July 22, 2009

The Honorable Jan Brewer
Governor of Arizona
The Executive Tower
1700 West Washington
Phoenix, Arizona 85007

Re: Request to Amend the Call for Special Session to Address Issues Resulting from SB 1271's Passage

Dear Governor Brewer:

On behalf of the 43,000 plus members of the Arizona Association of REALTORS®, I appreciate the opportunity to present you with this letter and the accompanying information regarding the above-cited legislation. SB 1271 dramatically alters well settled Arizona law on the relationship between Arizona residential real estate owners and their lenders. The bill has far reaching effects, well beyond those testified to in committee. None of those effects are positive or helpful to restart the Arizona economy.

Unfortunately, we did not fully recognize the impacts of the legislation when it was heard as a strike-everything amendment on June 10 in the Senate Finance Committee. In reading the amendment and listening to testimony, the changes to A.R.S. §33-814(G) seemed reasonable at the time. However, after researching the case law and reading the many hundreds of emails sent to us by people who will be personally impacted by SB 1271, the case law is clear and the consequences will be severe. Undoubtedly, those who voted in favor of this legislation could not have known about its far reaching legal and practical impacts. We respectfully request that you amend your Call for Special Session to permit the Arizona Legislature to reconsider these amendments to our laws.

Lenders on Arizona residential real estate are entitled to foreclose on a home in a very short amount of time – 90 days from default. Arizona's foreclosure timeline is among the nation's quickest. Heretofore, lenders are generally not allowed to chase a defaulting borrower on purchase money loan for any additional recovery beyond that which they receive when they sell off the foreclosed house. SB 1271 permits lenders to pursue deficiencies on many types of residential real estate loans but does nothing to alter the very short foreclosure timeline. The result is that the owner – lender rights and remedies balance will soon be way out of balance.

We have now completed our legal and practical analysis and it appears that the principal reason offered in support of the amendment to statute, to address "Spec Builders" using the statute to avoid a deficiency judgment, has already been resolved by the Arizona Courts and thus is not an unresolved issue for the proponents which required legislative attention. In fact, the Arizona Courts have already found that the anti-deficiency statute does not apply to loans secured by houses owned by a developer.

We now know that there are considerable issues here that need immediate attention during your recently called Special Session of the Forty-ninth Arizona Legislature.

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Chief among these reasons is that SB 1271 removes any incentive for a lender to work with a borrower to keep a distressed loan in effect. Until now, banks needed to work with borrowers otherwise they'd be stuck with a house they'd have to sell. If this bill stays as law, the banks will have an incentive to use Arizona's expedited foreclosure process to collect pennies on the dollar and sue the trustor for the difference. The result will be a dramatic increase in foreclosures, litigation, falling real estate prices, a prolonged recession in Arizona and banks obtaining a double recovery as noted in *Walker v. Community Bank*[1].

There are many other reasons, described in the accompanying attachments, to be profoundly concerned about the consequences of this bill. Again, we respectfully request that you amend your Call for Special Session to include this issue so that a repeal of the amendments or adjustments can be made to the statute before it goes into effect.

If you or your staff would like to meet with us regarding our concerns about SB 1271, please don't hesitate to make the request.

Respectfully,

Tom Farley
CEO

cc: Speaker Kirk Adams
President Robert Burns
David Lujan, House Minority Leader
Jorge Garcia, Senate Minority Leader
Senator Sylvia Allen
Senator Steve Pierce
Kevin Tyne, Chief of Staff
Richard Bark, Deputy Chief of Staff for Policy
Scott Smith, Director of Legislative Affairs
Jeri Auther, Policy Advisor, Rules and Regulations
Victor Riches, Chief of Staff – Arizona House of Representatives
Wendy Baldo, Chief of Staff – Arizona State Senate
Judy Lowe, Commissioner, Arizona Department of Real Estate
Felecia Rotellini, Superintendent, Arizona Department of Financial Institutions
Mike Wasmann, 2009 AAR President
Craig Sanford, 2009 Legislative Affairs Chairman
The AAR Board of Directors
Local REALTOR® Association Presidents
Lee Miller, Arizona Trustees Association
Brain Tassinari, Arizona Real Estate Investors Association
Spencer Kamps, Homebuilders Association of Central Arizona

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[1] *see Walker v. Community Bank (1974) 10 Cal.3d 729, 733-734 [111 Cal.Rptr. 897, 518 P.2d 329]). However, having resorted to the security, whether by judicial sale or private nonjudicial sale, the mortgagee could obtain a deficiency judgment against the mortgagor for the difference between the amount of the indebtedness and the amount realized from the sale. As a consequence during the great depression with its dearth of money and declining property values, a mortgagee was able to purchase the subject real property at the foreclosure sale at a depressed price far below its normal fair market value and thereafter to obtain a double recovery by holding the debtor for a large deficiency.*

Practical Issues – SB 1271

Left without further amendment, SB 1271 amends A.R.S. §33-814(G) in such a fashion that it sends well settled case law into a state of confusion. At a time in which 1 in 30 homeowners are in foreclosure (Arizona is ranked 2nd in the nation) SB 1271 not only causes confusion but will likely damage a large number of consumers for a longer period of time than the already painful and damaging process of foreclosure.

The concerns expressed below and in the following pages are meant to brief those reviewing the Arizona Association of REALTORS®' request to amend the current Call for Special Session to address the consequences of the above-cited bill. In short, they are as follows and further explained below:

- The legislation impacts more than just "Spec Builders" that desire to use the Anti-Deficiency Statute as articulated in committee testimony by the proponents. It is questionable if this concern is valid as the issue has already been tested in the Arizona Courts and has been found not to protect developers because they don't meet the standards placed in the current statute. (*Mid Kansas Federal Savings & Loan Ass'n v. Dynamic Development Corp.*, 167 Ariz. 122, 804 P.2d 1310 (1991) on the page entitled, *Legal Issues Memo)*
- Second/vacation homes, rental property and family-owned property may lose their anti-deficiency protection if the trustor did not utilize or occupy the property for six consecutive months. This is a dramatic shift in the way our statute, specifically subsection G, has worked and negatively impacts far more individuals than the reported amendment is suggested to assist. The current statute focuses on the trustor property being utilized as a single one-family or two-family dwelling for the protection against deficiency to be provided. As amended, the focus is on the trustor themselves utilizing the property instead of the property being utilized. While this may seem like a subtle change, how property is used or utilized under this statute has been the focal point of many legal cases. SB 1271 changes well settled case law involving property used as a secondary home or as a rental property.
- Loss of the deficiency protection could lead to deficiency judgments being placed on or against their personal, real and perishable property to satisfy the deficiency judgment.
- Deficiency judgments authorize the garnishment of wages, attach to real, personal and perishable property and force their sale at the courthouse step by auction.
- Deficiency judgments will likely further damage the credit of numerous individuals after foreclosure. Deficiency judgments last five years unless renewed and they then can be renewed indefinitely until the loan is satisfied or the person files for bankruptcy protection.
- Bankruptcy cases are likely to rise considerably since the protection against a deficiency judgment has been removed from statute for several types of property owners.
- The amended statute does not look forward prospectively, but rather changes the rights after the fact for borrowers in favor of lenders. Instead of drafting an amendment that changes the "terms of the deal" for loans originated after a future date, the legislation retroactively affects rights of borrowers that entered into agreements
- Tax consequences are a stated concern of many that are commenting on the recent changes to A.R.S. §33-814(G) by eliminating the "non-recourse debt" exception for cancellation of debt income for non-owner occupied property.
- Lenders that received Troubled Asset Relief Funds (TARP) such as nationally charted banks also are authorized to seek deficiency judgments against property owners after foreclosure. This fact is causing considerable angst, frustration and questions about fairness among many as they comment about SB 1271.

- The current statute provides lenders the ability to force a quick sale of real property (within 90 days under a deed of trust foreclosure versus a judicial foreclosure which could take a year or longer) which protects lenders while granting a trustor the protection against a deficiency. The balance struck by the current statute is lost with the amendments contained in SB 1271. Under SB 1271, the lender not only changed the terms of the deal struck by the parties after the fact, but now they have obtained a quick and forced sale of the property with no protection for the borrower.

The negative impacts beyond further damaged credit and financial circumstances for a conceivably large number of Arizonans are likely to be an increase in bankruptcy filings. Since SB 1271 has changed the rules for loans that were agreed to by both parties, including potential remedies, many Arizonans will likely find the only relief available to them will be to seek bankruptcy protection. This outcome certainly is not good for the former property owner and is certainly not good for the state. Arizona is facing one of the worst state budget deficits in the nation. We should not strive to be number one in bankruptcy filings as our state seeks to recover economically.

Deficiency Judgments after Foreclosure[2]: In some circumstances, a lender is entitled to sue a borrower for any losses after a foreclosure. For example: A lender loans a person $200,000 to purchase a property. The property owner fails to make the loan payments and the lender forecloses. When the lender sells the property, it is only able to sell it for $180,000, which results in a $20,000 loss to the lender. If the lender is entitled to sue the ex-property owner to recover that loss, the lender can obtain a deficiency judgment for the amount the ex-property owner owed the lender, minus either the fair market value of the property on the date of the sale or the sale price at the trustee's sale, whichever is higher. A.R.S. §33-814.

When permitted, a deficiency action must be instituted within 90 days after the foreclosure sale. A.R.S. §33-814. Once the lender obtains a money judgment for the deficiency (the ex-property owner is called a judgment debtor and the lender is the judgment creditor), it can collect on the judgment through various legal means, such as:

- Employing a collection agency
- Garnishment of earnings (wages) A.R.S. §12-1570 *et. seq.*
- Garnishment of non-earnings (bank deposits) A.R.S. §12-1598 *et. seq.*
- Writ of execution which allows the sheriff to take non-exempt personal property and sell it at public auction to satisfy the judgment A.R.S. §12-1551 *et. seq.*
- Judgment liens on real property (currently owned or later acquired). A.R.S. §33-961 *et. seq.*

A.R.S. §12-1566(D) requires the judgment creditor collecting on a deficiency to proceed first against all other real property of the debtor before proceeding against the debtor's primary residence.

The judgment is valid for five years and can be renewed for an additional five years A.R.S. §12-1611. These actions by the judgment creditor can result in the judgment debtor filing for bankruptcy protection. Chapter 7 is the most common form of bankruptcy and is a liquidation proceeding, available to individuals, married couples, partnerships and corporations.

Anti-Deficiency Statutes: If the property was a residential property, the borrower may have protection against such a lawsuit due to two anti-deficiency statues, A.R.S. §33-729(A)[3] (which applies to judicial foreclosure of mortgages) or A.R.S. §33-814(G) (which applies to non-judicial foreclosure of deeds of trusts). Anti-deficiency statutes were enacted during the great depression in the 1930s – "with its dearth of money and declining property values, a mortgagee was able to purchase property at the foreclosure sale at a depressed price far below its normal fair market value and thereafter to obtain a double recovery by holding the debtor for a large deficiency." *Baker v. Gardner,* 160 Ariz. 98, 770 P.2d 766 (1988) (citing Cornelison *v. Kornbluth,* 542 P.2d 981 (CA. 1975)).

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[2] *Notably, if a deficiency action is permitted, a lender may decide not to foreclose, waive its security and sue on the note and/or guarantee. A.R.S. §12-1566(E). However this remedy is beyond the scope of this memo.*

[3] *A.R.S. § 33-729(A) applies only to purchase money mortgages, however, the Arizona Supreme court construed it to apply to purchase money deeds of trust that are foreclosed judicially as well. Mid Kansas Federal Savings & Loan Association v. Dynamic Development Corp., 167 Ariz. 122, 126, 804 P.2d 1310, 1314 (1991). A purchase money mortgage (or deed of trust) as one "given to secure the payment of the balance of the purchase price, or to secure a loan to pay all or part of the purchase price." A.R.S § 33-814(G) applies to deeds of trust foreclosed by trustee's sale, whether or not they are purchase money.*

The anti-deficiency statutes apply to a specific, limited group of residential mortgages and trust deeds. *Id.* The legislature's objective in enacting these statutes has been interpreted to abolish the personal liability of those who give trust deeds encumbering properties of two and one-half acres or less and used for single-family or two-family dwellings. *Id.*

To obtain anti-deficiency protection the property securing the loan must be: (i) two and one-half acres or less and (ii) limited to and utilized for either a single one-family or a single two-family dwelling. The dwelling does not have to constitute the borrower's residence for the anti-deficiency provisions to apply. *Northern Arizona Properties v. Pinetop Properties Group*, 151 Ariz. 9, 725 P.2d 501 (App. 1986). The Court in *Northern Arizona Properties stated:*

> The . . . exemption "which is limited to and utilized for either a single one-family or single two-family dwelling" does not require that the dwelling constitute someone's permanent residence or normal place of abode. Further, it does not preclude investment use such as occurred in this case. The statute simply does not address the contentions relied on by Northern. While we agree with Northern, that the legislature perhaps meant only to exclude deficiency judgments in foreclosure actions against a single family homeowner and not against an investment homeowner, the statute just does not say that. If Northern is correct in its surmise, only the legislature can correct the language . . . to preclude investment homeowners.

However, the anti-deficiency statutes do not apply to loans secured by houses owned by a developer, where the houses have not yet been used as a dwelling and are not yet susceptible to being used as a dwelling. *Mid Kansas Federal Savings & Loan Ass'n v. Dynamic Development Corp.*, 167 Ariz. 122, 804 P.2d 1310 (1991). The court in *Mid Kansas* citing the *Baker* case noted that both anti-deficiency statutes were to protect consumers. *Id.* at 128, 804 P.2d at 1315. "As with virtually all anti-deficiency statutes, the Arizona provisions were designed to temper the effects of economic recession on mortgagors by precluding "artificial deficiencies resulting from forced sales." *Id.* (quoting Boyd and Balentine, *Arizona's Consumer Legislation: Winning the Battle But . . .*, 14 ARIZ.L.REV. 627, 654 (1972)). Anti-deficiency statutes put the burden on the lender or seller to fairly value the property when extending the loan, recognizing that consumers often are not equipped to make such estimations. *Id.* The court went on to state: " [w]hile we can infer that the legislature's primary intent was to protect individual homeowners rather than commercial developers, neither the statutory text nor legislative history evinces an intent to *exclude* any other type of mortgagor."

Further, the court in *Mid Kansas* noted that in contrast to the *Northern Arizona Properties* case, the property in *Mid Kansas* had never been used as a dwelling, and was not yet susceptible of being used as a dwelling. The court held that commercial residential properties held by the mortgagor for construction and eventual *resale* as dwellings are not within the definition of properties "limited to" and "*utilized* for" single-family dwellings. The property is not utilized as a dwelling when it is unfinished, has never been lived in, and is being held for sale to its first occupant by an owner who has no intent to ever occupy the property. *Id.* at 129, 804 P.2d at 1317.

SB 1271 *(effective September 30, 2009)*: As discussed above, the law prior to SB1271's passage prohibited a lender from seeking a deficiency judgment against the trustor (foreclosed ex-property owner) if the trust property is 2.5 acres or less and is used as a single one-family or single two-family dwelling. SB 1271 amended A.R.S. §33-814 (G) to require that the trustor must have "utilized" the property for six consecutive months and a certificate of occupancy must have been issued. SB 1271 states in pertinent part:

> If trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling BY THE TRUSTOR UNDER THE DEED OF TRUST FOR AT LEAST SIX CONSECUTIVE MONTHS AND FOR

WHICH A CERTIFICATE OF OCCUPANCY HAS BEEN ISSUED is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs and expenses. THE TRUSTOR IS RESPONSIBLE FOR DEMONSTRATING THAT THE TRUST PROPERTY WAS USED BY THE TRUSTOR AS A ONE-FAMILY OR A SINGLE TWO-FAMILY DWELLING FOR AT LEAST SIX CONSECUTIVE MONTHS.

SB 1271 raises numerous legal issues, such as:

- Whether "utilized by the trustor" means that the house must be lived in by the owner (trustor) or merely be utilized as a dwelling by the owner i.e., renting to tenants or allowing someone to occupy the house for six consecutive months.
- Whether the property must be utilized "by the trustor" for six consecutive months at any time after the deed of trust was recorded or whether it must be utilized "by the trustor" continually for 6 months immediately preceding the trustee's sale.
- Whether the statute will result in adverse tax consequences for homeowners after foreclosure by eliminating the "non-recourse debt" exception for cancellation of debt income for non-owner occupied property.
- Whether the statute can be challenged on contractual, constitutional or other grounds because the trustors and lenders made financial decisions and entered into these loan contracts based on the anti-deficiency statutes as they currently exist. Arguably, the law under which the loan was granted should apply to any remedy for loan default. A change in the law that creates substantially more liability for the trustor under the loan contract after the fact is inherently problematic.

LEXSEE 160 ARIZ 98

John P. BAKER and Deborah Mae Baker, husband and wife, Plaintiffs/Appellants, v. Gary GARDNER and Margaret Gardner, husband and wife, Defendants/Appellees

No. CV-88-0104-PR

Supreme Court of Arizona

160 Ariz. 98; 770 P.2d 766; 1988 Ariz. LEXIS 197; 24 Ariz. Adv. Rep. 8

December 20, 1988

SUBSEQUENT HISTORY: [*1]**

Supplemental Opinion on Grant of Reconsideration March 20, 1989.

PRIOR HISTORY:

Appeal from the Superior Court of Maricopa County, Court of Appeals No. 2 CA-CV 87-0282, Maricopa County No. C-587681, The Honorable Michael J. O'Melia, Judge.

DISPOSITION: AFFIRMED.

LexisNexis(R) Headnotes

COUNSEL:

Norman Rosenblum, Scottsdale, for plaintiffs/appellants.

Oscar C. Rauch, Phoenix, for defendants/appellees.

Ryley, Carlock & Applewhite, P.A. by George Read Carlock, Abigail Carson Berger, Phoenix, for amici curiae Arizona Bankers' Ass'n and Sav. and Loan League of Arizona, The Arizona Bank, Citibank (Arizona), First Interstate Bank of Arizona, The Valley Nat. Bank.

Norling, Oeser & Williams by Steven H. Williams, Reinhard W. Fischer, Phoenix, for amici curiae Strom.

JUDGES:

En Banc. Feldman, Vice Chief Justice. Gordon, C.J., and Holohan and Moeller, JJ., concur. Cameron, Justice, dissenting.

OPINION BY:

FELDMAN

OPINION:

[*99] [767]** A promissory note evidencing the deferred balance of the purchase price of residential property was secured by a second deed of trust. We granted review to determine whether the note's holder may waive the security of the deed of trust and bring an action for the entire unpaid balance. We have jurisdiction under Ariz. Const. art. 6, § 5(3) and *A.R.S.* **[***2]** *§ 12-120.24.*

FACTS

The Bakers sold the Gardners a single-family home for $ 131,000. Most of the purchase price was financed by an ICA Mortgage Corp. (ICA) loan, secured by a deed of trust. For the balance of the price, the Gardners gave the Bakers a promissory note for $ 17,500, secured by a second trust deed. The Gardners subsequently defaulted on both loans. ICA noticed a trustee's sale, as *A.R.S. § § 33-807* and 33-808 permit.

Before the sale, the Bakers brought this action to recover the unpaid balance of the promissory note. They did not exercise their rights under the second trust deed. Both the Bakers and the Gardners moved for summary judgment. The trial judge granted the Gardners' motion, holding that *A.R.S. § 33-814(E)* (the so-called "anti-deficiency" statute) precluded the action on the note.

