not worse off under a short sale.

REGISTERED SUPPORT / OPPOSITION:

Support

Innovative Financial Resources, Inc.  
Law Office of Michael Spilger  
Laturno Kuick Ralty

Opposition

None on file.

Analysis Prepared by: Mark Farouk / B. & F. / (916) 319-3081

**EXHIBIT 4**

**ASSEMBLY JUDICIARY COMMITTEE**  
**MANDATORY INFORMATION WORKSHEET**

\*\*\*\*\*IMPORTANT NOTE\*\*\*\*\*

THIS FORM MUST BE FULLY COMPLETED AND HAND-DELIVERED TO THE COMMITTEE NO LATER THAN SEVEN (7) CALENDAR DAYS AFTER IT IS INITIALLY DELIVERED TO THE AUTHOR'S OFFICE. IF THE BILL HAS BEEN SET FOR HEARING, IT SHALL CONSTITUTE AN AUTHOR'S RESET IF A SATISFACTORY WORKSHEET OR OTHER REQUESTED INFORMATION HAS NOT BEEN TIMELY RECEIVED BY THE COMMITTEE.

ALL SUBSTANTIVE AUTHOR'S AMENDMENTS MUST BE HAND-DELIVERED TO THE COMMITTEE IN LEGISLATIVE COUNSEL FORM (ORIGINAL AND EIGHT COPIES) WITHIN SEVEN (7) CALENDAR DAYS PRIOR TO THE HEARING. FAILURE TO DO SO MAY RESULT IN AN AUTHOR'S RESET.

THE COMMITTEE RECORDS THE DATE THIS WORKSHEET IS DELIVERED, THE DATE IT IS RETURNED, AND THE DATE THE COMMITTEE RECEIVES AMENDMENTS.

*PLEASE RETURN COMPLETED WORKSHEETS TO THE COMMITTEE BY EMAIL TO SABA.HASHMAT@ASM.CA.GOV. PLEASE ALSO HAND-DELIVER TWO (2) COPIES OF THIS WORKSHEET AND ANY SUPPORTING DOCUMENTS TO THE COMMITTEE.*

ASSEMBLY JUDICIARY COMMITTEE, 1020 N Street (LOB), Room 104

Bill Number: SB931 Author: Ducheny

Author's staff person: Nadia Leal phone: e-mail:

1. What do you see as the key issue(s) raised by the bill.

*Please see the attached fact sheet.*

2. Please provide a statement of the author's purpose for the bill, which may be used in the Committee's analysis, including *in detail* the problem or deficiency in the current law that the bill seeks to remedy, and how the bill resolves the problem.

*Please see the attached fact sheet.*

3. Who is the sponsor of the bill? If there is no sponsor, what person or entity requested that the bill be introduced? Please provide the name and telephone number of any sponsor or other person who may be contacted by the Committee for information regarding the bill.

*The author is the sponsor of the bill. Shanna Welsh, San Diego attorney, brought this issue to our attention. She has worked closely with local organizations like*

*the Housing Opportunities Collaborative to help distressed homeowners through local home clinics. She can be contact for background and technical questions.*

4. Please show the results of an Inquiry search regarding each similar and/or related bill (for example, same key words and/or code section) that has been introduced in this legislative session, or in any prior legislative session covered by the Inquiry system. (When using the Bill Search function in Inquiry, be sure to check the "all versions" button in the dialog box that appears after you choose the "word" search criterion.) Please include the bill number and year, a summary of the bill's contents, and the disposition of each bill.

*SB 1178 (Corbett) pending vote on the Senate Floor.*

5. Please identify and summarize all similar or related pending federal legislation (see <http://thomas.loc.gov/home/thomas2.html>) and any bills or existing laws you are aware of in other states.

*N/A*

6. Please summarize and show the results (by citation) of a computer search regarding all existing California statutes (<http://www.leginfo.ca.gov/calaw.html>) and all existing federal statutes (<http://www4.law.cornell.edu/uscode/>) relevant to this bill. Please also indicate any relevant court decisions.