The court of appeals reversed, reasoning that *A.R.S. § 33-722* (providing for a creditor's election of remedies) permitted the action. *Baker v. Gardner*, No. 2 CA-CV 87-0282 (Ariz.Ct.App. Feb. 2, 1988) (memorandum decision). Consequently, the court held that a trust deed beneficiary/creditor can choose either to exercise his rights under the trust deed or waive the security **[***3]** and file an action for the unpaid balance of the note. *Id.* at 3. We granted review because the issue is of statewide importance and of first impression. *See* Rule 21, Ariz.R.Civ.App.P., 17B A.R.S.

ISSUE AND CONTENTIONS

We must decide whether the "anti-deficiency" statute, *A.R.S. § 33-814(E)*, limits the trust deed beneficiary to selling the secured property to satisfy the debt or if *A.R.S. § 33-722* allows the beneficiary to waive the security and bring an action for the unpaid balance of the promissory note.

The Bakers argue that *A.R.S. § 33-722* allows them to waive the security and sue on the promissory note. The statute provides as follows:

> If separate actions are brought on the debt and to foreclose the mortgage given to secure it, the plaintiff shall elect which to prosecute and the other shall be dismissed.

If correct, the Bakers could obtain a judgment against the Gardners for the loan's unpaid balance and collect that judgment by execution against all the Gardners' nonexempt property. *See, e.g., A.R.S. § 14-2402.*

[*100] **[**768]** The Gardners counter that this interpretation of § 33-722 circumvents *A.R.S. § 33-814(E)*, which specifically applies to trust deeds **[***4]** encumbering certain residential parcels. That statute reads:

> E. If trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs and expenses. n1

The Gardners contend that where the property meets the criteria of § 33-814(E), that statute supersedes § 33-722. Any other interpretation, they argue, permits the beneficiary to collect the entire loan balance when § 33-814(E) limits the beneficiary to only the proceeds of the forced sale of the property.

> n1 The legislature has recently amended the statute. 1988 Ariz.Sess.Laws ch. 22, § 1. The amendments are irrelevant to the case before us.

DISCUSSION

A. The Court of Appeals' Decision

At first reading, the statutes conflict: if § 33-722 applies, the Bakers obtain a judgment for the balance **[***5]** of the debt, but if § 33-814(E) applies, the Bakers can only force the sale of the encumbered property and cannot recover any deficiency between the sale proceeds and the balance of the debt. The court of appeals resolved this conflict by relying on its holding in *Southwest Savings & Loan Association v. Mason, 155 Ariz. 443, 747 P.2d 604 (Ct.App.1987), vacated, 156 Ariz. 210, 751 P.2d 526 (1988).* n2 *Baker*, memo. decision at 2.

> n2 We granted review of *Southwest Savings* on January 19, 1988. Subsequently, counsel informed us they had settled and stipulated to dismissal of the petition for review. We dismissed the petition, exercising our discretion to vacate the court of appeals' opinion. *156 Ariz. at 211, 751 P.2d at 527.*

Southwest Savings dealt with the conflict between *A.R.S. § § 33-722* and 33-729(A). Section 33-729(A) prohibits a deficiency judgment on foreclosure of purchase money mortgages encumbering property **[***6]** of two and one-half acres or less utilized for one-family or two-family residences. The court of appeals concluded that it should read the anti-deficiency and election statutes *in pari materia*

> to give meaning to each . . . . Both sections can be given meaning by allowing an election but also by holding that once the mortgagee elects to bring an action on the note, he cannot thereafter attempt to attach the [mortgaged] property in order to satisfy that judgment on the note.

155 Ariz. at 445, 747 P.2d at 606. The appellate court's construction, in other words, effectively amends *A.R.S. § 33-722* to read as follows:

> If separate actions are brought on the debt and to foreclose the mortgage given to secure it, the plaintiff shall elect which to prosecute and the other shall be dismissed, *however should the plaintiff elect to waive the mortgage, he shall not be allowed to later attach the property formerly subject to the mortgage in order to evade the provisions of A.R.S. § 33-729(A).*

Id. (Howard, J., dissenting) (emphasis added). The majority provided no support for this construction, n3 but had to use it because otherwise the majority's **[***7]** reconciliation of the conflicting statutes would not only have circumvented the anti-deficiency statute, it would have repealed it.

> n3 *See* Justice Scalia's poignant comment on the *ipse dixit* in *Morrison v. Olson, U.S. , , 108 S.Ct. 2597, 2637, 101 L.Ed.2d 569 (1988)* (Scalia, J., dissenting).

In the present case, the majority of the court of appeals reasoned that *Southwest Savings* was "dispositive," so that the beneficiary of the trust deed, like the "mortgagee [in *Southwest Savings*] could proceed at law to collect the debt, but could not look to the property given as trust deed security . . . ." *Baker*, memo. decision at 3. Judge Howard, dissenting in both cases, believed that

"*A.R.S. § 33-722* is a general statute governing mortgages, but that **[*101]** **[**769]** *A.R.S. § 33-729(A)* is a specific statute governing [a special] type of mortgage." *Southwest Savings, 155 Ariz. at 446, 747 P.2d at 607* (Howard, J., dissenting). Consequently, **[***8]** the "remedy provided by the [anti-deficiency] statute is exclusive." *Id.; see also Baker*, memo. decision at 3 (Howard, J., dissenting from court's analysis of § 33-814(E) on the same grounds). We agree with Judge Howard.

B. General Principles

Courts construe seemingly conflicting statutes in harmony when possible. *State v. Perkins, 144 Ariz. 591, 594, 699 P.2d 364, 367 (1985), overruled on other grounds, State v. Noble, 152 Ariz. 284, 731 P.2d 1228 (1987).* However, when two statutes truly conflict, either the more recent or more specific controls. *E.g., Pima County v. Heinfeld, 134 Ariz. 133, 136, 654 P.2d 281, 284 (1982); State v. Davis, 119 Ariz. 529, 534, 582 P.2d 175, 180 (1978).*

Under both principles, the anti-deficiency statute would prevail. The legislature adopted it in 1971, while the statute permitting the plaintiff to elect between separate actions comes from territorial days. *See* Civil Code § 3274 (1901). Further, the anti-deficiency statutes apply to a particular, limited group of mortgages and trust deeds -- those encumbering **[***9]** parcels of two and one-half acres or less and used for single-family or two-family dwellings. Thus, they are more specific.

C. Legislative Objectives

Such general principles, however, help courts decide questions of statutory conflict only when legislative intent or objectives are unknown. Here, therefore, dealing with conflicting and ambiguous statutes, we must try to determine legislative intent or, at least, objectives and construe the statutes to further those objectives. *See State v. Tramble, 144 Ariz. 48, 51, 695 P.2d 737, 740 (1985).*

The legislature enacted both anti-deficiency statutes in 1971 with several other consumer-oriented laws. n4 1971 Ariz.Sess.Laws ch. 182, § 3 and ch. 136, § 7. *See generally* Boyd & Balentine, *Arizona's Consumer Legislation: Winning the Battle but . . ., 14 ARIZ.L.REV. 627, 654 (1972).* These statutes were to preclude "artificial deficiencies resulting from forced sales." *Id.; see also A.R.S. § 33-814(A).* More importantly, the statutes created the "direct benefit of . . . the elimination of hardships resulting to consumers who, when purchasing a home, fail to realize the extent to **[***10]** which they are subjecting assets besides the home to legal process." *Id.*

n4 Among them was subsection (A) of *A.R.S. § 33-814*, which encourages the creditor to make a market value bid for property sold at a non-judicial sale by prohibiting a deficiency judgment after a trustee's sale unless the higher of the fair market value of the property or the credit bid is first deducted from the balance owing.

The legislative history of *A.R.S. § 33-729(A)*, which applies to mortgages, demonstrates the legislature's objective of protecting consumers from financial ruin. Section 33-729(A) was part of H.B. 330, enacted in 1971 "to *protect the homeowners* from deficiency judgments." Minutes of Meeting, Committee on Ways and Means, March 31, 1971, at 2 (emphasis added). We must

assume the same purpose accounts for the contemporaneous statute applying to trust deeds that encumber similar residential property. Therefore, we read both anti-deficiency statutes -- § § 33-729(A) and 33-814(E) -- as evincing the legislature's desire [***11] to protect certain homeowners from the financial disaster of losing their homes to foreclosure plus all their other nonexempt property on execution of a judgment for the balance of the purchase price.

The court of appeals' construction here obviously conflicts with the legislature's objective. The Gardners presumably lost whatever equity they had in the house on the non-judicial sale noticed by ICA under the first trust deed. Under the court of appeals' opinion, the Gardners would have faced sale of their other assets on execution of the judgment on the note secured by the Bakers' second deed of trust. In our view, the legislature would not have **[*102]** **[**770]** protected homeowners from deficiency judgments but still permitted the holder of a mortgage or deed of trust to obtain essentially the same result by waiving the security and bringing action on the note. This statutory construction seems inconsistent with the patent legislative objective.

D. Authority on Legislative Intent

Authority supports our conclusion that the legislative objective in adopting anti-deficiency statutes such as ours is inconsistent with permitting the creditor to waive the security and bring an action on **[***12]** the note. Cases from California "are of particular interest as Arizona has adopted much of its redemption and mortgage statutes" from that state. *Skousen v. L.J. Development Co., Inc., 134 Ariz. 289, 292 n. 5, 655 P.2d 1341, 1344 n. 5 (Ct.App.1982).*

Our anti-deficiency statutes are similar to Cal.Code Civ.Proc. § 580b n5 California adopted § 580b in 1933 in response to the Great Depression. *See Winklemen v. Sides, 31 Cal.App.2d 387, 408, 88 P.2d 147, 158 (1939).* The history of the legislation is described in *Cornelison v. Kornbluth, 15 Cal.3d 590, 542 P.2d 981, 988-90, 125 Cal.Rptr. 557, 564-66 (1975),* which notes that California's single-action statute preceded 1900, while the anti-deficiency statutes, like Arizona's, were adopted much later. *See also Barbieri v. Ramelli, 84 Cal. 154, 23 P. 1086 (1890).*

n5 Cal.Code Civ.Proc. § 580b provided the following:

> No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property.

[*13]**

We considered the California anti-deficiency statute in *Catchpole v. Narramore, 102 Ariz. 248, 428 P.2d 105 (1967).* In *Catchpole*, the holder of a note given for the deferred balance of the purchase price of California residential property brought a debt action in Arizona against the note's maker. The case arose before passage of *A.R.S. § § 33-729(A)* and 33-814(E), when Arizona law permitted "a deficiency judgment where the security is not sufficient to satisfy the debt." *102 Ariz. at 250, 428 P.2d at 107.* However, the Arizona maker claimed that Cal.Code Civ.Proc. § 580b precluded such an action. The words of the California statute, like the subsequently enacted Arizona statutes, only prohibited a deficiency judgment after forced sale of property.

The note holder in *Catchpole* advanced essentially the same arguments as the majority of our court of appeals here. The holder contended that the California statute was procedural, directed only to the holder's remedy after sale, and therefore did not prohibit waiving the security and maintaining an action for the debt. We held, however, that California's statute was **[***14]** substantive and designed to destroy the creditor's right to a money judgment. The creditor/seller could not "recoup the balance due on the purchase price of real property. The statute does not simply govern applicable procedures; it *obliterates the debtor's [personal] liability.*" *Id. at 250-51, 428 P.2d at 107-08* (emphasis added). Our interpretation of the California law's objective conforms with later California cases. *See, e.g., Spangler v. Memel, 7 Cal.3d 603, 498 P.2d 1055, 102 Cal.Rptr. 807 (1972).*

Dealing with a similar statute, the North Carolina Supreme Court reached the same conclusion regarding the objective of its legislature. *See Ross Realty v. First Citizens Bank & Trust, 296 N.C. 366, 370, 250 S.E.2d 271, 273 (1979).* n6 We believe that **[*103]** **[**771]** these cases from California and North Carolina, interpreting statutes like ours, provide clear insight to the objective of Arizona's statute. We have neither found, nor have the parties cited us to, authority supporting a different conclusion on legislative intent or objective.

n6 The North Carolina statute, *N.C.Gen.Stat. § 45-21.38* provided in pertinent part the following:

> Deficiency judgments abolished where mortgage represents part of purchase price. -- In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate . . .

[*15]**

E. Authority Interpreting Anti-Deficiency Statutes

We turn now to cases from the states that have interpreted statutes similar to our anti-deficiency statutes. Acknowledging that California does not permit a creditor to waive the security and bring an action on the note, the majority of our court of appeals here and in *Southwest Savings* found California cases inapposite because California has a single-action statute (Cal.Code Civ.Proc. § 726) that requires a creditor first to exhaust the security before bringing an action on the debt, while *A.R.S. § 33-722* permits an election. *See Baker*, memo. decision at 3; *Southwest Savings, 155 Ariz. at 445 n. 2, 747 P.2d at 606 n. 2; see also Dudley v. Peterson, 42 Ariz. 282, 287, 25 P.2d 276, 277 (1933).* We believe the California cases cannot be so distinguished.

Long before California passed its anti-deficiency statute, California courts had held that its single-action statute did not apply when the security was destroyed. The doctrine apparently arose in *Hibernia Savings & Loan Society v. Thornton, 109 Cal. 427, 42 P. 447, 448 (1895),* **[***16]**

where the California Supreme Court stated that if the security had "become extinguished" by foreclosure of a prior lien or had "been destroyed or [had] ceased to exist," then it "may be" that the lienholder "need not go through the idle form of bringing an action for foreclosure before he can have a judgment on the note." Quoted in *Dudley, 42 Ariz. at 287, 25 P.2d at 277; cf. Barbieri*, 84 Cal. at , 23 P. at 1087 (earlier case holding single-action statute applied even though market conditions and prior liens rendered mortgage valueless).

What "may be" became law when the California Supreme Court held that the single-action "rule of section 726 does not apply to a sold-out junior lienor . . . ." *Roseleaf Corp. v. Chierighino, 59 Cal.2d 35, 39, 378 P.2d 97, 99, 27 Cal.Rptr. 873, 875 (1963),* relying on *Brown v. Jensen, 41 Cal.2d 193, 259 P.2d 425 (1953), cert. denied, 347 U.S. 905, 74 S.Ct. 430, 98 L.Ed. 1064 (1954).* Thus, unless prevented by the anti-deficiency statute, such a lienholder could bring an action on the note. *Roseleaf Corp., 59 Cal.2d at 39, 378 P.2d at 99, 27 Cal.Rptr. at 875.* **[***17]**

Notwithstanding the inapplicability of the single-action statute, California held that the later-enacted anti-deficiency statute prohibits waiving the security and suing on the note. *See, e.g., Spangler, 7 Cal.3d at 610, 498 P.2d at 1059, 102 Cal.Rptr. at 811; Bargioni v. Hill, 59 Cal.2d 121, 122, 378 P.2d 593, 594, 28 Cal.Rptr. 321, 322 (1963); Brown, 41 Cal.2d at 195, 259 P.2d at 426.* Like the case before us today, each of these cases involved sold-out junior lienholders who, despite the single-action statute, attempted to bring an action on the debt. *Spangler* is illustrative. The California Supreme Court held that even though Cal.Code Civ.Proc. § 726 did not prohibit it, a sold-out junior lienholder could not maintain an action on the note. In reaching this conclusion, the court indicated that the purpose of the anti-deficiency statute was to "discourage land sales that are unsound because the land is overvalued and, in the event of a depression in land values, to prevent the aggravation of the downturn that would result if defaulting purchasers lost **[***18]** the land and were [also] burdened with personal liability." *7 Cal.3d at 612, 498 P.2d at 1060, 102 Cal.Rptr. at 812.* The statute prevents such evils by "placing the risk of inadequate security on the . . . mortgagee." *Id.* We read our statute as having a similar purpose and endeavor to effect that purpose here.

Again we note the result the North Carolina Supreme Court reached in *Ross Realty v. First Citizens Bank & Trust, 296 N.C. at 370, 250 S.E.2d at 273.* Without prior foreclosure or sale, the creditor in *Ross* attempted to waive the security and **[*104]** **[**772]** sue on the note. The court noted the inherent ambiguity in a statute that explicitly prohibited only deficiency judgments without any prohibition against election. Nevertheless the court concluded that the statute prohibited an election to waive the security. The court stated that due to

> the purpose for which [the statute] was adopted, the perceived problem which the statute seeks to remedy, and the effect which a literal construction of the statute produces, we are compelled to construe the statute more broadly and to conclude that the Legislature **[***19]** intended to take away from creditors the option of suing upon the note in [the specified type of] transaction. This construction of the statute not only prevents its evasion, but also gives effect to the Legislature's intent.

Id. at 373, 250 S.E.2d at 275. n7

n7 It may be argued, though the Bakers did not, that the anti-deficiency statute literally applies only if the property "is sold pursuant to the trustee's power of sale" and does not apply where the creditor waives the security and brings an action on the note. California, as well as North Carolina, has rejected this contention. The California court noted that § 580b "speaks of a deficiency judgment after sale," but pointed out that the prohibited deficiency judgment "is still a deficiency judgment even though it may consist of the whole debt because a deficiency is nothing more than the difference between the security and the debt . . . ." *Brown, 41 Cal.2d at 197, 259 P.2d at 427.*

The Bakers **[***20]** have not cited to one state with an antideficiency statute that allows a noteholder to waive his security and bring an action for the unpaid debt. We have found only one such state. In *Page v. Ford, 65 Or. 450, 131 P. 1013 (1913),* the Oregon Supreme Court held that the creditor can maintain an action on the note notwithstanding the statute abolishing deficiency judgments. *Id. at 451, 131 P. at 1013.* Without analysis, except by noting the title of the statute, the Oregon court concluded that this was "settled beyond the pale of discussion." *Id.* We do not agree with this conclusion, finding it unsupported by either analysis, authority, or logic. Indeed, North Carolina rejected *Page*, describing it as having "mechanically construed" the statute while ignoring legislative intent. *Ross, 296 N.C. at 372, 250 S.E.2d at 275.* The Oregon decision is particularly inapposite here, considering the California cases and *Catchpole*, which, after detailed analysis, had reached a different conclusion before our legislature passed the anti-deficiency statutes.

F. Holding and Conclusion **[***21]**

We conclude that the legislature's objective in enacting § 33-814(E) was to abolish the personal liability of those who give trust deeds encumbering properties of two and one-half acres or less and used for single-family or two-family dwellings. We can further that objective only by construing the statute to forbid the circumvention the Bakers attempted here. The holder of the note and security device may not, by waiving the security and bringing an action on the note, hold the maker liable for the entire unpaid balance. Thus, with regard to the limited class of mortgages and deeds of trust described in § § 33-729(A) and 33-814(E), the effect of the anti-deficiency statutes is to change the Arizona rule we described in *Catchpole* to the law of California as we described it in the same case.

In reaching this conclusion, we do no violence to the text of the statutes. Nor do we leave *A.R.S. § 33-722* a meaningless shell. The creditor/beneficiary can still elect to sue on the note in all cases except those involving the particular mortgages and deeds of trust described in the anti-deficiency statutes. *See Southwest Savings & Loan Association v. Ludi, 122 Ariz. 226, 228, 594 P.2d 92, 94 (1979).* **[***22]**

We therefore vacate the court of appeals' decision and affirm the trial court's judgment. We award the Gardners attorney's fees, subject to proceedings under Rule 21, Ariz.R.Civ.App.P, 17B A.R.S.

DISSENTBY:

CAMERON

DISSENT:

CAMERON, Justice, dissenting.

I regret that I must dissent. The majority believes *A.R.S. § 33-722* conflicts with **[*105]** **[**773]** *A.R.S. § 33-729(A)* and § 33-814(E). I disagree. *A.R.S. § § 33-729(A)* and 33-814(E) apply only when the creditor elects to foreclose on the property while *A.R.S. § 33-722* allows a creditor to choose whether to sue on the note or on the deed of trust, but prohibits the creditor from proceeding on both. Neither *A.R.S. § 33-729(A)* nor § 33-814(E) prohibits a mortgagee from electing to proceed at law to collect its debt. These statutes merely prohibit an action to recover any deficiency remaining after a mortgage foreclosure action. *See Southwest Savings and Loan Association v. Ludi, 122 Ariz. 226, 228, 594 P.2d 92, 94 (1979) (A.R.S. § 33-729(A)* is only applicable to deficiencies remaining after the foreclosure of a mortgage). *A.R.S. § 33-729(A)* states in part:

> [I]f a mortgage is given to secure the payment of the balance **[***23]** of the purchase price, or to secure a loan to pay all or part of the purchase price, of a parcel of real property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling, the lien of judgment *in an action to foreclose such mortgage* shall not extend to any other property of the judgment debtor, nor may general execution be issued against the judgment debtor to enforce such judgment, and if the proceeds of the mortgaged real property sold under special execution are insufficient to satisfy the judgment, the judgment may not otherwise be satisfied out of other property of the judgment debtor, notwithstanding any agreement to the contrary.

(Emphasis added).

A.R.S. § 33-814(E) states:

> If trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling is *sold pursuant to the trustee's power of sale*, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs and expenses.

(Emphasis added).

In this case, the Bakers never commenced **[***24]** foreclosure proceedings; thus, *A.R.S. § § 33-814(E)* and 33-729(A) do not apply. The Bakers filed a complaint to recover the unpaid balance of the promissory note and never exercised their rights under the second deed of trust. At the time they filed their complaint, the first lienholder (ICA) had not yet foreclosed on the trust property. The fact that ICA did eventually foreclose on the property should not deprive the Bakers of their right to choose whether to sue on the promissory note or proceed with foreclosure. *A.R.S. § 33-722* gives creditors this option:

> If separate actions are brought on the debt and to foreclose the mortgage given to secure it, the plaintiff shall *elect which to prosecute* and the other shall be dismissed.

(Emphasis added).

This section establishes that a mortgagee has the right to bring an action on the debt rather than on the mortgage if the mortgagee desires. The statute does not limit this right to apply only when the deed of trust is on property not described in the anti-deficiency statutes, i.e. less than two and one-half acres and a single one or two-family dwelling.

The majority states that they have done no damage to *A.R.S. § 33-722.* **[***25]** This is a euphemism at best and questionable at least given the fact that they have completely eliminated a creditor's right to elect his or her remedy any time a deed of trust is taken on property described in the anti-deficiency statutes.

Some might consider it good policy to prevent those creditors with a deed of trust on a family home from electing their remedy. However, it is not the function of the courts to amend statutes and deprive certain creditors of their statutory right in order to make good policy. This should be left to the legislature.

LEXSEE 160 ARIZ 98

John P. BAKER and Deborah Mae Baker, husband and wife, Plaintiffs/Appellants, v. Gary GARDNER and Margaret Gardner, husband and wife, Defendants/Appellees

No. CV-88-0104-PR

Supreme Court of Arizona

160 Ariz. 98; 770 P.2d 766; 1989 Ariz. LEXIS 30; 31 Ariz. Adv. Rep. 3

March 20, 1989

SUBSEQUENT HISTORY: [*1]**

160 Ariz. 98 at 105.

PRIOR HISTORY:
Original Opinion of December 20, 1988, Reported at 160 Ariz. 98.

LexisNexis(R) Headnotes

COUNSEL:

Norman Rosenblum, Scottsdale, Attorney for Plaintiffs/Appellants

Oscar C. Rauch, Scottsdale, Attorneys for Defendants/Appellees

Ryley, Carlock & Applewhite, P.A., Phoenix, By: George Read Carlock, Abigail Carson Berger, Attorneys for Amici Curiae Arizona Bankers' Association and Savings and Loan League of Arizona, The Arizona Bank, Citibank (Arizona), First Interstate Bank of Arizona, The Valley National Bank

Norling, Oeser & Williams, Phoenix, By: Steven H. Williams, Reinhard W. Fischer, Attorneys for Amici Curiae Strom

JUDGES:

Feldman, Vice Chief Justice. Gordon, C.J. and Moeller, J., concur.

OPINIONBY:

FELDMAN

OPINION:

[*105] [773]** SUPPLEMENTAL OPINION

FELDMAN, Vice Chief Justice.

The Bakers and several amici have moved for reconsideration under Rule 22, **[*106] [**774]** Ariz. R. Civ. App. P., 17B A.R.S. Because the amici's briefs raise serious concerns that there may be some misunderstanding about the scope of *Baker*, we granted the reconsideration motion to clarify and, hopefully, obviate any confusion in the lending industry. We also consider amici's argument that the opinion should have only **[***2]** prospective application.

DISCUSSION

A. Scope of the Anti-Deficiency Statutes and *Baker v. Gardner*

The amici argue that even in cases that do not involve purchase money deeds of trust *Baker* may be read to prohibit creditors from waiving the security and electing to sue on the note as permitted by *A.R.S. § 33-722*. They contend that our holding should apply only to purchase money deeds of

trust securing the type of real property described by the deed of trust anti-deficiency statute. *See A.R.S. § 33-814(E)* (now numbered *A.R.S. § 33-814(F)*). This follows, they argue, because we based the opinion on policy considerations relevant only to purchase money collateral. Thus, when the loan was not made to finance the purchase of residential real estate, the lender should have the option to either waive the security and sue on the note, as § 33-722 allows, or foreclose on the collateral and obtain a judgment for any deficiency.

The Gardners disagree, claiming that it would be better policy if lenders holding collateral on homes were limited to foreclosure without being able to execute on the borrower's other assets. The better social policy, however, was not our focus. We attempted, **[***3]** rather, to effect legislative objectives. *Supra* at 101, *770 P.2d at 769.*

In pursuing that objective, we held that permitting the creditor to avoid the anti-deficiency statute by waiving the security and suing on the note would effectively destroy the anti-deficiency legislation. Consequently, the scope of *Baker* is defined by the scope of the two anti-deficiency statutes: *A.R.S. § 33-729(A)* (mortgages) and 33-814(E) (deeds of trust). Where the statutes forbid the creditor from obtaining a deficiency judgment, the election statute is inapplicable. *Supra* at 103, *770 P.2d at 771.*

The converse, of course, is that under § 33-722 a creditor can elect to forego foreclosure and sue on the note in all cases except those involving the mortgages and deeds of trust to which the anti-deficiency statutes apply. *Supra* at 103, *770 P.2d at 771.* The mortgage anti-deficiency statute, *A.R.S. § 33-729(A)*, only applies to purchase money mortgages, but the deed of trust anti-deficiency statute is not limited to purchase money collateral. *See, A.R.S. § 33-814(E).* The conflict, however, is more apparent than real because a deed of **[***4]** trust beneficiary may choose to foreclose the deed of trust "in the manner provided by law for the foreclosure of mortgages on real property." *A.R.S. § 33-807(A); see also* § 33-814(D). When the beneficiary so chooses, the action is one "for the foreclosure of a deed of trust as a real property mortgage [and] the provisions of title 33, chapter 6, article 2 [which includes the mortgage anti-deficiency statute] are applicable." *A.R.S. § 33-814(C).*

Thus, subsection (E) of § 33-814 prohibits deficiency judgments on the described residential property only when the property "is sold pursuant to the trustee's power of sale." The creditor who holds a deed of trust on the described type of residential property and who chooses the advantages of non-judicial foreclosure cannot obtain a deficiency judgment even if he is not dealing with purchase money collateral. If, however, that creditor chooses to proceed by judicial foreclosure under § 33-814(D), the governing statute prohibits election to sue on the note only in cases involving purchase money collateral encumbering the residential property described in *A.R.S. § 33-729(A).*

The essence of *Baker* was simply that *A.R.S. § 33-722* (permitting **[***5]** an election of remedies) did not apply to security covered by the later enacted anti-deficiency statutes. Any other interpretation would have destroyed the policy of consumer protection **[*107]** **[**775]** that, in light of cases from California and this court, was our legislature's objective. *See supra* at 102, *770 P.2d at 770* (citing *Catchpole v. Narramore, 102 Ariz. 248, 428 P.2d 105 (1967).* That rationale has no application to situations in which the legislature has left the creditor power to obtain a deficiency judgment. In those cases, the election statute applies.

B. Summary and Application

Where the creditor chooses non-judicial foreclosure, he cannot obtain a deficiency judgment if the collateral is within the class protected by the deed of trust anti-deficiency statute. Where, however, the creditor chooses judicial foreclosure, he can obtain a deficiency judgment in all cases except those involving purchase money loans on the type of real property that the mortgage foreclosure statute describes. Therefore, where the creditor can obtain a deficiency judgment he can also elect to waive the security under *A.R.S. § 33-722* and **[***6]** sue on the note. By choosing judicial foreclosure, the creditor can obtain a deficiency judgment in all cases except those dealing with purchase money collateral on the residential property described in § 33-729(A). He may, therefore, proceed under § 33-722 in all cases that do not fall within § 33-729(A).

We reject the contention that *Baker* be given only prospective effect. Unless three conditions are present, an Arizona civil appellate decision will normally have both retroactive and prospective effect. *Law v. Superior Court, 157 Ariz. 147, 160, 755 P.2d 1135, 1148 (1988)* (supplemental opinion). *Law* describes those conditions as

> 1. The opinion establishes a new legal principle by overruling clear and reliable precedent or by deciding an issue whose resolution was not foreshadowed;
>
> 2. Retroactive application would adversely affect the purpose behind the new rule; and
>
> 3. Retroactive application would produce substantially inequitable results.

Id. We find that these three conditions are not present here.

Baker did not overrule any clear and reliable Arizona precedents, and our holding was foreseeable. *See supra* at 101, **[***7]** *770 P.2d at 769* (citing *Catchpole*).

Here, retroactive application of *Baker* advances the legislature's objective of protecting home purchasers from economic hardships. Supra at 102-103, *770 P.2d at 770-771.* Thus, retroactive application would not adversely affect the purpose behind the new rule.

Finally, as to any inequities that *Baker* may visit on some lenders, giving home purchasers the full benefit of legislative protection outweighs the hardships to lenders. Even assuming, *arguendo*, that this balance may upset some leaders, we believe it preferable to follow the clear legislative objective of protecting home buyers.

ORDER

The pending motions were considered by the court, Justice Corcoran did not participate.

IT IS ORDERED as follows:

1. The Motion for Reconsideration was granted for the purpose of filing a supplemental opinion. The opinion is ordered filed this date. Justice Cameron does not join in the supplemental opinion and would grant the Motion for Reconsideration for the reasons set forth in his dissent.

2. The Application for Award of Attorneys' Fees and Costs is granted, allowing fees in the amount of $ 7,500 and costs **[***8]** in the amount of $ 250.79.

LEXSEE 151 ARIZ. 9

NORTHERN ARIZONA PROPERTIES, a Limited Partnership, Western Financial Management Corp., its General Partner, Plaintiffs-Appellants, v. PINETOP PROPERTIES GROUP, a General Partnership; Mike Newsome and Jane Doe Newsome, Husband and Wife; Dennis A. Kramer and Jane Doe Kramer, Husband and Wife; Shirley A. Kibler and John Doe Kibler, Husband and Wife; and Eric D. Kibler and Jane Doe Kibler, Husband and Wife; Transamerica Title Insurance Company, a California corporation and Sports Village Three Homeowners Association, Defendants-Appellees

No. 1 CA-CIV 8452

Court of Appeals of Arizona, Division One, Department C

151 Ariz. 9; *725 P.2d 501*; *1986 Ariz. App. LEXIS 794*

May 20, 1986

SUBSEQUENT HISTORY: [***1]
Review Denied September 16, 1986.

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Writs of Execution
Contracts Law > Debtor & Creditor Relations
Real Property Law > Financing > Mortgages & Other Security Instruments > Satisfaction & Termination > General Overview
[HN1] *Ariz. Rev. Stat. § 33-729(A)* reads: Except as provided in subsection B, if a mortgage is given to secure the payment of the balance of the purchase price, or to secure a loan to pay all or part of the purchase price, of a parcel of real property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling, the lien of judgment in an action to foreclose such mortgage shall not extend to any other property of the judgment debtor, nor may general execution be issued against the judgment debtor to enforce such judgment, and if the proceeds of the mortgaged real property sold under special execution are insufficient to satisfy the judgment, the judgment may not otherwise be satisfied out of other property of the judgment debtor, notwithstanding any agreement to the contrary.

Governments > Legislation > Interpretation
[HN2] "Dwelling" means a residential-type structure which is real property and contains one or more family housing units, or a residential condominium unit wherever situated.

Governments > Legislation > Interpretation
Real Property Law > Zoning & Land Use > Building & Housing Codes
[HN3] Pursuant to *Ariz. Rev. Stat. § 1-213*, words and phrases shall be construed according to common and approved use of the language.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > Deficiency Judgments

[HN4] The *Ariz. Rev. Stat. § 33-729(A)* exemption, which is limited to and utilized for either a single one-family or single two-family dwelling, does not require that the dwelling constitute someone's permanent residence or normal place of abode. Further, it does not preclude investment use.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview

[HN5] Pursuant to *Ariz. Rev. Stat. § 33-814(C)*, the beneficiary of the deed of trust is authorized to foreclose the deed in the same manner as a real property mortgage and when that election is made, the provisions relating to mortgage foreclosure, *Ariz. Rev. Stat. § 33-721, et seq.*, are applicable.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview

[HN6] *Ariz. Rev. Stat. § 33-807(A), (B)* reads, in part: At the option of the beneficiary a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property in which event the provisions of chapter 6 of this title govern the proceedings. The beneficiary or trustee shall constitute the proper and complete party plaintiff in any action to foreclose a deed of trust. The power of sale may be exercised by the trustee without express provision therefor in the trust deed. B. The trustee or beneficiary may file and maintain an action to foreclose a deed of trust at any time before the trust property has been sold under the power of sale. A sale of trust property under the power of sale shall not be held after an action to foreclose the deed of trust has been filed unless the foreclosure action has been dismissed.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview

[HN7] When the election is made to foreclose a deed of trust as a mortgage, chapter 6 of title 33 Ariz. Rev. Stat., *Ariz. Rev. Stat. § 33-701, et seq.*, controls.

COUNSEL: Parham & Cox by Michael A. Parham, Phoenix, for plaintiffs-appellants.

Storey & Ross by Lawrence E. Wilk, Dennis I. Wilenchik, Phoenix, for defendants-appellees.

JUDGES: Eubank, Presiding Judge. Shelley and Haire, JJ., concur.

OPINION BY: EUBANK

OPINION

[*9] **[**501]** The single issue raised in this appeal is whether the trial court properly construed *A.R.S. § 33-729(A)* as precluding a deficiency **[*10]** **[**502]** judgment in the foreclosure of a deed of trust as a mortgage.

Pinetop Properties Group (Pinetop), a partnership, purchased a condominium (condo), Unit 24-A, Sports Village Unit Three, located in Pinetop, Arizona, from Northern Properties (Northern). The condo consisted of three bedrooms and was situated in a building containing three other similar condo units. Northern sold the condo to Pinetop, receiving in exchange a promissory note for $ 25,176.41, payable monthly, which was secured by a deed of trust. In addition, Pinetop assumed a prior encumbrance against the condo which also required monthly payments. The Pinetop partners personally used the condo when it was not rented out to third parties. There is no dispute that **[***2]** the condo did produce

some rental income for Pinetop. In January, 1984, Pinetop defaulted on the payments and in August, 1984, Northern filed this action to foreclose the deed of trust as a mortgage. The parties stipulated to the foreclosure of the deed of trust, but they disputed whether Northern was entitled to receive a deficiency judgment, in light of the statutory exemption (*A.R.S. § 33-729(A)*) claimed by Pinetop. The trial court ruled in favor of Pinetop on the exemption issue by summary judgment. The court also foreclosed Northern's trust deed. Northern appeals only from that part of the judgment that denied it a deficiency judgment. We affirm.

Northern contends that it is entitled to the deficiency judgment as authorized by *A.R.S. § 33-727(A)* because Pinetop is not entitled to the exemption provided by *A.R.S. § 33-729(A)*. [HN1] The statutory exemption reads:

> Except as provided in subsection B, if a mortgage is given to secure the payment of the balance of the purchase price, or to secure a loan to pay all or part of the purchase price, of *a parcel of real property* of two and one-half acres or less *which is limited to and utilized for either a single one-family* **[***3]** *or single two-family dwelling*, the lien of judgment in an action to foreclose such mortgage shall not extend to any other property of the judgment debtor, nor may general execution be issued against the judgment debtor to enforce such judgment, and if the proceeds of the mortgaged real property sold under special execution are insufficient to satisfy the judgment, the judgment may not otherwise be satisfied out of other property of the judgment debtor, notwithstanding any agreement to the contrary. (Emphasis added).

A.R.S. § 33-729(A).

Northern argues that "dwelling," as used in the statute, should be defined as a permanent residence not held for investment. It further contends in its brief as follows:

> . . . In order to be a dwelling, a property must constitute someone's permanent residence or normal place of abode. The apartment in this case is occupied at the most by the week, and usually by the week-end by vacationers. It is more like a motel suite in the nature of its use than a dwelling. It is most certainly *not* "limited to and utilized for" a dwelling. It is therefore not encompassed by the exception to deficiencies set forth in *ARS § 33-729(A)*. **[***4]**
>
> * * *
>
> . . . There is no question that the property at issue was designed for use as a dwelling. The question is whether the structure actually is being "utilized" as such. Plaintiff's position is that it has been held by defendants solely and exclusively for very short term transient occupancy, and this use does not constitute utilization as a dwelling.

In support of its argument, Northern cites thirteen cases selected from footnotes numbered 45, 57.1 and 99 of 28 C.J.S., *Dwelling* (3d reprint 1974) and the 1985 pocket part. These cases are cited without much in the way of analysis but generally do support Northern's argument. However, we note in reviewing the footnotes of this C.J.S. definition section, that Northern selected minority definition cases and that the majority of the

cases do not define [*11] [**503] "Dwelling" with the specificity that Northern argues for. An example is Northern's own citation of a part of the C.J.S. text which generally runs contrary to its argument.

> The term [Dwelling] is not free from ambiguity, but is one of multiple meanings. Many definitions have been given in adjudicated cases, and they are not entirely harmonious. [***5] It does not always have the same sense in all cases, for it may mean one thing under an indictment for burglary or arson, another under a homestead law, another under a pauper law, and another in a contract or devise.

28 C.J.S., *Dwelling*, at 599-600. The last word "devise" actually ends with a semicolon and, although not quoted, continues:

> . . .; but the particular meaning intended to be expressed by it when used in a given instance, may be rendered obvious by the context or attendant circumstances; and usually resort must be had to those aids to interpretation to ascertain what is meant, and the usual line of demarcation has been the use to which the building is devoted as a habitation for man. In its broadest significance the word denotes a building used as a settled human abode; any building, edifice, or structure inclosed with walls and covered, whatever may be the materials used for building; and, in common parlance, when not qualified, conveys the notion of a home. It has been said that the character of a building or place as a dwelling is not necessarily affected by temporary absences therefrom, by the circumstances of size or cost, or kind of construction, [***6] or of the number of rooms occupied, or of the persons occupying them; although the term may be used in a qualified sense as referring to a building designed as a single dwelling to be used by one family. Also the term may be used as a description of realty. (Footnote references omitted).

Id. at 600.