*SB 1178 (Corbett) pending vote on the Senate Floor.*

7. Have there been any informational hearings on the subject matter of the bill? If so, when? Please attach all information distributed by the Committee that held the hearing.

*N/A*

8. Please describe all amendments the author currently wishes to make before this bill is heard in Committee. (Please recall that amendments must be hand-delivered to the Committee in Leg Counsel form at least 7 calendar days before the bill is to be heard.)

*The Office of Research and Planning has asked for a technical amendment that would clarify the bill does not apply to "a corporation or political subdivision of the state." The Cal Mortgage program ensures loans for the health facilities. After reviewing SB 931 they want to make sure the anti-deficiency protections in the bill do not apply to healthcare facilities. Please see the attached copy of the proposed amendment. Contact for this request is Anne Drumm, 326-3600.*

9. Please summarize any studies, reports, statistics or other evidence showing that the problem exists and that the bill will properly address the problem. Please also attach copies of all such evidence and/or state where such material is available for reference by Committee counsel.

*Please see the attached fact sheet, memo on this issue, and news article.*

10. Please list all groups, agencies or persons that have contacted you in support or in opposition to the bill. Please attach copies of all letters of support and opposition.

*No opposition. Support from Keeney Waite and Stevens, Innovative Financial Resources, Law Offices of Michael Spilger, and Laturno Kuick Realty.*

11. Please describe any concerns that you anticipate may be raised in opposition to your bill, and state your response to those concerns.

*Up to this point, we have worked with interested parties who may have concerns and we do not foresee any issues.*

12. Please list the name, organization and telephone number of all witnesses that you anticipate will testify in support or opposition to the bill. (Please note that the Committee limits the number of testifying witnesses to 2 per side. Additional witnesses may identify themselves for the record.)

*Shanna Welsh, Telephone: (619)232-7325*

**PLEASE REMEMBER TO EMAIL THIS COMPLETED WORKSHEET,  
AND ALSO DROP OFF 2 HARD COPIES TO THE COMMITTEE.  
TYPE AS DETAILED RESPONSES AS POSSIBLE. THANK YOU  
VERY MUCH FOR YOUR ASSISTANCE.**

## **SB 931 (Ducheny)**

### **Short Sale Judgment Deficiency Protection**

#### **SUMMARY:**

SB 931 would prohibit a lender from pursuing a deficiency judgment in any case of short sale in which the property is sold for less than the amount owed with written consent from the lender. Under this bill, once the lender provides written consent for the short sale of the property, the borrower (homeowner) would be released from the obligation to pay the remaining balance of the loan in the future.

#### **BACKGROUND:**

Given the State's economic and housing crisis, many distressed homeowners are opting for a short sale of their home to help them take responsibility for the situation, rather than just walking away and letting the property go to foreclosure. A short sale is when the sale proceeds fall short of the balance owed on the property. In a short sale, the lender agrees to sell the property at a loss when the borrower is unable to pay their mortgage. A short sale appears as "settled debt" on the credit report, and helps the homeowner feel like they took responsibility for the obligation to pay the money back, rather than just walking away. However, there are significant risks for homeowners that choose to do a short sale in order to avoid a foreclosure.

For distressed homeowners who do not have purchase money loans, (i.e. those who have refinanced), a short sale may not be a wise option. Pursuant to *California Code of Civil Procedure* §580d, in foreclosure, the homeowner is relieved of the obligation to pay the debt owed to the foreclosing entity. In most cases, the first deed of trust forecloses, and therefore, the borrower is relieved of the debt on the first deed of trust. If there is a second deed of trust, the debt remains as unsecured debt. A short sale often relieves debt only up to the amount of the sale price, and in today's economy the sale price is often less than the first deed of trust recorded against the property. More often than not, the borrowers have a first and a second deed of trust. Therefore, the homeowner with non-purchase money loans may have a greater amount of personal liability after a short sale than they would otherwise have in foreclosure.