Included in the C.J.S. footnotes, two Arizona Supreme Court cases are cited. The earliest is *Ainsworth v. Elder, 40 Ariz. 71, 9 P.2d 1007 (1932)*. In *Elder* the court considered a restrictive covenant which restricted a subdivision lot to the erection of one residence costing not less than five thousand dollars. The appellant was enjoined from building a duplex on the lot. The Supreme Court analyzed several cases involving the definition of "residence" and "dwelling" and held that based on "the usual significance of the words in the locality where they are used" the covenant "prohibits the erection of a building for any purpose except occupancy by a single family for residence purposes and that a duplex . . . is prohibited." *Id. at 79, 9 P.2d at 1009. Elder* is cited by Northern in support of its argument. Under the circumstances of *Elder*, the holding [***7] that "one residence" is synonymous with a "dwelling house" and excludes a duplex makes good sense. However, we do not see the case as defining "dwelling" in all other circumstances.

The other Arizona case cited in the footnotes, but not cited in the briefs, is *Smith v. Second Church of Christ, Scientist, 87 Ariz. 400, 351 P.2d 1104 (1960)*. In *Smith* two restrictive covenants were involved. The 1913

covenant provided that the "grantee shall erect no dwellings on said land the cost of which shall be less than $ 4,000.00 each and . . . that no barns, garages or other buildings whatsoever shall be erected on said land until after the construction of said dwellings shall be well under way." Our Supreme Court said: "A dwelling is, of course, a building suitable for residential purposes and does not include a Church." *Id. at 405, 351 P.2d at 1107.* Certainly, this definition runs contra to Northern's argument.

In *Lindus v. Northern Insurance Company of New York, 103 Ariz. 160, 438 P.2d 311 (1968)*, our Supreme Court, interpreting an insurance policy clause covering "All premises where the Named Insured . . . maintains a residence and includes private approaches and other **[***8]** premises and private approaches thereto for use in connection with said residence . . .", said: "The word 'residence' in the context means the dwelling **[*12] [**504]** or abode of the insured." *Id. at 163, 438 P.2d at 314.* This case illustrates the court's reliance on the context of the word (residence) and defining it within the context of the sentence and paragraphs where it is used. This case was not cited in the briefs.

Finally, in our case *Kovalik v. Delta Investment Corporation, 125 Ariz. 602, 611 P.2d 955 (App.1980)*, we held, in part, that a "lot" in a mobile home park was not a "dwelling" within the Truth in Lending Act (*15 U.S.C. §§ 1635, 1635(e)*) clause exempting credit transactions involving "first lien against a dwelling to finance the acquisition of that dwelling" from the Act. In arriving at the conclusion we relied on the definition of a "dwelling" set forth in Regulation Z, *12 C.F.R. § 226.2(p)*:

> [HN2] "Dwelling" means a residential-type structure which is real property and contains one or more family housing units, or a residential condominium unit wherever situated. *125 Ariz. at 605, 611 P.2d at 955.*

This definition is useful in the context **[***9]** of the issue *sub judice*.

In response to Northern's contentions, Pinetop argues that the legislative intent expressed in *A.R.S. § 33-729(A)* is clear and unambiguous; that [HN3] pursuant to *A.R.S. § 1-213* "[W]ords and phrases shall be construed according to common and approved use of the language . . ."; that "dwelling" is defined in Webster's Ninth New Collegiate Dictionary (1976) as: "a shelter (as a house or a building) in which people live" and similarly defined in the Uniform Building Code of 1982 and the One and Two-Family Dwelling Code (1979). Thus, Pinetop argues, no intention was expressed by the legislature to limit the definition of "Dwelling" to a person's principal abode, or to limit a "dwelling" to non-rental purposes. Finally, Pinetop points out that the restrictions governing the use of the condominiums specifically permit the lease or rental of any unit, subject only to the restrictions and bylaws of the Association.

We agree with Pinetop. "Dwelling" as used by the legislature in *A.R.S. § 33-729(A)* does not lend itself to the restrictive definition advanced by Northern. The Arizona cases cited above agree with the majority of jurisdictions in generally giving **[***10]** a broad definition to "dwelling", limited only by the context of its use. [HN4] The *A.R.S. § 33-729(A)* exemption "which is limited to and utilized for either a single one-family or single two-family dwelling" does not require that the dwelling constitute someone's permanent residence or normal place of abode. Further, it does not preclude investment use such as occurred in this case. The statute simply does

not address the contentions relied on by Northern. While we agree with Northern, that the legislature perhaps meant only to exclude deficiency judgments in foreclosure actions against a single family homeowner and not against an investment homeowner, the statute just does not say that. If Northern is correct in its surmise, only the legislature can correct the language of *A.R.S. § 33-729(A)* to preclude investment homeowners. (We also note in passing that no issue was raised, either in the trial court or here, regarding the applicability of the *A.R.S. § 33-729(A)* exemption to a three or more unit condominium. Thus, that issue is not before us and is not decided here).

Finally, the briefs assume that the mortgage foreclosure exemption *§ 33-729(A)* applies to the foreclosure of **[***11]** a deed of trust rather than *§ 33-814(E)*, which also limits deficiency judgments in a deed of trust sale. While we agree, the lack of case authority requires us to examine the question. First, the deed of trust involved herein is a security transaction document authorized by *A.R.S. § 33-801, et seq.* It is not a mortgage (*A.R.S. § 33-701, et seq.*). However, [HN5] pursuant to *A.R.S. § 33-814(C)*, the beneficiary of the deed of trust is authorized to foreclose the deed "in the same *manner* as a real property mortgage" and when that election is made, the provisions **[*13]** **[**505]** relating to mortgage foreclosure (*A.R.S. § 33-721, et seq.*) are applicable. [HN6] *A.R.S. § 33-807(A)* and *(B)* contains the same authorization with slightly different and stronger language. It reads, in part:

> . . . At the option of the beneficiary a trust deed may be foreclosed in the *manner* provided by law for the foreclosure of mortgages on real property in which event the provisions of chapter 6 of this title *govern* the proceedings. The beneficiary or trustee shall constitute the proper and complete party plaintiff in any action to foreclose a deed of trust. The power of **[***12]** sale may be exercised by the trustee without express provision therefor in the trust deed.
>
> B. The trustee or beneficiary may file and maintain an action to foreclose a deed of trust at any time before the trust property has been sold under the power of sale. A sale of trust property under the power of sale shall not be held after an action to foreclose the deed of trust has been filed unless the foreclosure action has been dismissed. (Footnote omitted). (Emphasis added).

While the word "manner" might reasonably be limited to procedure, the use of the words "govern the proceedings" by the legislature, clearly shows its intent that *A.R.S. § 33-729(A)* would govern or control the foreclosure of a deed of trust as a mortgage. The phrase "govern the proceedings" was added in 1984 and constitutes the last word by the legislature. Laws 1984, ch. 121, § 10. Thus, reading *§§ 33-814(C)* and *33-807(A)* and *(B)* together, the legislative intention is clear that [HN7] when the election is made to foreclose a deed of trust as a mortgage, chapter 6 of title 33 A.R.S. (*A.R.S. § 33-701, et seq.*) controls. Thus, we agree with the position taken by both parties that *§ 33-729(A)* is the controlling **[***13]** statute where the election is made to foreclose a deed of trust as a mortgage.

The judgment is affirmed.

LEXSEE 167 ARIZ. 122

MID KANSAS FEDERAL SAVINGS AND LOAN ASSOCIATION OF WICHITA, a corporation organized and existing under the laws of the United States of America, Plaintiff-Appellee, v. DYNAMIC DEVELOPMENT CORPORATION, an Arizona corporation, Defendant-Appellant

No. CV-89-0447-PR

Supreme Court of Arizona

167 Ariz. 122; *804 P.2d 1310*; *1991 Ariz. LEXIS 5*; *78 Ariz. Adv. Rep. 3*

January 10, 1991

SUBSEQUENT HISTORY: Mandate Issued February 1, 1991.

PRIOR HISTORY: [***1] Appeal from the Superior Court of Maricopa County; No. CV-87-05080; The Honorable Bernard J. Dougherty, Judge. Opinion of the Court of Appeals, Division One, No. 1 CA-CV88-310., *163 Ariz. 233, 787 P.2d 132 (Ct. App. 1989)*; vacated.

DISPOSITION: REVERSED AND REMANDED

LexisNexis(R) Headnotes

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > Judicial Foreclosures
Real Property Law > Financing > Mortgages & Other Security Instruments > Purchase-Money Mortgages
[HN1] Arizona has two anti-deficiency statutes. *Ariz. Rev. Stat. § 33-729(A)* applies to purchase money mortgages and purchase money deeds of trust foreclosed judicially pursuant to the authority of *Ariz. Rev. Stat. § 33-807(A)*. *Ariz. Rev. Stat. § 33-814(G)* applies to deeds of trust that are foreclosed by trustee's sale, regardless of whether they represent purchase money obligations. Both sections prohibit a deficiency judgment after sale of a parcel of property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling. *Ariz. Rev. Stat. §§ 33-729(A), 33-814(G)*.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > Deficiency Judgments
[HN2] Arizona has an election of remedies statute within the general law applicable to mortgages. Under *Ariz. Rev. Stat. § 33-722*, a mortgagee can foreclose and seek a deficiency judgment or can sue on the note and then execute on the resultant judgment but cannot bring both actions simultaneously.

Governments > State & Territorial Governments > Elections
Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview
Real Property Law > Financing > Mortgages & Other Security Instruments > Purchase-Money Mortgages
[HN3] The election statute, *Ariz. Rev. Stat. § 33-722*, was limited by the subsequently enacted purchase money mortgage anti-deficiency statute, *Ariz. Rev. Stat. § 33-729(A)*, which bars the lender from waiving the security and suing on the debt.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > Deficiency Judgments

Real Property Law > Financing > Mortgages & Other Security Instruments > Purchase-Money Mortgages
Real Property Law > Financing > Mortgages & Other Security Instruments > Redemption > Statutory Redemption
[HN4] Assuming that the deed of trust falls within one of the anti-deficiency statutes, an action for a deficiency is prohibited after a trustee's sale on any deed of trust and after judicial foreclosure on purchase money deeds of trust. *Ariz. Rev. Stat. §§ 33-814(G)* and *33-729(A)*. If a lender holds a non-purchase money deed of trust, he may recover a deficiency if he does so through an action for judicial foreclosure because *Ariz. Rev. Stat. § 33-729(A)* applies only to purchase money liens. In this latter case, of course, the debtor receives the protections of judicial foreclosure, including a statutory redemption right.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > Deficiency Judgments
Real Property Law > Financing > Mortgages & Other Security Instruments > Redemption > Statutory Redemption
[HN5] In Arizona, the debtor has no right of statutory redemption after the deed of trust is foreclosed by trustee's sale. *Ariz. Rev. Stat. § 33-811(B)*.

Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > General Overview
Governments > Legislation > General Overview
Real Property Law > Financing > Mortgages & Other Security Instruments > Redemption > General Overview
[HN6] When the holder of a non-purchase money deed of trust of the type described in *Ariz. Rev. Stat. § 33-814(G)* forecloses by non-judicial sale, the statute protects the borrower from a deficiency judgment. The lender therefore may not waive the security and sue on the note. The holder may, however, seek to foreclose the deed of trust as if it were a mortgage, as allowed by *Ariz. Rev. Stat. § 33-814(E)*; if he does so, the debtor is allowed redemption rights under *Ariz. Rev. Stat. §§ 33-726* and *12-1281 through 12-1289* and is thus protected from low credit bids, but the holder may recover a deficiency judgment -- the difference between the balance of the debt and the sale price -- unless the note is a purchase money obligation. In the latter case, the borrower is protected by the mortgage anti-deficiency statute, *Ariz. Rev. Stat. § 33-729(A)*, which applies only to purchase money obligations.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview
[HN7] See *Ariz. Rev. Stat. § 33-729(A)*.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview
[HN8] See *Ariz. Rev. Stat. § 33-814(G)*.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview

[HN9] Anti-deficiency statutes put the burden on the lender or seller to fairly value the property when extending the loan, recognizing that consumers often are not equipped to make such estimations.

Governments > Legislation > Interpretation

[HN10] Where the language of a statute is plain and unambiguous, courts must generally follow the text as written.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview

[HN11] Both Arizona anti-deficiency statutes require that the property be (1) two and one-half acres or less, (2) limited to and utilized for a dwelling that is (3) single one-family or single two-family in nature.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview

[HN12] Commercial residential properties held by the mortgagor for construction and eventual resale as dwellings are not within the definition of properties "limited to" and "utilized for" single-family dwellings.

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

Real Property Law > Financing > Mortgages & Other Security Instruments > Redemption > Mortgagor's Right

Real Property Law > Financing > Mortgages & Other Security Instruments > Satisfaction & Termination > Merger

[HN13] Generally, when one person obtains both a greater and a lesser interest in the same property, and no intermediate interest exists in another person, a merger occurs and the lesser interest is extinguished. Thus, merger may occur when a mortgagee's interest and the fee title are owned by the same person. The potential for merger arises whenever a mortgagee acquires the mortgagor's equity of redemption. However, even if a merger would otherwise occur at law, contrary intent or equitable considerations may preclude this result under appropriate circumstances.

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

Real Property Law > Financing > Mortgages & Other Security Instruments > Satisfaction & Termination > Merger
Real Property Law > Financing > Secondary Financing > Lien Priorities
[HN14] Where the same mortgagee holds both a first and second mortgage on the mortgagor's land, and becomes the purchaser at the foreclosure sale of one of the mortgages, the question of merger of rights -- often called extinguishment -- arises. The merger of rights doctrine addresses the narrow question of whether the mortgagor's personal liability on the senior debt has been discharged. The primary issue in the doctrine of merger of rights is whether the lender would be unjustly enriched if he were permitted to enforce the debt.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview
Real Property Law > Financing > Mortgages & Other Security Instruments > Satisfaction & Termination > General Overview
Real Property Law > Financing > Secondary Financing > Lien Priorities
[HN15] If one holding both junior and senior mortgages forecloses the junior and purchases the property at the foreclosure sale, the long-standing rule is that, absent a contrary agreement, the mortgagor's personal liability for the debt secured by the first mortgage is extinguished.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview
Real Property Law > Financing > Secondary Financing > Lien Priorities
[HN16] When the same mortgagee holds both the junior and senior mortgages on the land and buys at the foreclosure sale of the junior mortgage the mortgagor has an equitable right to have the land pay the mortgage before his personal liability is called upon and the purchaser will not be permitted to retain the land and enforce the same against the mortgagor personally.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview
Real Property Law > Financing > Mortgages & Other Security Instruments > Satisfaction & Termination > General Overview
[HN17] The indebtedness will be presumed to have been discharged so soon as the holder of it becomes invested with title to the land upon which it is charged, on the principle that a party may not sue himself at law or in equity. The purchaser is presumed to have bought the land at its value, less the amount of indebtedness secured thereon, and equity will not permit him to hold the land and still collect the debt from the mortgagor.

Real Property Law > Financing > Mortgages & Other Security Instruments > Redemption > Mortgagor's Right
Real Property Law > Financing > Mortgages & Other Security Instruments > Satisfaction & Termination > Merger
Real Property Law > Financing > Secondary Financing > Lien Priorities

[HN18] The merger of rights doctrine holds that the senior lien is merged into -- or extinguished by -- the title acquired by the lienholder when he acquires the mortgagor's equity of redemption under a sale on the junior lien.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview

[HN19] Where the mortgagee acquires title to the property through an involuntary conveyance, such as foreclosure, the parties obviously will not have formed a mutual intent concerning the continued enforceability of the debt.

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JUDGES: En Banc. Feldman, Vice Chief Justice. Gordon, C.J., and Moeller and Corcoran, JJ., concur. Cameron, Justice, dissenting in part, concurring in part.

OPINION BY: FELDMAN

OPINION

[*124] [1312]** OPINION

A construction lender held notes secured by first and second deeds of trust on a residential developer's property. The lender acquired title to the property at a trustee's sale on the second trust deed and thereafter brought an action against **[***2]** the developer for the balance due on the first notes. The court of appeals held that the lender was precluded from doing so under *A.R.S. § 33-814(G)* [1] and the rationale of our decision in *Baker v. Gardner, 160 Ariz. 98, 770 P.2d 766 (1989).*

1 Then codified as *§ 33-814(E).*

We must determine whether the anti-deficiency statutes apply to a residential developer and whether a lender may recover the balance owing on the first notes after it has acquired title to the property at the foreclosure sale of its second deed of trust. *Rule 23, Ariz.R.Civ.App.P., 17B A.R.S.* We have jurisdiction under *Ariz. Const. art. 6, § 5(3)* and *A.R.S. § 12-120.24.*

FACTS AND PROCEDURAL HISTORY

A. Factual Background

Dynamic Development Corporation (Dynamic) is a developer that builds and sells residential and commercial property. In May 1985, Dynamic secured financing from Mid Kansas Federal Savings and Loan Association (Mid Kansas) for the construction of ten "spec" homes on lots Dynamic owned in a Prescott **[***3]** subdivision. The total loan, amounting to $ 803,250, was disbursed in the form of ten separate loans, each evidenced by a separate note and secured by a separate deed of trust on a single unimproved lot. Unable to complete construction with the amounts financed under the first notes, Dynamic obtained an additional $ 150,000 loan from Mid Kansas in January of 1986. This loan was evidenced by a single promissory note and a blanket deed of trust on the seven lots remaining unsold.

The first and second notes came due in the summer of 1986. Two more lots were sold and released from the liens. In the fall of 1986, Mid Kansas notified Dynamic that the five remaining properties would be sold at a trustee's sale if the total debt on the first and second notes was not paid. Dynamic was unable to pay the total balance due, but did sell one more lot prior to the trustee's sale and applied the proceeds to the second note.

Mid Kansas noticed a trustee's sale on the four remaining properties, each of which was by then improved by a substantially finished residence. At the time of the trustee's sale, Dynamic owed Mid Kansas approximately $ 102,000 on the second **[*125]** **[**1313]** note and $ 425,000 **[***4]** on the four first notes. Originally, the sales on the first deeds were scheduled for the day after the sale on the second deed. On January 20, 1987, the second-position blanket deed of trust was foreclosed by the sale of the four parcels. Mid Kansas purchased the property with a credit bid of the balance owed on the second note. The four first-position sales were postponed and ultimately never held. Having thus acquired title to the property, Mid Kansas now seeks to waive the security of the first liens and sue for the balance due on the first notes.

B. Procedural Background

Mid Kansas's amended complaint stated causes of action for recovery of the balance due under each of the four promissory notes. Mid Kansas moved for partial summary judgment on the four debt claims. The trial court granted the motion and entered judgment for Mid Kansas pursuant to *Rule 54(b), Ariz.R.Civ.P., 16 A.R.S.*

The court found that Dynamic was in default on the four construction notes in the principal amount of $ 425,250 plus interest at thirteen percent. The court rejected Dynamic's claim that Mid Kansas had "artificially created a deficiency and now seeks a deficiency judgment against the maker **[***5]** of the notes." The court determined that

> under the holding of *Southwest Savings and Loan v. Ludi, 122 Ariz. 226 [594 P.2d 92 (1979)]*, Plaintiff can maintain an action on these notes notwithstanding there was a Trustee's Sale instituted by Plaintiff on a separate deed of trust involving the [same] subject properties.

On appeal, Dynamic argued that Mid Kansas was prohibited from recovering on the promissory notes by the Arizona anti-deficiency statute, *A.R.S. § 33-814(G)*. After the release of our opinion in *Baker*, Dynamic filed a supplemental brief asserting that *Ludi* could no longer be read to permit a residential mortgage holder to waive its security and sue on the note. *See Southwest Sav. & Loan*

Ass'n v. Ludi, 122 Ariz. 226, 594 P.2d 92 (1979). Dynamic argued that *Baker* prohibited any attempt to waive the security and sue on the note as a disguised action for deficiency. Therefore, Mid Kansas could not both foreclose the second deed by power of sale and elect to sue Dynamic on the first notes covering the same property.

The court of appeals reversed and remanded the case for entry of judgment for **[***6]** Dynamic. *Mid Kansas Fed. Sav. & Loan Ass'n v. Dynamic Dev. Corp., 163 Ariz. 233, 787 P.2d 132 (Ct.App.1989)*. The court held that under *Baker*, Mid Kansas's attempt to waive the security and sue on the debt was an action for a deficiency, barred after a trustee's sale under *§ 33-814(G)*. Judge Brooks concurred in the result, but argued that the case should have been decided according to the principles of merger and extinguishment, rather than under the anti-deficiency statute, because he was "not persuaded that a residential developer may claim the statutory protection against deficiency judgments afforded to homeowners under *Baker v. Gardner." Id. at 239, 787 P.2d at 138* (Brooks, J., concurring).

Mid Kansas petitioned for review in this court, presenting the following issues for our consideration:

1. Whether commercial developers of residential property who borrow for business purposes are entitled to the benefit of Arizona's consumer anti-deficiency statutes, *A.R.S. §§ 33-729(A)* and *33-814(G)*.

2. Whether Arizona's anti-deficiency statutes apply when the encumbered properties are not actually used as residences.

3. **[***7]** Whether a lender's election to waive its security and sue upon a construction loan note secured by a deed of trust constitutes an action for a deficiency prohibited by Arizona's anti-deficiency statutes, *A.R.S. §§ 33-729(A)* and *33-814(G)*.

DISCUSSION

A. The Applicability of the Anti-Deficiency Statutes

[HN1] Arizona has two anti-deficiency statutes. *A.R.S. § 33-729(A)* applies to purchase **[*126]** **[**1314]** money mortgages and purchase money deeds of trust foreclosed judicially pursuant to the authority of *A.R.S. § 33-807(A)*. *A.R.S. § 33-814(G)* applies to deeds of trust that are foreclosed by trustee's sale, regardless of whether they represent purchase money obligations. Both sections prohibit a deficiency judgment after sale of a parcel of "property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling." *A.R.S. §§ 33-729(A), 33-814(G)*.

[HN2] Arizona also has an election of remedies statute within the general law applicable to mortgages. Under *A.R.S. § 33-722*, a mortgagee can foreclose and seek a deficiency judgment or can sue on the note and then execute on the resultant judgment but cannot bring both actions simultaneously. **[***8]** *See* Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S.CAL.L.REV. 843, 928 (1980). The election statute is intended to protect the debtor from multiple suits and at the same time grant the creditor the benefit of the security.

The election statute alters the traditional common law rule that a holder of a note secured by a mortgage has the right to sue on the note alone, to foreclose on the property, or to pursue both

remedies at once (although there may be only one recovery on the debt). *See Paramount Ins., Inc. v. Rayson & Smitley, 86 Nev. 644, 472 P.2d 530, 533 (1970).* [2] However, the reach of the statute, as applied to most mortgages, is quite limited. In *Smith v. Mangels, 73 Ariz. 203, 207, 240 P.2d 168, 170 (1952)*, this court held the election statute does not preclude a subsequent foreclosure action after judgment on the debt, as is the case in some other states. *See, e.g., Neb.Rev.Stat. §§ 25-2140* and *25-2143* (1989); N.Y. Real Prop.Acts.Law § 1301 (McKinney 1979); *S.D.Codified Laws Ann. §§ 21-47-5* and *21-47-6* (1987).

2 Under the statutory scheme, the provisions within the law of mortgages (chapter 6 of A.R.S. Title 33) are not applicable to deeds of trust unless the deed of trust is judicially foreclosed as a mortgage pursuant to *A.R.S. § 33-807(A). See A.R.S. § 33-805.* The election statute is within chapter 6. Therefore, the election statute is not applicable to deeds of trust foreclosed by trustee's sale, and there is no analogous statute within the law applicable to deeds of trust. Dynamic does not contend that the lender lost its common law right to elect among its remedies. *See generally Universal Inv. Co. v. Sahara Motor Inn, Inc., 127 Ariz. 213, 215, 619 P.2d 485, 487 (Ct.App.1980)* (deed of trust statute does not mandate foreclosure by trustee's sale, but allows option to foreclose as mortgage or bring action on debt).

[*9]** In *Baker*, we held [HN3] the election statute was limited by the subsequently enacted purchase money mortgage anti-deficiency statute, *A.R.S. § 33-729(A)*, which barred the lender from waiving the security and suing on the debt. *160 Ariz. at 104, 770 P.2d at 772.* In so holding, we joined the courts of California and North Carolina in finding that such an election is inconsistent with the anti-deficiency statutes, which limit the lender to recovery from the land itself. *Id.*

Baker held that the lender should not be allowed to circumvent the anti-deficiency statute by electing to sue the debtor on the note, thereby realizing any difference between the value of the real property and the amount owed on the debt. As our supplemental opinion pointed out, *Baker's* holding applies whenever the anti-deficiency statutes apply and therefore is not always limited to the purchase money situation. *160 Ariz. at 106-07, 770 P.2d at 774-75.* [HN4] Assuming that the deed of trust falls within one of the anti-deficiency statutes, an action for a deficiency is prohibited after a trustee's sale on any deed of trust and after judicial foreclosure on **[***10]** purchase money deeds of trust. *See A.R.S. §§ 33-814(G)* and *33-729(A).* If a lender holds a non-purchase money deed of trust, he *may* recover a deficiency *if* he does so through an action for judicial foreclosure because *A.R.S. § 33-729(A)* applies only to purchase money liens. In this latter case, of course, the debtor receives the protections of judicial **[*127]** **[**1315]** foreclosure, including a statutory redemption right. [3]

3 [HN5] In Arizona, the debtor has no right of statutory redemption after the deed of trust is foreclosed by trustee's sale. *A.R.S. § 33-811(B).* This is also the rule in California, where deficiency judgments are prohibited after foreclosure by trustee's sale. The following comments regarding the California statute inform our discussion of *A.R.S. § 33-814(G)*:

> The [statute's] purpose . . . was to put nonjudicial enforcement of a deed of trust on a par with judicial foreclosure and sale . . . . [Prior to its enactment] . . . [c]reditors preferred private sale because it avoided a statutory period of redemption. By exercising the power instead of foreclosing judicially, the

> creditor could obtain a deficiency judgment as well as the enhanced proceeds of a redemption-free sale. This procedure allowed the creditor to bid in the property himself at an unfairly low price -- or offer that opportunity to someone else -- secure in the knowledge that any deficiency would be recoverable in a personal judgment against the principal. Comment, *Exonerating the Surety: Implications of the California Anti-deficiency Scheme*, 57 CAL.L.REV. 218, 232 (1969).

[*11]** Read together, therefore, the statutes enact the following scheme: [HN6] when the holder of a non-purchase money deed of trust of the type described in *A.R.S. § 33-814(G)* forecloses by non-judicial sale, the statute protects the borrower from a deficiency judgment. The lender therefore may not waive the security and sue on the note. *Baker, 160 Ariz. at 106, 770 P.2d at 774.* The holder may, however, seek to foreclose the deed of trust as if it were a mortgage, as allowed by *§ 33-814(E)*; if he does so, the debtor is allowed redemption rights under *§§ 33-726* and *12-1281 through 12-1289* and is thus protected from low credit bids, but the holder may recover a deficiency judgment -- the difference between the balance of the debt and the sale price -- unless the note is a purchase money obligation. In the latter case, the borrower is protected by the mortgage anti-deficiency statute, *A.R.S. § 33-729(A)*, which applies only to purchase money obligations. *Baker, 160 Ariz. at 106, 770 P.2d at 774.*

Thus, if under *Baker* and the facts of this case Dynamic is protected by an anti-deficiency statute, Mid Kansas could not elect to waive **[***12]** its security and sue on the first notes after having already chosen to proceed by trustee's sale under the second deed of trust.

B. Persons and Properties Included Within the Statutory Definitions

Mid Kansas argues that neither Dynamic, as a developer, nor the property under construction is protected by an anti-deficiency statute. Neither of the statutes is limited to individual homeowners rather than residential developers. Rather, the statutes apparently protect any mortgagor, provided the subject property is a single one- or two-family residential dwelling on two and one-half acres or less. [4]

4 The statutes read as follows (relevant portions emphasized):

[HN7] *A.R.S. § 33-729(A)*:

> [I]f a mortgage is given to secure the payment of the balance of the purchase price, or to secure a loan to pay all or part of the purchase price, of *a parcel of real property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling* . . . [there shall be no deficiency judgment] . . .

[HN8]

A.R.S. § 33-814(G):

> If *trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling* is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs and expenses.

[*13]** As we noted in *Baker*, both anti-deficiency statutes were enacted in 1971, along with several other laws designed to protect consumers. *160 Ariz. at 101, 770 P.2d at 769.* As with virtually all anti-deficiency statutes, the Arizona provisions were designed to temper the effects of economic recession on mortgagors by precluding "artificial deficiencies resulting from forced sales." *Id.* (quoting Boyd and Balentine, *Arizona's Consumer Legislation: Winning the Battle But . . .*, 14 ARIZ.L.REV. 627, 654 (1972)). [HN9] Anti-deficiency statutes put the burden on the lender or seller to fairly value the property when extending the loan, recognizing that consumers often **[*128] [**1316]** are not equipped to make such estimations. *See generally Spangler v. Memel, 7 Cal.3d 603, 102 Cal.Rptr. 807, 812-13, 498 P.2d 1055, 1060-61 (1972)*; Leipziger, *Deficiency Judgments in California: The Supreme Court Tries Again*, 22 U.C.L.A. L.REV. 753, 759-61 (1975). Indeed, the articulated purpose behind *A.R.S. § 33-729(A)* (and presumably behind its deed of trust counterpart, as we held in *Baker*) was **[***14]** to protect "homeowners" from deficiency judgments. *See Baker, 160 Ariz. at 101, 770 P.2d at 769.*

However, absent express limiting language in the statute or explicit evidence of legislative intent, we cannot hold that the statute excludes residential developers. [HN10] Where the language of a statute is plain and unambiguous, courts must generally follow the text as written. *Mid Kansas, 163 Ariz. at 238, 787 P.2d at 137* (citing *State Farm Mut. Ins. Co. v. Agency Rent-A-Car, Inc., 139 Ariz. 201, 203, 677 P.2d 1309, 1311 (Ct.App.1983)*; *cf. Ritchie v. Grand Canyon Scenic Rides, 165 Ariz. 460, 799 P.2d 801 (1990)* (rule inapplicable where it would produce absurd result)). While we can infer that the legislature's primary intent was to protect individual homeowners rather than commercial developers, neither the statutory text nor legislative history evinces an intent to *exclude* any other type of mortgagor. [5] Indeed, the North Carolina Supreme Court decided to apply a similar anti-deficiency statute to a commercial borrower, finding that the statute expressed no **[***15]** intent to exclude commercial transactions and therefore that the court could not read in such an intent. *Barnaby v. Boardman, 313 N.C. 565, 330 S.E.2d 600, 603 (1985).* Therefore, we hold that so long as the subject properties fit within the statutory definition, the identity of the mortgagor as either a homeowner or developer is irrelevant.

> 5 We take notice of the fact that the legislature has included such a limitation in other statutory provisions. For example, *A.R.S. § 33-806.01(D)*, which deals with a trustee's right to transfer his interest in trust property, applies only to trust property that is limited to and utilized for dwelling units and that is *not* used for commercial purposes.

In contrast to the lack of legislative limitation as to the type of mortgagor protected, there is specific textual expression as to the type of property protected. [HN11] Both statutes require that the property be (1) two and one-half acres or less, (2) limited to and utilized for a dwelling that is **[***16]** (3) single one-family or single two-family in nature. In applying a statute, we have long held that its words are to be given their ordinary meaning, unless the legislature has offered its own

definition of the words or it appears from the context that a special meaning was intended. *State Tax Comm'n v. Peck, 106 Ariz. 394, 395, 476 P.2d 849, 850 (1970).*

A.R.S. § 33-814(G) calls for the property to be "limited to" a single one- or two-family dwelling. The word "dwelling" is susceptible to several interpretations, depending on the context of its use. *See* 28 C.J.S. *Dwelling* (1941 and 1990 Supp.). However, the principal element in all such definitions is the "purpose or use of a building for human abode," meaning that the structure is wholly or partially occupied by persons lodging therein at night or *intended* for such use. *Id.; see also Smith v. Second Church of Christ, Scientist, 87 Ariz. 400, 405, 351 P.2d 1104, 1107 (1960)* (defining "dwelling" as "a building suitable for residential purposes").

The anti-deficiency statutes require not only that the property be limited to dwelling purposes, but also **[***17]** that it be "utilized for" such purposes. In *Northern Arizona Properties v. Pinetop Properties Group*, the court of appeals held that an investment condominium, which was occasionally occupied by the owners and occasionally rented out to third persons, fell within the statutory definition. *151 Ariz. 9, 725 P.2d 501 (Ct.App.1986).* In deciding that the statute applied to a dwelling used for investment purposes and not as the mortgagor's principal residence, the court employed the definition of "dwelling" in Webster's Ninth New Collegiate Dictionary and **[*129]** **[**1317]** in several housing codes as "a shelter . . . in which people live." Hence, although the condominium was held as an investment, it was also used (utilized) as a dwelling. *Id. at 12, 725 P.2d at 504.*

In contrast to the *Northern Arizona Properties* case, the property in question here had never been used as a dwelling, and was in fact not yet susceptible of being used as a dwelling. There is a difference between property intended for eventual use as a dwelling and property utilized as a dwelling. We hold that [HN12] commercial residential properties held by the mortgagor **[***18]** for construction and eventual *resale* as dwellings are not within the definition of properties "limited to" and "*utilized* for" single-family dwellings. The property is not utilized as a dwelling when it is unfinished, has never been lived in, and is being held for sale to its first occupant by an owner who has no intent to ever occupy the property. *Cf. Northern Arizona Properties* (mortgagors intended to occupy property occasionally and rent it out).

Therefore, we hold that by its terms, the anti-deficiency statute does not apply to Dynamic in this case and *A.R.S. § 33-814(G)* does not preclude Mid Kansas from waiving its security and bringing a debt action on the notes. [6]

6 Because we conclude that Dynamic is not protected by the anti-deficiency statute, we do not reach the issue of whether Mid Kansas's action on the first notes would have constituted an action for deficiency under *Baker* or an action on an "independent obligation" under *Ludi*. In *Ludi*, as in *Baker*, two notes were secured by the same real estate. However, unlike *Baker*, the second note in *Ludi* was given to obtain a home improvement loan and therefore was "independent from" the first note, given to secure a purchase money deed of trust. *Ludi, 122 Ariz. at 228, 594 P.2d at 94.* We note that, in any case, *Ludi* is not in direct conflict with *Baker* because the lender in *Ludi* used a judicial proceeding to foreclose its first deed of trust before bringing an action on the second, non-purchase money obligation. *Id. at 227, 594 P.2d at 93.*

[*19]** C. The Doctrine of Merger and Extinguishment

Because we hold that the anti-deficiency statute does not apply, we must reach the merger and extinguishment issue that is the basis of the concurring opinion in the court of appeals. Dynamic listed that issue for our consideration under *Rule 23(c), Ariz.R.Civ.App.P., 17B A.R.S.*, as an issue not decided by the court of appeals but that would need to be addressed if the court of appeals' opinion were reversed. [7]

7 In its response, Dynamic characterizes this issue as one involving unjust enrichment and election of remedies. The doctrine takes into consideration a little of both, but is more properly characterized as merger and extinguishment.

1. *Merger of Estates*

As Dynamic has noted, the facts in this case provide the basis for two merger arguments. The first is the theory of merger of estates. [HN13] Generally, when one person obtains both a greater and a lesser interest in the same property, and no intermediate interest exists in another person, a merger occurs and the **[***20]** lesser interest is extinguished. 3 R. POWELL, THE LAW OF REAL PROPERTY § 459 (1990 Rev.). Thus, merger may occur when a mortgagee's interest and the fee title are owned by the same person. *Id.* The potential for merger arises whenever a mortgagee acquires the mortgagor's equity of redemption. However, even if a merger would otherwise occur at law, contrary intent or equitable considerations may preclude this result under appropriate circumstances. 2 L. JONES, THE LAW OF MORTGAGES § 1080 (8th ed. 1928). This court has long recognized these general rules of merger of estates. *Bowman v. Cook, 101 Ariz. 366, 419 P.2d 723 (1966)*; *Hathaway v. Neal, 31 Ariz. 155, 251 P. 173 (1926).*

We assume, therefore, no one arguing to the contrary, that when Mid Kansas acquired title on the foreclosure of its *second* lien, its rights under *that* lien were merged in the title. *See Bowman, 101 Ariz. at 367, 419 P.2d at 724.* The question before us, however, is somewhat different. Today we must consider if Mid Kansas's rights under **[*130]** **[**1318]** the *first* lien were affected when it acquired title **[***21]** by foreclosure on its *second* lien.

2. *Merger of Rights*

[HN14] Where the same mortgagee holds both a first and second mortgage on the mortgagor's land, and becomes the purchaser at the foreclosure sale of one of the mortgages, the question of merger of *rights* -- often called extinguishment -- arises. The merger of rights doctrine addresses the narrow question of whether the mortgagor's personal liability on the senior debt has been discharged. *Wright v. Anderson, 62 S.D. 444, 253 N.W. 484, 487 (1934).* The primary issue in the doctrine of merger of rights is whether the lender would be unjustly enriched if he were permitted to enforce the debt. *See generally* Burkhart, *Freeing Mortgages of Merger, 40 VAND.L.REV. 283, 382 (1987).*

Although the mortgagee's purchase of the property at the foreclosure of the senior mortgage will not extinguish the debt secured by a junior mortgage, the reverse is true where the junior mortgage is foreclosed. [HN15] If one holding both junior and senior mortgages forecloses the junior and purchases the property at the foreclosure sale, the long-standing rule is that, absent a contrary agreement, the **[***22]** mortgagor's personal liability for the debt secured by the first mortgage is extinguished. G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 6.16, at 467 (2d ed. 1985). The rule has been followed for generations. *See Board of Trustees of the Gen.*

Retirement Sys. v. Ren-Cen Indoor Tennis & Racquet Club, 145 Mich.App. 318, 377 N.W.2d 432 (1985), appeal denied, 425 Mich. 875, 388 N.W.2d 680 (1986); *Tri-County Bank & Trust Co. v. Watts, 234 Neb. 124, 449 N.W.2d 537 (1989)*; Annotation, *Union of Title to Mortgage and Fee in Same Person as Affecting Right to Personal Judgment for Mortgage Debt*, 95 A.L.R. 89, 104-105 (1935) (citing *Belleville Sav. Bank v. Reis, 136 Ill. 242, 26 N.E. 646 (1891)*); *McDonald v. Magirl, 97 Iowa 677, 66 N.W. 904 (1896)*; *Wright, 253 N.W. 484*; *see also* 2 G. GLENN, MORTGAGES § 337, at 1408 (1943).

The basis of the merger of rights doctrine is that the purchaser at a foreclosure sale of a junior lien takes subject to all senior liens. *Ren-Cen Club, 377 N.W.2d at 434*; **[***23]** *Wright, 253 N.W. at 487*; *see also* Burkhart, *supra*, *40 VAND.L.REV. at 377.* Although the purchaser does not become personally liable on the senior debt (as does an assuming grantee), the purchaser must pay it to avoid the risk of losing his newly acquired land to foreclosure by the senior lienholder. Therefore, the land becomes the primary fund for the senior debt, and the purchaser is presumed to have deducted the amount of the senior liens from the amount he bids for the land. *Tri-County Bank, 449 N.W.2d at 541.* [8] As the court in *Wright* explained, [HN16] when the same mortgagee holds both the junior and senior mortgages on the land and buys at the foreclosure sale of the junior mortgage:

> The mortgagor . . . has an equitable right to have the land pay the mortgage before his personal liability is called upon and the purchaser will not be permitted to retain the land . . . and enforce the same against the mortgagor personally.