In addition, some lenders are using language in their short sale letters, stating that they reserve the right to pursue the homeowner for the remaining balance of the loan (deficiency) after the close of escrow for both purchase money and non-purchase money loans. This language could be interpreted by the Court as an executory waiver of the CCP §580b purchase money protection. Current law prohibits lenders to pursue deficiency judgment in the case of purchase money loans. It is of concern that borrowers who do short sales will become test cases. They will be surprised in years to come when collection agencies and attorneys attempt to collect or obtain judgments for short sale deficiencies.

SB 931 attempts to encourage homeowners to short sell their properties when they are unable to pay their mortgage, by providing the homeowner the same protection that currently exist for borrowers who choose foreclosure. Short sales help keep the real estate market moving, save banks millions in foreclosure costs, and help preserve communities by preventing long-term

vacancies that occur with bank owned properties. Short sales are a better option for distressed homeowners, banks, and communities.

**WHAT THE BILL DOES:**

- Prevents lenders from pursuing the homeowner for the deficiency after the close of escrow once they have given written consent of the short sale.
- Releases the borrower from the obligation to pay the remaining balance of the loan.
- Prevents borrowers from being in a worse position after a short sale than they would have been after foreclosure.
- Ensures a fair process and consumer protection when there is a written agreement by a lender to short sell a property.

**SPONSOR:** Author

**STATUS:** Assembly Banking and Finance Committee. Hearing on June 7<sup>th</sup>.

**CONTACT:** Nadia Leal-Carrillo, (916) 651-4040

## Proposed Amendments

580e. (a) No judgment shall be rendered for any deficiency under a note secured by a first deed of trust or first mortgage for a dwelling of not more than four units, in any case in which the trustor or mortgagor, who is not a corporation or political subdivision of the state, sells the dwelling for less than the remaining amount of the indebtedness due at the time of sale with the written consent of the holder of the first deed of trust or first mortgage. With the written consent of the holder of the first deed of trust or first mortgage to that sale, the holder of the first deed of trust or first mortgage shall be deemed to accept the sale proceeds as full payment, and the remaining amount of the indebtedness on the first deed of trust or first mortgage shall be fully discharged.

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



TO: HOUSING OPPORTUNITIES COLLABORATIVE  
 FROM: SHANNA E. WELSH, ESQ.

RE: SHORT SALE LEGISLATION – Senate Bill 931

Senate Bill 931 is authored by the office of Senator Denise Ducheny, of California Senate District 40. Shanna E. Welsh is the primary contact for the bill.

The purpose of this proposed legislation is primarily to protect distressed homeowners who have non-purchase money recourse loans on residential property (1-4 units), when the fair market value of the subject property is less than the balance of the first deed of trust. The legislation will make sure that these homeowners do not incur a higher dollar amount of liability after a short sale than they would otherwise have after a foreclosure sale. For many homeowners in the group described above, a short sale would result in greater personal liability. Please review the example, below:

<b>Homeowner #1</b> – Homeowner has a first deed of trust for \$300,000, and second deed of trust for \$90,000. These loans are non-purchase money recourse loans due to a refinance.	
Foreclosure – 1 <sup>st</sup> Deed of Trust Forecloses	Short Sale for fair market value of \$250,000
Deficiency after foreclosure = \$90,000 personal liability	Deficiency after short sale = \$140,000 personal liability
Explanation: When the first deed of trust forecloses, pursuant to CCP §580d, the first deed of trust has no further recourse for any deficiency. The second deed of trust (\$90,000) becomes a sold out junior lien and may pursue the borrower for the amount of the second deed of trust.	Explanation: When the non-purchase money borrower short sells for fair market value, the first deed of trust holder may pursue the borrower for the deficiency of \$50,000 for the first deed of trust. Also, the second deed of trust holder may pursue the borrower for the unpaid balance on the second deed of trust.
Result: The borrower has less personal liability after foreclosure than after short sale.	

Many distressed homeowners have purchase money loans, which are defined as loans that secure payment of the balance of the purchase price for the borrower's primary residence. These borrowers are protected by Cal. Code of Civil Procedure §580b, which states, in summary, that a purchase money lender cannot pursue a deficiency judgment after the sale of residential real property. This protection is not available to borrowers with non-purchase money loans. Non-purchase money loans occur when a borrower has refinanced, or has not used the residential property as his/her primary residence. These loans are also called "recourse loans".

In foreclosure, CCP §580d prohibits the foreclosing lender from pursuing any deficiency on the foreclosed loan, regardless of whether the loan is purchase money or non-purchase money. In most cases, the first deed of trust forecloses, so the borrower has no deficiency on the first deed of trust, regardless of the classification of the loans as purchase money or non-purchase money. This gives borrowers a logical, financially sound reason to opt for foreclosure over short sale.

**Other Examples:**

<b>Homeowner #2</b> – Homeowner has a first deed of trust for \$300,000, and second deed of trust for \$90,000. These loans are purchase money loans.	
Foreclosure – 1 <sup>st</sup> Deed of Trust Forecloses	Short Sale for fair market value of \$250,000, but both lenders reserve their right to pursue a deficiency.
Deficiency = \$0, no personal liability	Deficiency = Up to \$140,000 personal liability, if a Court determines that the borrower can waive CCP §580b protection.
Explanation: When the first deed of trust forecloses, pursuant to CCP §580b and §580d, the lenders cannot pursue any deficiency. The second loan of \$90,000 is a non-recourse loan because it is purchase money.	Explanation: The waiver of CCP §580b has not been tested by the Court. Consensus among attorneys is that a court would not allow the waiver due to policy, but as of yet, we don't know.
Result: The borrower has less risk of personal liability in foreclosure than in short sale.	

<b>Homeowner #3</b> – Homeowner has a first deed of trust for \$300,000, and no other loans. It is a non-purchase money loan due to a refinance.	
Foreclosure	Short Sale for fair market value of \$250,000.
Deficiency = \$0, no personal liability	Deficiency = \$50,000 personal liability, for deficiency.
Explanation: When the first deed of trust forecloses, pursuant to CCP §580d, the lenders cannot pursue any deficiency.	Explanation: In a short sale, the protection of CCP §580d does not apply because this is a sale by the mortgagor, not the mortgagee or trustee.
Result: The borrower has less personal liability in foreclosure than in short sale.	

<b>Homeowner #4</b> – Homeowner has one purchase money loan for \$300,000.	
Foreclosure	Short Sale for fair market value of \$250,000, but lender reserves right to pursue deficiency.
Deficiency = \$0, no personal liability	Deficiency = \$50,000 personal liability, if a Court determines that the borrower can waive CCP §580b protection.
Explanation: When the first deed of trust forecloses, pursuant to CCP §580d, the lenders cannot pursue any deficiency.	Explanation: The waiver of CCP §580b has not been tested by the Court. Consensus among attorneys is that a court would not allow the waiver due to policy, but as of yet, we don't know.
Result: The borrower has less personal liability in foreclosure than in short sale.	

**Other reasons to support this legislation:**

Preventing Future Litigation against Real Estate Professionals:

Many real estate brokers and agents who assist homeowners with short sales are not fully aware of these potential outcomes, and some short sellers will be surprised in years to come when collection agencies and attorneys attempt to collect or obtain judgments for the deficiencies. We hope to avoid this by passing legislation that prevents borrowers from being in a worse position after a short sale than they would have been in after foreclosure. New guidelines issued by the U.S. Treasury Department, to be effective this April 2010, support this policy.

Benefits of Short Sales:

We want to encourage distressed homeowners to short sell properties when the loan amount is higher than the fair market value of the property. These sales keep the real estate market moving, and may save a bank more than \$50,000 in foreclosure costs per home. Short sales also prevent vacancies in neighborhoods. Post-foreclosure REO properties (i.e., real estate owned by a bank) stay vacant for months until they are released into the market. People who leave these homes due to foreclosure have a bad habit of removing the appliances, stripping them of any fixtures that have value, and vandalizing the properties for emotional reasons. A short sale allows the distressed homeowner to feel that they have taken responsibility for the problem.

Potential for Long-Term Collections and Lawsuits:

Lenders have up to four years to decide whether to pursue the deficiency, based on applicable statutes of limitation. These unsettled debts caused by loan deficiencies will be packaged and sold on a secondary market to law firms and collection agencies. These collectors will pay pennies on the dollar for the right to collect on the deficiencies.