253 N.W. at 487. Similarly, the court in *Ren-Cen Club* noted that

> [HN17] [t]he indebtedness will be presumed to have been discharged so **[***24]** soon as the holder of it becomes invested with title to the land upon which it is charged, on the principle that a party may not sue himself at law or in equity. The purchaser is presumed to have bought the land at its value, less the amount of indebtedness secured thereon, and equity will not **[*131]** **[**1319]** permit him to hold the land and still collect the debt from the mortgagor.

377 N.W.2d at 435 (quoting *Belleville Savings Bank v. Reis, 136 Ill. 242, 26 N.E. 646, 647 (1891)* (citations omitted)).

> 8 In a transfer "subject to" the senior mortgage, the essence of the transaction is that "the transferee agrees, as between her and her transferor, that the debt is to be satisfied out of the land." NELSON & WHITMAN, *supra*, § 5.3, at 271.

Thus, [HN18] the merger of rights doctrine holds that the senior lien is merged into -- or extinguished by -- the title acquired by the lienholder when he acquires the mortgagor's equity of redemption under a sale on the junior lien. **[***25]** Of course, this rule comes into play only when the equity of redemption is extinguished. *See Wright, 253 N.W. at 487*; 2 JONES, *supra*, § 1080, at 514. Although the deed of trust is a relatively new instrument that postdates cases such as *Wright* and *Belleville*, we find the doctrine of merger and extinguishment even more compelling under a

modern deed of trust statute, which cuts off the borrower's equity of redemption at the time of the trustee's sale. *See A.R.S. § 33-811(B).* In *Patton v. First Federal Savings & Loan Ass'n*, we commented on the unique features of the deed of trust that required a strict construction in favor of the borrower:

> Compared to mortgage requirements, the Deed of Trust procedures authorized by statute make it far easier for lenders to forfeit the borrower's interest in the real estate securing a loan, and also abrogate the right of redemption after sale guaranteed under a mortgage foreclosure . . . . [U]nder a Deed of Trust, the trustee holds a power of sale permitting him to sell the property out of court with no necessity of judicial action. The Deed of Trust statutes thus strip borrowers of many **[***26]** of the protections available under a mortgage. Therefore, lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the borrower.

118 Ariz. 473, 477, 578 P.2d 152, 156 (1978).

As we have previously noted, even where a merger would otherwise occur at law, an express agreement between the parties that no merger shall occur often precludes such a finding by the court. NELSON & WHITMAN, *supra*, § 6.16, at 467 (citing *Toston v. Utah Mortgage Loan Co., 115 F.2d 560 (C.C.A.Idaho 1940)*; *Continental Title & Trust Co. v. Devlin, 209 Pa. 380, 58 A. 843 (1904)*; *Van Woerden v. Union Improvement Co., 156 Wash. 555, 287 P. 870 (1930))*. Of course, [HN19] where the mortgagee acquires title to the property through an involuntary conveyance, such as foreclosure, the parties obviously will not have formed a mutual intent concerning the continued enforceability of the debt. Burkhart, *supra, 40 VAND.L.REV. at 377.*

However, such an intent may be implied under circumstances that would make a finding **[***27]** of merger inequitable to the parties. The dissent in *Wright*, for instance, argued that where the mortgagee paid the full value of the property without deducting the amount of the prior lien, the rule of merger should not apply. *253 N.W. at 489* (Polley, J., dissenting). This argument was adopted by a recent decision that allowed a bank to retain its claim for the unsecured deficiency remaining on the first mortgage even though the bank purchased the property at the foreclosure sale on the second mortgage. *In re Richardson, 48 B.R. 141* (Bkrtcy, E.D.Tenn.1985). The court found that the bank had not tried to take unfair advantage of the debtor because its bid had reflected the value of the property and the bank had, in addition, credited the debtors with the amount beyond the bid it received on reselling the property. *Id. at 142.* A different result would obtain where the mortgagee is permitted to keep land that is worth as much as the two mortgage debts and also allowed to collect on the senior debt. In the latter situation, the mortgagee would be unjustly enriched, and the merger doctrine is appropriately **[***28]** applied to destroy the senior debt. NELSON & WHITMAN, *supra*, § 6.16, at 467-68.

The facts in this case clearly illustrate and require application of the doctrine **[*132]** **[**1320]** of merger and extinguishment; they also demonstrate that no equitable exception is appropriate here. Mid Kansas held the four first deeds of trust and the second blanket deed of trust on the four lots. Mid Kansas purchased all four pieces of property with a credit bid of the amount due on the second lien, $ 101,986.67. Mid Kansas thus acquired free and clear title to improved property apparently worth between $ 555,750 and $ 608,000. [9] Even accepting the lower figure, it is apparent

that the sum of the junior and senior liens ($ 527,236.67 -- exclusive of interest and costs) on the property at the relevant time -- the date of the foreclosure sale -- was probably less than the value of the property. Mid Kansas obviously tendered a credit bid that was discounted by the amount of the senior liens. Therefore, Mid Kansas would be unjustly enriched were we to allow it to acquire, for $ 100,000, property worth over $ 500,000 and also sue Dynamic for another $ 400,000 under the first notes. Mid Kansas does not **[***29]** contend that the property it acquired was worth less than the total owed on the first and second liens.

> 9 The value of the properties, as listed on the IRS Statements of Acquisition or Abandonment of Secured Property filed by Mid Kansas, totalled $ 555,750. Mid Kansas submitted appraisals to the trial court estimating the value of the lots, if completed in accordance with the plans and specifications, at $ 608,000. Ironically, the IRS statements filed by Mid Kansas stated that the "borrower was not personally liable for repayment of the debt," although Mid Kansas attributes this to "clerical error" and has since "corrected" the forms.

On these facts, we hold that the doctrine of merger and extinguishment applies. *See Ren-Cen Club, 377 N.W.2d at 436* (equity will not assist plaintiff in obtaining the price advantage of purchasing at a second mortgage sale without the disadvantage of having to satisfy the debt secured by the first mortgage). Because the holder of the senior lien acquired **[***30]** title, free from any equity of redemption, on the foreclosure of the junior lien, the doctrine of merger extinguishes the maker's liability on the senior notes. [10] This result is supported by other courts that have applied the doctrine of merger and extinguishment and held that the debt secured by the first mortgage is discharged when the senior mortgagee acquires the property at a sale on the second mortgage and the price at foreclosure sale is depressed to reflect the outstanding first mortgage. *See, e.g., Ren-Cen Club, 377 N.W.2d 432*; *Tri-County Bank, 449 N.W.2d 537*; *see also* authorities cited in Annot., *supra*, 95 A.L.R. at 104-105.

> 10 We note that our legislature has specifically curtailed a lender's ability to obtain a judgment against the debtor in excess of the fair value of the land in those cases where a deficiency judgment is permitted. *See A.R.S. § 33-814(A).* We find this legislative proscription against unjust enrichment persuasive in our present holding.

[*31]** CONCLUSION

The anti-deficiency statute, *A.R.S. § 33-814(G)*, does not apply to Dynamic in this case because the homes under construction were not utilized for single-family dwellings. We vacate the court of appeals' opinion and reverse the trial court's judgment. The case is remanded to the trial court for proceedings consistent with this opinion. On remand, the parties will have the opportunity to present evidence as to the value of the property at the time of the foreclosure sale. If the facts are as they appear on this record, equity will require no exception to the doctrine of merger and extinguishment. If Dynamic prevails, it will be eligible for its attorney's fees subject to *Rule 21, Ariz.R.Civ.App.P., 17B A.R.S.*

CONCUR BY: CAMERON (In Part)

DISSENT BY: CAMERON (In Part)

DISSENT

CAMERON, Justice, dissenting in part, concurring in part.

I concur in the result the majority ultimately reaches. However, because of my dissent in *Baker v. Gardner, 160 Ariz. 98, 770 P.2d 766 (1988)*, I write separately. In *Baker* I did not agree with the majority **[*133]** **[**1321]** that *A.R.S. § 33-722* conflicted with *A.R.S. § 33-729(A)* and *§ 33-814(E)*. [11] *Id. at 105, 770 P.2d at 774.* **[***32]** It was my belief then, and now, that *any* creditor has the right under *§ 33-722* to elect either to foreclose on the mortgage *or* to sue on the note. *Id. at 105, 770 P.2d at 774.* Once the creditor chooses to foreclose, the anti-deficiency statutes apply, and he cannot seek a deficiency judgment. *Id.*

11 *A.R.S. § 33-814(E)* is now codified as *§ 33-814(G).*

The majority reiterates the rationale of *Baker*, noting that if the anti-deficiency statutes include Dynamic, Mid Kansas would be precluded from waiving its security and could not sue on the first note after having foreclosed on the second note. Next, the majority determines whether Dynamic, as a commercial developer, is protected by the anti-deficiency statutes. Noting the statutes' purpose was to protect "homeowners" from deficiency judgments and to protect consumers who were not sophisticated enough to value property when seeking a loan, the majority includes commercial developers as mortgagors within statutory protection. **[***33]** Commercial developers, however, are business people who are capable of valuing their business enterprises when seeking commercial or construction loans. They are neither unsophisticated consumers nor "homeowners."

After determining that Dynamic falls within the class of persons protected by the statutes, the majority then notes that the property in question does not fit the statutory language. The majority stated that "commercial residential properties held by the mortgagor for construction and eventual *resale* as dwellings are not within the definition of properties 'limited to' and '*utilized* for' . . . dwellings." At 129, 804 P.2d at 1317. Commercial developers are generously included as mortgagors covered under the statutes, but excluded due to the type of property they hold. Again, I believe this is wrong. The majority's interpretation of "dwelling" and "utilized for" means that a commercial developer's property will never meet the statutory language. By applying the reasoning of my dissent in *Baker*, we could have more easily and clearly reached the majority's result, without having to extend empty statutory protection. I believe that the anti-deficiency **[***34]** statutes were not intended to cover commercial developers and, therefore, Mid Kansas has the right to elect to foreclose or to sue on the first note.

I agree with the majority's ultimate disposition of this case. Mid Kansas should not be allowed to experience a windfall by foreclosing on the second note and later suing on the first note. As the majority points out, Mid Kansas gave a credit bid equal to the amount due on the second note ($ 101,986) and received improved property worth approximately $ 550,000-$ 600,000. They now want to collect the balance due on the first note. By using the doctrine of merger and extinguishment, the majority reached the right result.

MARY PAULINE CORNELISON, Plaintiff and Appellant, v. O. JOHN KORNBLUTH, Defendant and Respondent

L.A. No. 30393

Supreme Court of California

15 Cal. 3d 590; *542 P.2d 981*; *125 Cal. Rptr. 557*; *1975 Cal. LEXIS 256*

December 1, 1975

PRIOR HISTORY: Superior Court of Los Angeles County, No. NWC 17200, Frank T. Cotter, Judge.

DISPOSITION: The judgment is affirmed.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > General Overview
[HN1] The procedure for the entry of a summary judgment provides a method by which, if the pleadings are not defective, the court may determine whether the triable issues apparently raised by them are real or merely the product of adept pleading.

Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Summary Judgment > Supporting Materials > Affidavits
[HN2] Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor and his opponent does not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue.

Contracts Law > Types of Contracts > Covenants
Real Property Law > Deeds > General Overview
Real Property Law > Financing > Mortgages & Other Security Instruments > Transfers > Assumptions
[HN3] Upon the transfer of real property covered by a mortgage or deed of trust as security for an indebtedness, the property remains subject to the secured indebtedness but the grantee is not personally liable for the indebtedness or to perform any of the obligations of the mortgage or trust deed unless his agreement to pay the indebtedness, or some note or memorandum thereof, is in writing and subscribed by him or his agent or his assumption of the indebtedness is specifically provided for in the conveyance. *Cal. Civ. Code §1624(7).*

Real Property Law > Torts > Waste > General Overview
[HN4] See *Cal. Civ. Code § 2929.*

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests
Real Property Law > Torts > Waste > Elements
[HN5] Waste is conduct (including in this word both acts of commission and of omission) on the part of the person in possession of land which is actionable at the behest of, and for protection of the reasonable expectations of, another owner of an interest in

the same land. Thus, waste is, functionally, a part of the law which keeps in balance the conflicting desires of persons having interests in the same land.

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests
Real Property Law > Torts > Waste > General Overview
[HN6] *Cal. Civ. Code § 2929*, though referring only to "the lien of a mortgage" and to the impairment of "the mortgagee's security," applies equally to a deed of trust, since a mortgage with power of sale and a deed of trust are treated similarly in California and both are considered as security interests protected from impairment. The statute imposes a duty not to commit waste upon any person whose interest is subject to the lien. Although a nonassuming grantee of mortgaged property is not personally liable on the debt, his interest in the property is subject to the lien and therefore he is under a duty not to impair the mortgagee's security.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview
Real Property Law > Purchase & Sale > General Overview
[HN7] *Cal. Civ. Proc. Code § 580b* provides that no deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his 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 real property, 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 such dwelling occupied, entirely or in part, by the purchaser.

Real Property Law > Deeds > General Overview
Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview
Real Property Law > Financing > Secondary Financing > General Overview
[HN8] *Cal. Civ. Proc. Code § 580d* provides that no judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property hereafter executed in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in such mortgage or deed of trust. The provisions of *§ 580d* shall 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 provisions of the Public Utilities Act.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > Purchase-Money Mortgages

[HN9] *Cal. Civ. Proc. Code § 580b* places the risk of inadequate security on the purchase money mortgagee.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview

Real Property Law > Torts > Waste > Remedies

[HN10] Damages in an action for waste are measured by the amount of injury to the security caused by the mortgagor's acts, that is by the substantial harm which impairs the value of the property subject to the lien so as to render it an inadequate security for the mortgage debt. A deficiency judgment is a personal judgment against the debtor-mortgagor for the difference between the fair market value of the property held as security and the outstanding indebtedness. *Cal. Civ. Code § 726.*

Civil Procedure > Judgments > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview

Real Property Law > Torts > Waste > Elements

[HN11] It is clear that the two judgments against the mortgagor, one for waste and the other for a deficiency, are closely interrelated and may often reflect identical amounts. If property values in general are declining, a deficiency judgment and a judgment for waste would be identical up to the point at which the harm caused by the mortgagor is equal to or less than the general decline in property values resulting from market conditions. When waste is committed in a depressed market, a deficiency judgment, although reflecting the amount of the waste, will of course exceed it if the decline of property values is greater. However, when waste is committed in a rising market, there will be no deficiency judgment, unless the property was originally overvalued; in this event, there would be no damages for waste unless the impairment due to waste exceeded the general increase in property values.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests

Real Property Law > Torts > Waste > General Overview

[HN12] It is clear that allowing an action for waste following a foreclosure sale of property securing purchase money mortgages may often frustrate the purpose of Cal. Civ. Code § 580b. Damages for waste would burden the defaulting purchaser with both loss of land and personal liability and the acts giving rise to that liability would have been caused in many cases by the economic downturn itself. In the case of waste committed in bad faith, the purchase money lender should not go remediless since they do not involve the type of risk intended to be borne by him in promoting the objectives of § 580b.

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests
Real Property Law > Torts > General Overview
Torts > Damages > Compensatory Damages > Property Damage > Award Calculations
[HN13] The court holds that Cal. Civ. Code § 580b should apply to bar recovery in actions for waste following foreclosure sale in the first instance but should not so apply in the second instance of bad faith waste. The court further holds that it is within the province of the trier of fact to determine on a case by case basis to what, if any, extent the impairment of the mortgagee's security has been caused (as in the first instance) by the general decline of real property values and to what, if any, extent (as in the second instance) by the bad faith acts of the mortgagor, such determination, in either instance, being subject to review under the established rule of appellate review.

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests
Real Property Law > Torts > Waste > Elements
Real Property Law > Torts > Waste > Remedies
[HN14] The court holds that in situations arising under Cal. Civ. Code § 580d, recovery for waste against the mortgagor following nonjudicial foreclosure sale is barred by the section's proscription against deficiency judgments when the waste actually results from the depressed condition of the general real estate market but not when the waste is caused by the bad faith acts of the mortgagor.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview
[HN15] As to Cal. Civ. Code § 580b, its protection against a deficiency judgment is extended to the successors in interest of the original mortgagor or trustor notwithstanding an express assumption of the indebtedness.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview
Real Property Law > Torts > Waste > General Overview
[HN16] In respect to waste not committed in bad faith, the nonassuming successor in interest is not liable either after a judicial sale or a nonjudicial one.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview
[HN17] A full credit bid is an amount equal to the unpaid principal and interest of the mortgage debt, together with the costs, fees and other expenses of the foreclosure.

Insurance Law > Property Insurance > Coverage > Real Property > General Overview
Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview
Real Property Law > Financing > Mortgages & Other Security Instruments > Satisfaction & Termination > General Overview
[HN18] Where an indebtedness secured by a deed of trust covering real property has been satisfied by the trustee's sale of the property on foreclosure for the full amount of the underlying obligation owing to the beneficiary, the lien on the real property is extinguished. *Cal. Civ. Code §2910.* In such event, the creditor cannot subsequently recover insurance proceeds payable for damage to the property.

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > Private Power-of-Sale Foreclosure
[HN19] At a nonjudicial foreclosure sale, the beneficiary is entitled to make a credit bid up to the amount of his indebtedness, since it would be useless to require him to tender cash which would only be immediately returned to him. However, the mortgagee is not required to open the bidding with a full credit bid, but may bid whatever amount he thinks the property worth. Indeed many creditors continually enter low credit bids to provide access to additional security or additional funds. It has been said that this is what the creditor should do.

Real Property Law > Deeds > Remedies > Damages
Real Property Law > Financing > Mortgages & Other Security Instruments > Satisfaction & Termination > General Overview
Real Property Law > Torts > Waste > General Overview
[HN20] With respect to an action for waste, if the beneficiary or mortgagee at the foreclosure sale enters a bid for the full amount of the obligation owing to him together with the costs and fees due in connection with the sale, he cannot recover damages for waste, since he cannot establish any impairment of security, the lien of the deed of trust or mortgage having been theretofore extinguished by his full credit bid and all his security interest in the property thereby nullified. If, however, he bids less than the full amount of the obligation and thereby acquires the property valued at less than the full amount, his security has been impaired and he may recover damages for waste in an amount not exceeding the difference between the amount of his bid and the full amount of the outstanding indebtedness immediately prior to the foreclosure sale.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In an action for damages by the beneficiary of a trust deed against a successor in interest of the trustor alleging breach of covenants contained in the trust deed and waste occasioned by defendant's alleged failure to properly and adequately care for the real property securing the trust deed, the trial court granted defendant's motion for summary

judgment. Defendant's declaration in support of his motion stated positively that he had never assumed either orally or in writing the indebtedness secured by the trust deed and that no such assumption was contained in the deed by which the property was conveyed to him, and such statement was confirmed by a copy of the deed attached to the declaration. A declaration of one of defendant's attorneys stated, in substance, that plaintiff had regained possession of the property by purchasing it on a full credit bid at a trustee's sale she had caused to be held. Plaintiff filed no counteraffidavits. (Superior Court of Los Angeles County, No. NWC 17200, Frank T. Cotter, Judge.)