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Substantive

AMENDMENT TO SENATE BILL NO. 931  
AS AMENDED IN SENATE MARCH 25, 2010

Amendment 1

On page 2, below line 20, insert:

(c) This section shall not apply if the trustor or mortgagor is a corporation or political subdivision of the state.

- 0 -



RN1015614

THE LAW OFFICE OF SHANNA E. WELSH  
SHANNA E. WELSH, ESQ.  
852 FIFTH AVE., SAN DIEGO, CA 92101  
TELE: (619)232-7325 FAX: (619)232-7313

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December 16, 2009

Via Email

Ms. Nadia Leal

Email: [nadia.leal@sen.ca.gov](mailto:nadia.leal@sen.ca.gov)

Re: SHORT SALE LEGISLATION  
Subject: Information You Requested

Dear Nadia:

The purpose of this letter is to provide you with some background information relating to the loopholes, risks and pitfalls for distressed homeowners who choose to do a short sale in order to avoid foreclosure. For many distressed homeowners who have purchase money loans, a short sale may help them to take responsibility for the situation, rather than just walking away and letting the property go to foreclosure. A short sale appears as "settled debt" on the credit report, and helps the homeowner feel like they took responsibility for the obligation to pay the money back, rather than just walking away.

However, distressed homeowners who do not have purchase money loans (i.e., those who have refinanced, or did not live in the property) a short sale may not be an advantage. Pursuant to *Cal. Code of Civil Procedure §580d*, in foreclosure, the homeowner is relieved of liability for the debt represented by the foreclosing deed of trust. The borrower only carries liability for sold out junior liens that are leftover after the foreclosure. On the other hand, a short sale often relieves debt only up to the amount of the sale price, and the sale price is often less than the full amount of the first deed of trust. Therefore, the homeowner with non-purchase money loans may walk away from a short sale with a greater amount of personal liability than they would have otherwise had in foreclosure. The better option in this situation is foreclosure, unless the individual specifically needs to avoid having foreclosure on their credit.

We want to encourage homeowners to short sell properties that are upside-down (i.e., the loan amount is higher than the fair market value of the property). These sales keep the real estate market moving, and save banks millions in foreclosure costs. The biggest issue I find recently is that those individuals with non-purchase money loans incur a greater amount of personal liability through a short sale than they would otherwise incur from foreclosure. Many real estate brokers and agents who assist homeowners with short

sales are unaware of this outcome, and some sellers will be surprised in years to come when collection agencies and attorneys attempt to collect or obtain judgments for the deficiency.

Only the most conscientious real estate professionals insist that homeowners meet with an attorney to assess the potential outcomes. Mr. Bill Stanhope is one such conscientious real estate professional who has brought many clients to me to discuss the potential outcomes. On several occasions, homeowners with non-purchase money loans are surprised and torn by the possibility that the lenders will come after them for the full amount of the deficiency after the short sale, and that the deficiency from the short sale is greater than it would be from foreclosure. Many decide that a short sale just isn't the smart decision.

Lenders are not helping this situation. On many occasions, lenders use language in their short sale letters, stating that they reserve the right to pursue the homeowner for the deficiency after the close of escrow. Even when the short sale homeowner has purchase money loans, banks like Bank of America are attempting to have homeowners waive the protection of CCP §580b by putting this language in the short sale letter. I have enclosed a copy of CCP §580b, with this letter, as well as some examples of short sale letters. The outcome of the waiver has not been tested by the Court, and so any homeowner who agrees to this term may become the test case in the next four years. See the emails that I have enclosed, from attorney members of the San Diego County Bar Association Real Property Division, discussing these important legal issues. I will try to reduce these emails down to a memo by tomorrow.

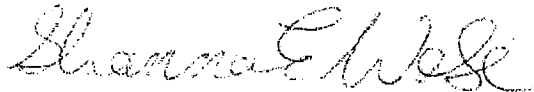
Once the short sale letter is received, a real estate professional representing the seller is bound with the difficult task of trying to negotiate the language of the letter to reduce the borrower's liability as much as possible. Oftentimes, the lender's response is that their investors will not allow them to make any promises that will reduce the investors ability to collect the deficiency. This puts the seller in a very uncertain position. I am enclosing a few of these short sale letters. The Bank of America letter is an example of the attempted CCP §580b waiver. The Wells Fargo letter is an example of a good and certain outcome for the seller, because Wells Fargo states that the deficiency is "forgiven". Consider the ambiguity in these letters, and how important it is for the state to regulate the terms of short sales so that short sellers are not haunted by creditors.

What is worse, lenders have up to four years to decide whether to pursue the deficiency, based on applicable statutes of limitation. I predict that these unsettled debts caused by short sale deficiencies will be packaged and sold on a secondary market to law firms and collection agencies. These collectors will pay pennies on the dollar for the right to collect on the deficiencies.

For these reasons, which I am happy to expound upon further by phone tomorrow, we propose new legislation to protect homeowners with both purchase money, and non-

purchase money loans, who take responsibility for short selling the property. These homeowners save the banks \$30,000 to \$40,000 per property because they avoid the foreclosure process.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Shanna E. Welsh".

Shanna E. Welsh  
Attorney at Law

## Effective:[See Text Amendments]

West's Annotated California Codes CurrentnessCode of Civil Procedure (Refs & Annos)Part 2. Of Civil Actions (Refs & Annos)\*Title 8. Of the Trial and Judgment in Civil Actions (Refs & Annos)\*Chapter 1. Judgment in General (Refs & Annos)

→ § 580b. Purchase money mortgages, etc.; no deficiency judgment

No deficiency judgment shall lie in any event after a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract of sale, or under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property or estate for years therein, or under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan 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.

Where both a chattel mortgage and a deed of trust or mortgage have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at any time under any one thereof if no deficiency judgment would lie under the deed of trust or mortgage on the real property or estate for years therein.

## CREDIT(S)

(Added by Stats.1933, c. 642, p. 1673, § 5. Re-enacted and amended by Stats.1935, c. 650, p. 1806, § 5. Amended by Stats.1935, c. 680, p. 1869, § 1; Stats.1949, c. 1599, p. 2846, § 1; Stats.1963, c. 2158, p. 4500, § 1; Stats.1989, c. 698, § 12.)

## HISTORICAL AND STATUTORY NOTES

## 2009 Electronic Update

## 1989 Legislation

The 1989 amendment inserted references to an estate for years following "real property" in three places.

Legislative intent regarding Stats.1989, c. 698, see Historical and Statutory Notes under Code of Civil Procedure § 726.

## 1994 Legislation

Section 1 of Stats.1994, c. 414 (S.B.1705), provides in part:

"By this act, the Legislature intends to clarify the existing rights of the Office of Statewide Health Planning and Development pursuant to its regulatory agreement, contract of insurance, and other contractual agreements developed



Effective:[See Text Amendments]

West's Annotated California Codes Currentness

Code of Civil Procedure (Refs & Annos)

Part 2. Of Civil Actions (Refs & Annos)

▣ Title 8. Of the Trial and Judgment in Civil Actions (Refs & Annos)

▣ Chapter 1. Judgment in General (Refs & Annos)

→ § 580d. Foreclosure under power of sale; no deficiency judgment; exceptions

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.

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

CREDIT(S)

(Added by Stats.1940, Ex.Sess., c. 29, p. 84, § 2. Amended by Stats.1989, c. 698, § 13.)

#### HISTORICAL AND STATUTORY NOTES

2009 Electronic Update

1989 Legislation

The 1989 amendment inserted two references to an estate for years following "real property", and made nonsubstantive changes.

Legislative intent regarding Stats.1989, c. 698, see Historical and Statutory Notes under Code of Civil Procedure § 726.