The Supreme Court affirmed, holding that the summary judgment as to the cause of action for breach of contract was proper since defendant at no time assumed the indebtedness underlying the deed of trust, and that, though defendant, as a nonassuming grantee could be held liable for waste if proved to have been committed in bad faith, plaintiff's full credit bid at the trustee's sale precluded her from establishing impairment of the security by which damages for waste are measured. The court fully discussed the relationship between actions for waste and the antideficiency judgment statutes, and it held that an action for waste following a foreclosure sale under a purchase money trust deed is barred by *Code Civ. Proc., § 580b*, if the acts of the defaulting purchaser giving rise to the claim of waste were in fact caused by a downturn in land values, but that, if the waste was caused by "bad faith" acts of the purchaser, an action for waste will lie. It was further held that *Code Civ. Proc., § 580d*, proscribing the obtaining of a deficiency judgment after foreclosure by private sale of real property securing any mortgage or deed of trust, bars recovery for waste against the mortgagor or trustor if the waste results from depressed real estate values but not if the waste is caused by the "bad faith" acts of the mortgagor or trustor. The court rejected plaintiff's contention that such rules were inapplicable to a successor in interest such as defendant. (Opinion by Sullivan, J., expressing the unanimous view of the court.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a) (1b) (1c) Deeds of Trust § 24--Actions for Breach of Covenants Against Nonassuming Successor to Trustor's Interest. --In an action by the beneficiary of a trust deed against a successor in interest of the trustor, the trial court properly granted defendant's motion for summary judgment as to a cause of action for breach of covenants contained in the trust deed, where defendant's declaration in support of his motion stated positively that he never assumed either orally or in writing the indebtedness secured by the trust deed and that no such assumption was contained in the deed by which the property was conveyed to him, where such statement was confirmed by a copy of the deed attached to the declaration, and where plaintiff filed no counterdeclaration denying such allegations.

(2) Summary Judgment § 3--Propriety. --Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his

favor and his opponent does not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue.

(3) Deeds of Trust § 8--Rights, Duties and Liabilities--Of Trustor's Grantee. --On the transfer of real property covered by a mortgage or deed of trust as security for an indebtedness, the property remains subject to the secured indebtedness but the grantee is not personally liable for the indebtedness or to perform any of the obligations of the mortgage or trust deed unless his agreement to pay the indebtedness or some note or memorandum thereof, is in writing and subscribed by him or his agent or his assumption of the indebtedness is specifically provided for in the conveyance (*Civ. Code, § 1624, subd. 7*).

(4) Waste § 1--Definition. --Waste is conduct (including both acts of commission and of omission) on the part of the person in possession of land which is actionable at the behest of, and for the protection of the reasonable expectations of another owner of an interest in the same land.

(5) Deeds of Trust § 24--Remedies--Action for Waste Following Sale of Security. --*Code Civ. Proc., § 580b*, proscribing the obtaining of a deficiency judgment after any foreclosure sale, private or judicial, of real property securing a purchase money mortgage or deed of trust, bars recovery for waste following a foreclosure sale if the acts of the defaulting purchaser giving rise to the claim of waste were in fact caused by a downturn in land values, but if the waste was caused by "bad faith" acts of the purchaser an action for waste will lie. It is within the province of the trier of fact to determine on a case by case basis to what, if any, extent the impairment of the security has been caused by the general decline of real property values and to what, if any extent by the bad faith acts of the defaulting purchaser, such determination, in either instance, being subject to appellate review.

(6) Deeds of Trust § 24--Remedies--Action for Waste Following Sale of Security. --*Code Civ. Proc., § 580d*, proscribing the obtaining of a deficiency judgment after a foreclosure by private sale of real property securing a mortgage or deed of trust, bars recovery for waste against the mortgagor or trustor if the waste actually results from the depressed condition of the general real estate market, but not if the waste is caused by the "bad faith" acts of the mortgagor or trustor.

(7) Deeds of Trust § 24--Remedies--Action for Waste Following Sale of Security. --The rules applying the antideficiency judgment provisions of *Code Civ. Proc., §§ 580b, 580d*, to bar actions for waste following foreclosure of a mortgage or deed of trust if the alleged waste is attributable to depreciated real estate market conditions, are applicable in cases involving nonassuming successors in interest of the original trustor or mortgagor.

(8) Deeds of Trust § 24--Remedies--Action for Waste Following Sale of Security--Effect of Full Credit Bid by Beneficiary. --In an action by the beneficiary of a trust deed against a successor in interest of the trustor, the trial court properly granted defendant's motion for summary judgment as to a cause of action for damages for waste

occasioned by defendant's alleged failure to properly and adequately care for the real property securing the trust deed, where plaintiff had caused the property to be sold at a trustee's sale and had purchased it at the sale by bidding an amount equal to the unpaid principal and interest, together with the costs, fees and other expenses of the foreclosure. In such a situation, a beneficiary cannot establish impairment of the security, by which damages for waste are measured, since his lien has been extinguished by his full credit bid and all his security interest in the property is thereby nullified.

COUNSEL: William J. Ferrin for Plaintiff and Appellant.

Levinson, Marcus & Bratter, Harvey Jay Migdal and Lawrence R. Lieberman for Defendant and Respondent.

Larwill, Wolfe & Blackstock and John Joseph Hall as Amici Curiae on Behalf of Defendant and Respondent.

JUDGES: In Bank. Opinion by Sullivan, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Clark, J., and Richardson, J., concurred.

OPINION BY: SULLIVAN

OPINION

[*593] **[**983]** **[***559]** In this action for damages for the breach of covenants contained in a deed of trust and for damages for waste, brought by the beneficiary against the trustors and their successors in interest, plaintiff Mary Cornelison appeals from a summary judgment entered in favor of defendant John Kornbluth and against plaintiff. As will appear, we have concluded that upon the record presented, the summary judgment was properly granted and should be affirmed.

[*594] On July 15, 1964, plaintiff sold a single-family dwelling in Van Nuys, California, to Maurice and Leona Chanon, taking back a promissory note in the sum of $ 18,800 secured by a first deed of trust on the property. The deed of trust, recorded on August 21, 1964, contained the following covenants: that the Chanons would pay the real property taxes and assessments against the property; that they would care for and maintain the property; and that if they resold **[**984]** **[***560]** the property, the entire unpaid balance would become immediately due and payable.

On December 10, 1964, the Chanons conveyed the property to defendant by grant deed. On September 6, 1968, defendant sold the property to Richard Larkins. In January 1969 the county health department condemned the house as unfit for human habitation. The Chanons being in default on the promissory note, plaintiff caused the property to be sold at a trustee's sale. Plaintiff purchased the property at the sale for the sum of $ 21,921.42, that being an amount equal to the balance due on the note plus foreclosure costs.

Plaintiff then brought the instant action for damages, her amended complaint (hereafter "complaint") filed March 24, 1970, setting forth two causes of action, one for

breach of contract and one for damages for waste. The first cause of action alleged in substance that defendant "agreed in writing to be bound by and to perform all of the covenants contained in the Note and Deed of Trust theretofore executed by defendants Maurice L. Chanon and Leona Chanon"; and that defendants breached these covenants (a) by selling the property to Larkins, (b) by failing to pay property taxes, (c) by failing to make payments on the note, and (d) by failing to properly care for and maintain the premises.

The second cause of action, after incorporating by reference the material allegations of the first cause of action, alleged in substance that defendant owed a duty to properly and adequately care for the property and that defendant negligently failed to fulfill this duty, thereby causing plaintiff to be damaged in specified particulars and amounts by reason of the loss of improvements to the real property as well as by reason of the loss of its use. On the first cause of action plaintiff prayed for damages in the sum of $ 18,169.66, and on the second cause of action for damages in the sum of $ 20,000 plus the reasonable rental of the property, and in addition for $ 45,000 punitive damages.

Defendant's answer admitted that he purchased the property from the Chanons and sold it to Larkins, but denied all other allegations for lack **[*595]** of information or belief. Defendant then moved for summary judgment. His declaration in support of the motion states in substance that he purchased the subject real property from the Chanons, that at the time of the purchase he knew it was encumbered by the deed of trust in favor of plaintiff as beneficiary, that he never assumed either orally or in writing the indebtedness secured by the deed of trust, and that no such assumption was contained in the deed conveying the property to him. The declaration attaches and incorporates by reference a copy of the grant deed which confirms the last statement.

Defendant also filed in support of the motion the declaration of one of his attorneys stating in substance that plaintiff regained possession of the subject property by purchasing it for $ 21,921.42 at the foreclosure sale conducted on June 4, 1969, said purchase having been effected "by a full credit bid resulting in the full satisfaction of the remaining indebtedness secured by the deed of trust . . . ." The declaration attaches and incorporates by reference a copy of the "trustees deed upon sale" which confirmed the statements of the declaration. Plaintiff filed no counteraffidavits. The court granted defendant's motion [1] and entered judgment accordingly. This appeal followed.

1 The court made the following order: "Motion for summary judgment in favor of defendant Kornbluth against plaintiff is now granted on the ground that the action has no merit as against said defendant in that there is no showing of a duty owing to plaintiff on the part of said defendant arising by contract (agreement) or otherwise to pay taxes on or to care for and maintain the real property and improvements in question; on the contrary, the absence of such a duty has been affirmatively shown by the uncontroverted declarations filed in support of the motion."

(1a) Plaintiff contends that the court erred in granting summary judgment because the **[**985]** **[***561]** "complaint is regular on its face and raises issues of fact." The argument in support of this contention boils down to this: The complaint alleges covenants contained in a recorded deed of trust to pay taxes and to keep the property in

repair which covenants run with the land, a consequent duty on defendant to perform said covenants, and a breach of this duty. Defendant's answer placed all these material allegations in issue and defendant's declaration in support of the motion "contains no facts contrary to the allegations set forth in the complaint" and "do not refute the essential allegations."

It is clear to us that plaintiff gravely misunderstands the purpose and function of summary judgment procedure. The same contention now made by plaintiff was rejected by this court 25 years ago in a unanimous opinion by Chief Justice Traynor in the leading case of *Coyne v.* **[*596]** *Krempels (1950) 36 Cal.2d 257, 262 [223 P.2d 244].* We there said: "In effect, it is contended that a motion for summary judgment cannot be granted unless the pleadings of the party opposing the motion are insufficient to state a cause of action or defense, for under defendant's contention a sufficient pleading raises a triable issue of fact requiring the denial of the motion.

"So construed, section 437c would be meaningless. 'It is not the purpose of the procedure under section 437c to test the sufficiency of the pleadings.' (*Eagle Oil & Ref. Co. v. Prentice, 19 Cal.2d 553, 560 [122 P.2d 264].*) . . . [HN1] The procedure for the entry of a summary judgment provides a method by which, if the pleadings are not defective, the court may determine whether the triable issues apparently raised by them *are real or merely the product of adept pleading.*" (Italics added.)

Since *Coyne v. Krempels, supra*, we have had occasion to set forth the rules on summary judgments many times and we would hope that they are now well understood by the profession. (See, e.g., *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 851-852 [94 Cal.Rptr. 785, 484 P.2d 953]*; *Joslin v. Marin Mun. Water Dist. (1967) 67 Cal.2d 132, 146-148 [60 Cal.Rptr. 377, 429 P.2d 889].*) **(2)** For present purposes, we need be concerned only with the following rule: "[HN2] Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor and his opponent does not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue." (*Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785].*)

(1b) Applying the foregoing rule we are satisfied that defendant's declaration is sufficient to support a summary judgment on the first cause of action for breach of contract. As previously stated, the basic theory of this cause of action is that defendant had a duty to comply with the covenants contained in the deed of trust given plaintiff by the Chanons since the document was recorded and its covenants ran with the land. Plaintiff's legal premise is completely erroneous. **(3)** [HN3] Upon the transfer of real property covered by a mortgage or deed of trust as security for an indebtedness, the property remains subject to the secured indebtedness but the grantee is not personally liable for the indebtedness or to perform any of the obligations of the mortgage or trust deed unless his agreement to pay the indebtedness, or some note or memorandum thereof, is in writing and subscribed by him or his agent or his **[*597]** assumption of the indebtedness is specifically provided for in the conveyance. (*Civ. Code, § 1624, subd. 7*; *Snidow v. Hill (1948) 87 Cal.App.2d 803, 806-807 [197 P.2d 801].*) **(1c)** Defendant's declaration states positively that he never assumed either **[**986]** **[***562]** orally or in writing the indebtedness secured by the Chanon deed of trust and that no such assumption

was contained in the deed by which the Chanons conveyed the property to him. An examination of a copy of the deed attached to the declaration confirms this. Plaintiff filed no counterdeclaration denying these allegations and as a consequence raised no triable issue of fact. Contrary to plaintiff's contention, a triable issue of fact cannot be raised by the allegations of her complaint. (*Coyne v. Kremples, supra, 36 Cal.2d 257, 262.*) Accordingly, summary judgment on the first cause of action was properly granted.

We now proceed to determine whether defendant's declarations are sufficient to support the summary judgment on the second stated cause of action for waste. On this issue we may outline the positions of the parties as follows: Defendant contends that since, as set forth in his attorney's declaration, plaintiff purchased the property for a full credit bid an action for waste is thereby precluded both by reason of the antideficiency legislation (*Code Civ. Proc., §§ 580b, 580d; Schumacher v. Gaines (1971) 18 Cal.App.3d 994 [96 Cal.Rptr. 223]*) and by reason of the extinguishment of the security interest through a full credit bid at the trustee's sale. (*Duarte v. Lake Gregory Land and Water Co. (1974) 39 Cal.App.3d 101, 105 [113 Cal.Rptr. 893].*) Plaintiff on the other hand contends that an action for waste may be maintained independently of the antideficiency provisions of *sections 580b* and *580d of the Code of Civil Procedure.*

In order to resolve this issue it is necessary to first define, and trace the history of an action for waste and secondly to analyze the impact of the antideficiency legislation induced by the depression of the 1930's upon this traditional action.

[HN4] *Section 2929 of the Civil Code* provides: "Waste. No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security." This section, enacted in 1872, codified a portion of the common law action for waste, as developed in England and adopted in earlier California cases. **(4)** "[HN5] [W]aste is conduct (including in this word both acts of commission and of omission) on the part of the person in possession of land which is actionable at the behest of, and for protection of the **[*598]** reasonable expectations of, another owner of an interest in the same land. . . . Thus, waste is, functionally, a part of the law which keeps in balance the conflicting desires of persons having interests in the same land." (5 Powell on Real Property (1974) § 636, pp. 5-6.)

The action for waste originated in the early common law sometime during the 12th century. Initially, it was designed to protect owners of succeeding estates of inheritance from the improper conduct of the person in possession which harmed the property. As the action evolved during the ensuing development of the common law, it was broadened so as to afford protection to concurrent holders of interests in land who were out of possession (e.g., mortgagees) from harm committed by persons who were in possession (e.g., mortgagors). Recognition of this enlarged purpose of the remedy was given in the United States in the leading case of *Van Pelt* v. *McGraw* (1850) 4 N.Y. (4 Comst.) 110 where the court held that a holder of a mortgage on lands had an action on the case against the mortgagor for acts of waste committed by the latter with knowledge that the value of the security would thereby be injured. *Van Pelt* clearly set forth the measure of damages: "Now this action is not based upon the assumption that the plaintiff's [mortgagee's] land has been injured, but that his mortgage as a security has been impaired. His damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be." (*Id., at p. 112.*)

Over a century ago this court in *Robinson v. Russell (1864) 24 Cal. 467, 472-473*, relying upon *Van Pelt*, declared that an action on the case could be maintained **[**987] [***563]** by the mortgagee of real property for damages for injuries done to the property which impaired the mortgage security and that action for an injunction would lie to restrain the commission of waste on the premises. [2] It was this cause of action that was codified in 1872 as *Civil Code section 2929.* [3]

2 "There can be no doubt but that an action can be maintained by the mortgagee for injuries of the character set forth in the complaint in this case, when it appears that by the acts complained of the mortgage security is impaired. . . . There can be as little doubt that the mortgagee may, by injunction, stay the commission of waste upon the mortgaged premises, when he makes a proper case in equity and shows that the commission of the threatened acts will materially impair the value of the property subject to the lien so as to render it an inadequate security for the mortgage debt." (*Robinson v. Russell, supra, at p. 473.*)

3 It is thus clear that waste insofar as it involves protection for the security interest of mortgagees (*Civ. Code, § 2929*) is limited to protection against harm committed by persons in possession of the property subject to the lien. However, it is equally clear that a mortgagee's security interest can be impaired by harm to the property committed by third persons not in possession and that a mortgagee can recover damages in tort for such impairment of his security interest. (*American Sav. & Loan Assn. v. Leeds (1968) 68 Cal.2d 611, 614, fn. 2 [68 Cal.Rptr. 453, 440 P.2d 933]*; *Easton v. Ash (1941) 18 Cal.2d 530, 539 [116 P.2d 433]*; *Lavenson v. Standard Soap Co. (1889) 80 Cal. 245, 246 [22 P. 184]*; *U.S. Financial v. Sullivan (1974) 37 Cal.App.3d 5, 15-17 [112 Cal.Rptr. 18]*; *Los Angeles T. & S. Bk. v. Bortenstein (1920) 47 Cal.App. 421, 424 [190 P. 850].*) This recovery against third parties involves different considerations and rules because the person sued is not the debtor-mortgagor, who is afforded a variety of legislative and judicial protections (see *U.S. Financial v. Sullivan, supra, 37 Cal.App.3d 5, 15*; Denton, *Right of a Mortgagee to Recover Damages from a Third Party for Injury to Mortgaged Property in Ohio* (1937) 3 Ohio St.L.J. 161.)

[HN6]

[*599] *Section 2929 of the Civil Code*, though referring only to "the lien of a *mortgage*" (italics added) and to the impairment of "the *mortgagee's* security," (italics added) applies equally to a deed of trust, since a mortgage with power of sale and a deed of trust are treated similarly in California and both are considered as security interests protected from impairment. [4] (Hetland, Cal. Real Estate Secured Transactions (Cont. Ed. Bar 1970) § 2.7, pp. 11-12; see *American Sav. & Loan Assn. v. Leeds, supra, 68 Cal.2d 611, 614, fn. 2*; *U.S. Financial v. Sullivan, supra, 37 Cal.App.3d 5, 15.*) The statute imposes a duty not to commit waste upon any "person whose interest is subject to the lien." Although a nonassuming grantee of mortgaged property is not personally liable on the debt, his interest in the property is subject to the lien (*Braun v. Crew (1920) 183 Cal. 728, 731 [192 P. 531]*; *Hibernia Sav. etc. Soc. v. Dickinson (1914) 167 Cal. 616, 621 [140 P. 265]*) and therefore he is under a duty not to impair the mortgagee's security. Defendant as a nonassuming grantee of the property subject to plaintiff's deed of trust was under a duty not to commit waste.

4 Since mortgages with power of sale and deeds of trust are both covered by *Civil Code section 2929*, the terms "mortgagor" and "mortgagee" will be used on occasion to include rights of trustor and beneficiary pursuant to a deed of trust in order to simplify terminology in the opinion. Nevertheless from time to time where appropriate according to the context, we will use the terms "trustor," "trustee" and "beneficiary."

Defendant contends, however, that assuming arguendo that he was under a duty not to commit waste and that his acts or omissions constituted waste by so materially impairing the value of the property as to render it inadequate security for the mortgage debt, nevertheless plaintiff is not entitled to recover because such recovery for waste would amount to a deficiency judgment proscribed by *sections 580b* [5] and **[**988]** **[***564]** *580d* [6] **[*600]** *of the Code of Civil Procedure.* In order to resolve this contention it is necessary to briefly summarize the array of legislation in the field of secured transactions in real property spawned by the depression of the 1930's.

5 [HN7] *Section 580b* provides in relevant part: "No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his 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 real property, 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 such dwelling occupied, entirely or in part, by the purchaser."

Hereafter, unless otherwise noted, all section references are to the Code of Civil Procedure.

6 [HN8] *Section 580d* provides: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property hereafter executed in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in such mortgage or deed of trust.

"The provisions of this section shall 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 provisions of the Public Utilities Act."