1994 Legislation

Section 1 of Stats.1994, c. 414 (S.B.1705), provides in part:

"By this act, the Legislature intends to clarify the existing rights of the Office of Statewide Health Planning and Development pursuant to its regulatory agreement, contract of insurance, and other contractual agreements developed under the Cal-Mortgage Loan Insurance Program and pursuant to Chapter 4 (commencing with Section 436) of the Health and Safety Code. The office shall have these rights notwithstanding the requirements of Sections 580a, 580b, 580d, and 726 of the Code of Civil Procedure in order that the office may expeditiously and efficiently enforce its statutory mandate to provide an insurance program for health facility construction, improvement, and expansion

**EXHIBIT 5**

AMENDED IN ASSEMBLY JUNE 1, 2010

AMENDED IN SENATE MARCH 25, 2010

AMENDED IN SENATE MARCH 15, 2010

**SENATE BILL**

**No. 931**

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**Introduced by Senator Ducheny**

February 2, 2010

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An act to add Section 580e to the Code of Civil Procedure, relating to mortgages.

LEGISLATIVE COUNSEL'S DIGEST

SB 931, as amended, Ducheny. Mortgages: deficiency judgments.

Existing law authorizes an action for a deficiency judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, as specified. Existing law prohibits a deficiency judgment in any case in which the real property or an estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust.

This bill would prohibit a deficiency judgment under a note secured by a first deed of trust or first mortgage for a dwelling of not more than 4 units in any case in which the trustor or mortgagor sells the dwelling for less than the remaining amount of the indebtedness due at the time of sale with the written consent of the holder of the first deed of trust or first mortgage. The bill would provide that written consent of the holder of the first deed of trust or first mortgage to that sale shall obligate that holder to accept the sale proceeds as full payment and to fully discharge the remaining amount of the indebtedness on the first deed of trust or first mortgage. The bill would specify that those provisions

would not limit the ability of the holder of the first deed of trust or first mortgage to seek damages and use existing rights and remedies against the trustor or mortgagor or any 3rd party for fraud or waste if the trustor or mortgagor commits either fraud with respect to the sale of, or waste with respect to, the real property that secures that deed of trust or mortgage. *The bill would make these provisions inapplicable if the trustor or mortgagor is a corporation or political subdivision of the state.*

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 580e is added to the Code of Civil
- 2 Procedure, to read:
- 3 580e. (a) No judgment shall be rendered for any deficiency
- 4 under a note secured by a first deed of trust or first mortgage for
- 5 a dwelling of not more than four units, in any case in which the
- 6 trustor or mortgagor sells the dwelling for less than the remaining
- 7 amount of the indebtedness due at the time of sale with the written
- 8 consent of the holder of the first deed of trust or first mortgage.
- 9 Written consent of the holder of the first deed of trust or first
- 10 mortgage to that sale shall obligate that holder to accept the sale
- 11 proceeds as full payment and to fully discharge the remaining
- 12 amount of the indebtedness on the first deed of trust or first
- 13 mortgage.
- 14 (b) If the trustor or mortgagor commits either fraud with respect
- 15 to the sale of, or waste with respect to, the real property that secures
- 16 the first deed of trust or first mortgage, this section shall not limit
- 17 the ability of the holder of the first deed of trust or first mortgage
- 18 to seek damages and use existing rights and remedies against the
- 19 trustor or mortgagor or any third party for fraud or waste.
- 20 (c) *This section shall not apply if the trustor or mortgagor is a*
- 21 *corporation or political subdivision of the state.*

O

**PROOF OF SERVICE**  
**Case No. S213137**

I am over the age of eighteen years 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, Tenth Floor, San Francisco, California 94111-4024.

On July 24, 2014, I served the following document(s):

**MOTION FOR JUDICIAL NOTICE;**  
**SUPPORTING MEMORANDUM; DECLARATION OF**  
**GINAMARIE CAYA**

on the following persons or entities:

Andrew Stilwell  
Stilwell, Weiner, de Vos, LP  
3160 Camino Del Rio South  
Suite 301,  
San Diego, CA 92108

Kent Qian  
National Housing Law Project  
703 Market Street, Suite 2000  
San Francisco, CA 94103

Elizabeth Scott Letcher  
Housing and Economics Rights  
Advocates  
1814 Franklin Street, Suite 1040  
Oakland, CA 94612

by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California on July 24, 2014.

  
Terry Metasavage