Prior to 1933, a mortgagee of real property was required to exhaust his security before enforcing the debt or otherwise to waive all right to his security (*§ 726*; see *Walker v. Community Bank (1974) 10 Cal.3d 729, 733-734 [111 Cal.Rptr. 897, 518 P.2d 329]*). However, having resorted to the security, whether by judicial sale or private nonjudicial sale, the mortgagee could obtain a deficiency judgment against the mortgagor for the difference between the amount of the indebtedness and the amount realized from the sale. As a consequence during the great depression with its dearth of money and declining property values, a mortgagee was able to purchase the subject real property at the foreclosure sale at a depressed price far below its normal fair market value and thereafter to obtain a double recovery by holding the debtor for a large deficiency. (*Roseleaf Corp.*

v. Chierighino (1963) 59 Cal.2d 35, 40 [27 Cal.Rptr. 873, 378 P.2d 97]; see Glenn, Mortgages (1943) § 156, pp. 857-861.) In order to counteract this situation, California in 1933 enacted fair market value limitations applicable to both judicial foreclosure sales (*§ 726*) [7] and private foreclosure sales (§ 580a) [8] which limited the mortgagee's **[*601]** deficiency judgment after exhaustion **[**989]** **[***565]** of the security to the difference between the fair value of the property at the time of the sale (irrespective of the amount actually realized at the sale) and the outstanding debt for which the property was security. Therefore, if, due to the depressed economic conditions, the property serving as security was sold for less than the fair value as determined under *section 726* or section 580a, the mortgagee could not recover the amount of that difference in his action for a deficiency judgment. (See Hetland, Secured Real Estate Transactions (Cont. Ed. Bar 1974) § 9.3, pp. 183-184.)

7 *Section 726* provides in part: "In the event that a deficiency is not waived or prohibited and it is decreed that any defendant is personally liable for such debt, then upon application of the plaintiff filed at any time within three months of the date of the foreclosure sale and after a hearing thereon at which the court shall take evidence and at which hearing either party may present evidence as to the fair value of the property or the interest therein sold as of the date of sale, the court shall render a money judgment, against such defendant or defendants for the amount by which the amount of the indebtedness with interest and costs of sale and of action exceeds the fair value of the property or interest therein sold as of the date of sale; provided, however, that in no event shall the amount of said judgment, exclusive of interest from the date of sale and of costs exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured by said mortgage or deed of trust."

8 Section 580a provides: "Whenever a money judgment is sought 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, following the exercise of the power of sale in such deed of trust or mortgage, the plaintiff shall set forth in his complaint the entire amount of the indebtedness which was secured by said deed of trust or mortgage at the time of sale, the amount for which such real property or interest therein was sold and the fair market value thereof at the date of sale and the date of such sale. Upon the application of either party made at least ten days before the time of trial the court shall, and upon its own motion the court at any time may, appoint one of the inheritance tax appraisers provided for by law to appraise the property or the interest therein sold as of the time of sale. Such appraiser shall file his appraisal with the clerk and the same shall be admissible in evidence. Such appraiser shall take and subscribe an oath to be attached to the appraisal that he has truly, honestly and impartially appraised the property to the best of his knowledge and ability. Any appraiser so appointed may be called and examined as a witness by any party or by the court itself. The court must fix the compensation of such appraiser, not to exceed five dollars per day, and expenses for the time actually engaged in such appraisal, which may be taxed and allowed in like manner as other costs. Before rendering any judgment the court shall find the fair market value of the real property, or interest therein sold, at the

time of sale. The court may render judgment for not more than the amount by which the entire amount of the indebtedness due at the time of sale exceeded the fair market value of the real property or interest therein sold at the time of sale with interest thereon from the date of the sale; provided, however, that in no event shall the amount of said judgment, exclusive of interest after the date of sale, exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured by said deed of trust or mortgage. Any such action must be brought within three months of the time of sale under such deed of trust or mortgage. No judgment shall be rendered in any such action until the real property or interest therein has first been sold pursuant to the terms of such deed of trust or mortgage, unless such real property or interest therein has become valueless."

In certain situations, however, the Legislature deemed even this partial deficiency too oppressive. Accordingly, in 1933 it enacted *section 580b* (see fn. 5, *ante*) which barred deficiency judgments altogether on purchase money mortgages. "[HN9] *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 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 Corp. v. Chierighino, supra, 59 Cal.2d 35, 42*; see also *Spangler v. Memel (1972) 7 Cal.3d 603, 612 [102 Cal.Rptr. 807, 498* **[*602]** *P.2d 1055]*; *Bargioni v. Hill (1963) 59 Cal.2d 121, 123 [28 Cal.Rptr. 321, 378 P.2d 593]*.)

Although both judicial foreclosure sales and private nonjudicial foreclosure sales provided for identical deficiency judgments in nonpurchase money situations subsequent to the 1933 enactment of the fair value limitations, one significant difference remained, namely property sold through judicial foreclosure was subject to the statutory right of redemption (§ 725a), while property sold by private foreclosure sale was not redeemable. By virtue of sections 725a and 701, the judgment debtor, his successor in interest or a junior lienor could redeem the property at any time during one year after the sale, frequently by tendering the sale price. The effect of this right of redemption was to remove any incentive on the part of the mortgagee to enter a low bid at the sale (since the property could be redeemed for that amount) and to encourage the making of a bid approximating the fair market value of the security. However, since real property purchased at a private foreclosure sale was not subject to redemption, the mortgagee by electing this remedy, could gain irredeemable title to the property by a bid substantially below the fair value and still collect a deficiency judgment for the difference between the fair value of the security and the outstanding indebtedness.

In 1940 the Legislature placed the two remedies, judicial foreclosure sale and private nonjudicial foreclosure sale on a parity by enacting *section 580d* (see fn. 6, *ante*). **[**990]** **[***566]** *Section 580d* bars "any deficiency judgment" following a private foreclosure sale. "It seems clear . . . that *section 580d* was enacted to put judicial enforcement on a parity with private enforcement. This result could be accomplished by

giving the debtor a right to redeem after a sale under the power. The right to redeem, like proscription of a deficiency judgment, has the effect of making the security satisfy a realistic share of the debt. [Citation.] By choosing instead to bar a deficiency judgment after private sale, the Legislature achieved its purpose without denying the creditor his election of remedies. If the creditor wishes a deficiency judgment, his sale is subject to statutory redemption rights. If he wishes a sale resulting in nonredeemable title, he must forego the right to a deficiency judgment. In either case the debtor is protected." (*Roseleaf Corp. v. Chierighino, supra, 59 Cal.2d 35, 43-44.*)

In the case at bench, we are now called upon to determine the effect of this antideficiency legislation upon the statutory action for waste. (*Civ. Code, § 2929.*) It will be recalled that [HN10] damages in an action for waste are **[*603]** measured by the amount of injury to the security caused by the mortgagor's acts, that is by the substantial harm which "[impairs] the value of the property subject to the lien so as to render it an inadequate security for the mortgage debt." (*Robinson v. Russell, supra, 24 Cal. 467, 473.*) A deficiency judgment is a personal judgment against the debtor-mortgagor for the difference between the fair market value of the property held as security and the outstanding indebtedness. (*§ 726.*) [HN11] It is clear that the two judgments against the mortgagor, one for waste and the other for a deficiency, are closely interrelated and may often reflect identical amounts. If property values in general are declining, a deficiency judgment and a judgment for waste would be identical up to the point at which the harm caused by the mortgagor is equal to or less than the general decline in property values resulting from market conditions. When waste is committed in a depressed market, a deficiency judgment, although reflecting the amount of the waste, will of course exceed it if the decline of property values is greater. However, when waste is committed in a rising market, there will be no deficiency judgment, unless the property was originally overvalued; in this event, there would be no damages for waste unless the impairment due to waste exceeded the general increase in property values.

Mindful of the foregoing, we now proceed to arrive at an assessment of the effect of *sections 580b* and *580d* upon an action for waste. **(5)** First, we examine the 580b proscription of a deficiency judgment after any foreclosure sale, private or judicial, of property securing a purchase money mortgage. The primary purpose of *section 580b* is "in the event of a depression in land values, to prevent the aggravation of the downturn that would result if defaulting purchasers lost the land and were burdened with personal liability." (*Bargioni v. Hill, supra, 59 Cal.2d 121, 123.*) [HN12] It is clear that allowing an action for waste following a foreclosure sale of property securing purchase money mortgages may often frustrate this purpose. Damages for waste would burden the defaulting purchaser with both loss of land and personal liability and the acts giving rise to that liability would have been caused in many cases by the economic downturn itself. For example, a purchaser caught in such circumstances may be compelled in the normal course of events to forego the general maintenance and repair of the property in order to keep up his payments on the mortgage debt. If he eventually defaults and loses the property, to hold him subject to additional liability for waste would seem to run counter to the purpose of *section 580b* and to permit the purchase money lender to obtain what is in effect a deficiency judgment. It is of course true that not all owners of real property subject to a purchase money **[*604]** mortgage commit waste solely **[**991]** **[***567]** or primarily as a result of the economic pressures of a market depression; indeed many

are reckless, intentional, and at times even malicious despoilers of property. In these latter circumstances to which we shall refer for convenience as waste committed in bad faith, the purchase money lender should not go remediless since they do not involve the type of risk intended to be borne by him in promoting the objectives of *section 580b* alluded to above.

Accordingly, [HN13] we hold that *section 580b* should apply to bar recovery in actions for waste following foreclosure sale in the first instance but should not so apply in the second instance of "bad faith" waste. We further hold that it is within the province of the trier of fact to determine on a case by case basis to what, if any, extent the impairment of the mortgagee's security has been caused (as in the first instance) by the general decline of real property values and to what, if any, extent (as in the second instance) by the bad faith acts of the mortgagor, such determination, in either instance, being subject to review under the established rule of appellate review. [9]

9 This holding is entirely consistent with the following statement by this court in *American Sav. & Loan Assn. v. Leeds, supra, 68 Cal.2d 611, 614*, footnote 2: "If plaintiff [in an action for tortious damage to security] were attempting to reach substitute property, it could do so without being barred by *section 580b of the Code of Civil Procedure.*" While the footnote does include references to actions for waste against mortgagors, "the substitute property" referred to is money recovered from third parties who tortiously damage the security, as explained in the case cited in the footnote, *Los Angeles T. & S. B. v. Bortenstein (1920) 47 Cal.App. 421, 424 [190 P. 850]*. As noted in footnote 3, *ante*, in this opinion, actions by mortgagees against nonpossessing third parties for tortious impairment of security are not affected by the antideficiency legislation.

(6) We now turn to assess the effect upon an action for waste of *section 580d* which applies to a nonpurchase money mortgage. We are satisfied that a different analysis must be pursued. It will be recalled from our earlier discussion that the Legislature intended to establish parity between judicial foreclosure and private foreclosure by denying a deficiency judgment subsequent to a private sale. Under a judicial foreclosure, the mortgagee is entitled to a deficiency judgment, but must bear the burden of a statutory redemption; under a private sale the mortgagee need not bear the burden of redemption, but cannot recover any deficiency judgment. If following a nonjudicial sale the mortgagee were allowed to obtain a judgment for damages for waste against the mortgagor, he would have the double benefits of an irredeemable title to the property and a personal judgment against the mortgagor for the impairment of the value of the property. This would essentially destroy **[*605]** the parity between judicial foreclosure and private foreclosure in all instances where the waste is actually caused by general economic conditions, since as we have explained, such recovery is in effect a deficiency judgment. If, however, the recovery is limited to waste committed in "bad faith," then the personal judgment would be entirely independent of the problems encompassed by the antideficiency legislation and would not affect the parity of remedies. Accordingly, [HN14] we hold that in situations arising under *section 580d*, recovery for waste against the mortgagor following nonjudicial foreclosure sale is barred by the section's proscription against deficiency judgments when the waste actually results from the

depressed condition of the general real estate market but not when the waste is caused by the "bad faith" acts of the mortgagor.

(7) Plaintiff contends, however, that neither *section 580b* nor *section 580d* applies to an action for waste against defendant because the latter was not the original mortgagor but a successor in interest. As noted in footnote 3, *ante*, a mortgagee can recover damages in tort for impairment of his security interest by nonpossessing **[**992] [***568]** third parties and this action is not limited by the antideficiency legislation protecting the debtor-mortgagor. In essence plaintiff contends that a successor owner of real property who impairs the mortgagee's security interest should be treated as a third party.

After a careful consideration of this argument, we conclude that it must be rejected as without merit. First [HN15] as to *section 580b*, its protection against a deficiency judgment is extended to the successors in interest of the original mortgagor or trustor notwithstanding an express assumption of the indebtedness. (See *Stockton Sav. & Loan Bank v. Massanet (1941) 18 Cal.2d 200, 208-209 [114 P.2d 592]*; *Jackson v. Taylor (1969) 272 Cal.App.2d 1, 5 [76 Cal.Rptr. 891]*; Hetland, Cal. Real Estate Secured Transactions (Cont. Ed. Bar 1970) § 6.25, pp. 273-274.) Accordingly, it would be illogical, we think, to subject successors in interest who do not assume the indebtedness to a greater liability than those who do assume it by permitting recovery against the former of damages for waste caused by a market downturn and not committed in "bad faith." Furthermore to permit such recovery would, in our opinion, impede if not defeat the policy underlying *section 580b* of preventing the aggravation of a depression in land values. (*Bargioni v. Hill, supra, 59 Cal.2d 121, 123.*) Secondly, as to *section 580d*, although the underlying policy is not so directly compelling and the nonassuming successor in interest somewhat in the position of a third party, nevertheless, in view of the interrelation **[*606]** of the two sections and the parity established between them as explained above, we are convinced that recovery against nonassuming successors in interest for waste caused by a market downturn and not committed in "bad faith" should not be permitted after a nonjudicial foreclosure sale. In sum, we conclude that [HN16] in respect to waste not committed in "bad faith," the nonassuming successor in interest is not liable either after a judicial sale or a nonjudicial one.

(8) While our foregoing conclusion may expose defendant to liability on the basis of having committed "bad faith" waste, the question need not be resolved. We have further concluded that even assuming that defendant is liable on such basis, nevertheless plaintiff cannot recover since she purchased the subject property at the trustee's sale by making a full credit bid. [10] As stated previously, the measure of damages for waste is the amount of the impairment of the security, that is the amount by which the value of the security is less than the outstanding indebtedness and is thereby rendered inadequate. (*Robinson v. Russell, supra, 24 Cal. 467, 473.*) The point of defendant's argument is that the mortgagee's purchase of the property securing the debt by entering a full credit bid establishes the value of the security as being equal to the outstanding indebtedness and ipso facto the nonexistence of any impairment of the security. As applied to the factual context of the instant case, the argument is that the purchase by plaintiff-vendor-beneficiary of the property covered by the purchase money deed of trust pursuant to a full

credit bid made and accepted at the nonjudicial foreclosure sale resulted in a total satisfaction of the secured obligation. We agree.

10 [HN17] That is, in an amount equal to the unpaid principal and interest of the mortgage debt, together with the costs, fees and other expenses of the foreclosure.

[HN18] Where an indebtedness secured by a deed of trust covering real property has been satisfied by the trustee's sale of the property on foreclosure for the full amount of the underlying obligation owing to the beneficiary, the lien on the real property is extinguished. (*Civ. Code, § 2910*; *Streiff v. Darlington (1973) 9 Cal.2d 42, 45 [68 P.2d 728]*; *Duarte v. Lake Gregory Land and Water Co., supra, 39 Cal.App.3d 101, 104-105.*) In such event, the creditor cannot subsequently recover insurance proceeds payable for damage to the property (*Reynolds v. London etc. Ins. Co. (1900) 128 Cal. 16, 19-20 [60 P. 467]*; **[**993]** **[***569]** *Duarte v. Lake Gregory Land and Water Co., supra, 39 Cal.App.3d at p. 105*; *Rosenbaum v. Funcannon (9th Cir. 1962) 308 F.2d 680, 684-685)*, net rent proceeds (*Eastland S. & L. Assn. v. Thornhill & Bruce, Inc. (1968) 260 Cal.App.2d 259, 261-262 [66 Cal.Rptr. 901]*), or damages for waste (*Schumacher v.* **[*607]** *Gaines (1971) 18 Cal.App.3d 994 [96 Cal.Rptr. 223]*). "[The] purpose of the trustee's sale is to resolve the question of value and the question of potential forfeiture through competitive bidding . . . ." (Hetland, Cal. Real Estate Secured Transactions (Cont. Ed. Bar 1970) p. 255.) In *Smith v. Allen (1968) 68 Cal.2d 93, 95-96 [65 Cal.Rptr. 153, 436 P.2d 65]*, this court held that a nonjudicial foreclosure sale, if regularly held, finally fixes the value of the property therein sold.

[HN19] At the nonjudicial foreclosure sale, the beneficiary is entitled to make a credit bid up to the amount of his indebtedness, since it would be useless to require him to tender cash which would only be immediately returned to him. (*Central Sav. Bank of Oakland v. Lake (1927) 201 Cal. 438, 447-448 [257 P. 521].*) However, the mortgagee is not required to open the bidding with a full credit bid, but may bid whatever amount he thinks the property worth. Indeed "many creditors continually enter low credit bids . . . to provide access to additional security or additional funds." (Hetland, Secured Real Estate Transactions (Cont. Ed. Bar 1974) p. 196.) It has been said that this is what the creditor should do: "'Of course, the situation would have been different if the loss-payable mortgagee, Rosenbaum had bid less for the property as was her right. In such case, a deficiency balance of the debt would have remained for which she would have had an entitlement out of the insurance policy. The extinguishment of the mortgage or deed of trust by the foreclosure would not have affected her right to be paid the remainder of the debt under the policy. [para.] However, this was not done. Presumably, Rosenbaum bid what she thought the security property to be worth in its condition at the time of her bid. To bid more than the property was then actually worth was not required of her, nor would such a bid be sensible.'" (*Rosenbaum v. Funcannon, supra, 308 F.2d 680, 685.*)

Exactly the same situation obtains [HN20] with respect to an action for waste. If the beneficiary or mortgagee at the foreclosure sale enters a bid for the full amount of the obligation owing to him together with the costs and fees due in connection with the sale, he cannot recover damages for waste, since he cannot establish any impairment of security, the lien of the deed of trust or mortgage having been theretofore extinguished by his full credit bid and all his security interest in the property thereby nullified. If,

however, he bids less than the full amount of the obligation and thereby acquires the property valued at less than the full amount, his security has been impaired and he may recover damages for waste in an amount not exceeding the difference between the amount of his bid and the full amount of the outstanding indebtedness immediately prior to the foreclosure sale.

[*608] Plaintiff complains that it is difficult to calculate precisely the amount of damages recoverable for waste so as to determine the proper amount which the beneficiary or mortgagee should bid at the foreclosure sale; therefore, she urges, it is unfair to impose such a burden on the beneficiary or mortgagee. Suffice it to say that no complicated calculations are necessary. The beneficiary or mortgagee need only enter a credit bid in an amount equal to what he assesses the fair market value of the property to be in its condition at the time of the foreclosure sale. If that amount is below the full amount of the outstanding indebtedness and he is successful in acquiring the property at the foreclosure sale, he may then recover any provable damages for waste.

To recapitulate, we conclude that the trial court properly granted summary judgment in favor of defendant and against plaintiff (1) as to the first cause of action **[**994]** **[***570]** for breach of contract since defendant at no time assumed the underlying indebtedness; and (2) as to the second cause of action for waste since, although defendant as a nonassuming grantor could be held liable for waste if proved to have been committed in bad faith, nevertheless plaintiff can establish no impairment of security, having acquired the property at the foreclosure sale by making a full credit bid.

The judgment is affirmed.