

AMENDED IN ASSEMBLY MAY 8, 1996  
AMENDED IN ASSEMBLY APRIL 25, 1996

CALIFORNIA LEGISLATURE—1995–96 REGULAR SESSION

**ASSEMBLY BILL**

**No. 2585**

**Introduced by Assembly Member Kuykendall**

February 21, 1996

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An act to repeal and add Section 2856 of the Civil Code, and to amend Section 580a of the Code of Civil Procedure, relating to sureties.

LEGISLATIVE COUNSEL'S DIGEST

AB 2585, as amended, Kuykendall. Guarantors.

(1) Existing law provides that any guarantor, including a guarantor of an obligation secured by real property or any interest therein, may waive the guarantor's rights of subrogation and reimbursement and any other rights and defenses available to the guarantor by reason of specified provisions of existing law.

Existing law provides that specified waivers shall not apply to a guaranty of a loan to an individual primarily for personal, family, or household purposes, secured by deed of trust or mortgage or a specified dwelling occupied by the borrower.

This bill would revise and recast these provisions to provide that a guarantor or other surety, including a guarantor of a note or other obligation secured by real property or an estate for years, may waive any or all of specified rights and defenses, as specified. It would also provide that specified waivers shall

not apply to a guaranty or other type of suretyship obligation made in respect of a loan secured by deed of trust or mortgage on a specified dwelling if the loan was used to pay all or part of the purchase price of the dwelling. The bill also would state legislative intent in this regard.

(2) Existing law specifies certain procedures for a complaint that seeks a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of note upon real property or any interest therein was given.

This bill would instead apply these procedures to a complaint that seeks a money judgment for the balance due upon a note secured by a deed of trust or mortgage with power of sale upon real property or an estate for years.

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

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

1 SECTION 1. Section 2856 of the Civil Code is  
2 repealed.

3 SEC. 2. Section 2856 is added to the Civil Code, to  
4 read:

5 2856. (a) Any guarantor or other surety, including a  
6 guarantor of a note or other obligation secured by real  
7 property or an estate for years, may waive any or all of the  
8 following:

9 (1) The guarantor or other surety's rights of  
10 subrogation, reimbursement, indemnification, and  
11 contribution and any other rights and defenses that are  
12 or may become available to the guarantor or other surety  
13 by reason of Sections 2787 to 2855, inclusive.

14 (2) Any rights or defenses the guarantor or other  
15 surety may have in respect of his or her obligations as a  
16 guarantor or other surety by reason of any election of  
17 remedies by the creditor.

18 (3) Any rights or defenses the guarantor or other  
19 surety may have because the principal's note or other  
20 obligation is secured by real property or an estate for  
21 years. These rights or defenses include, but are not



1 limited to, any rights or defenses that are based upon,  
2 directly or indirectly, the application of Section 580a,  
3 580b, 580d, or 726 of the Code of Civil Procedure to the  
4 principal's note or other obligation.

5 (b) A contractual provision that expresses an intent to  
6 waive any or all of the rights and defenses described in  
7 subdivision (a), shall be effective to waive these rights  
8 and defenses without regard to the inclusion of any  
9 particular language or phrases in the contract to waive  
10 any rights and defenses or any references to statutory  
11 provisions or judicial decisions.

12 (c) Without limiting any rights of the creditor or any  
13 guarantor or other surety to use any other language to  
14 express an intent to waive any or all of the rights and  
15 defenses described in paragraphs (2) and (3) of  
16 subdivision (a), the following provisions in a contract  
17 shall effectively waive all rights and defenses described in  
18 *paragraphs (2) and (3) of subdivision (a)*:

19  
20 The *guarantor or other* surety irrevocably and  
21 unconditionally waives all of the following:

22 (1) All rights ~~or~~ *and* defenses that the guarantor or  
23 other surety may have because the principal's note  
24 or other obligation is secured by real property or an  
25 estate for years. These rights and defenses include,  
26 but are not limited to, any rights or defenses that are  
27 based upon, directly or indirectly, the application of  
28 Section 580a, 580b, 580d, or 726 of the Code of Civil  
29 Procedure to the principal's note or other obligation.

30 (2) All rights and defenses that the guarantor or  
31 other surety has or may obtain as a result of any  
32 election of remedies by the creditor, even though the  
33 election of remedies, including, without limitation,  
34 completion of the exercise of a power of sale  
35 contained in a deed of trust or mortgage that secures  
36 the principal's note or other obligation, has destroyed  
37 or has otherwise impaired any rights of subrogation,  
38 reimbursement, contribution, and indemnification  
39 that the guarantor or other surety has or may obtain  
40 against the principal.



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2 (d) Without limiting any rights of the creditor or any  
3 guarantor or other surety to use any other language to  
4 express an intent to waive all rights and defenses of the  
5 surety by reason of any election of remedies by the  
6 creditor, the following provision shall be effective to  
7 waive all rights and defenses the guarantor or other  
8 surety may have in respect of his or her obligations as a  
9 surety by reason of an election of remedies by the  
10 creditor:

11

12 The *guarantor or other* surety waives all rights and  
13 defenses arising out of an election of remedies by the  
14 creditor, even though that election of remedies, such  
15 as a nonjudicial foreclosure with respect to security  
16 for a guaranteed obligation, has destroyed the  
17 surety's rights of subrogation and reimbursement  
18 against the principal by the operation of Section 580d  
19 of the Code of Civil Procedure or otherwise.

20

21 (e) Subdivisions (b), (c), and (d) shall not apply to a  
22 guaranty or other type of suretyship obligation made in  
23 respect of a loan secured by a deed of trust or mortgage  
24 on a dwelling for not more than four families when the  
25 dwelling is occupied, entirely or in part, by the borrower  
26 and that loan was in fact used to pay all or part of the  
27 purchase price of that dwelling.

28 SEC. 3. Section 580a of the Code of Civil Procedure is  
29 amended to read:

30 580a. Whenever a money judgment is sought for the  
31 balance due upon a note secured by a deed of trust or  
32 mortgage with power of sale upon real property or an  
33 estate for years, following the exercise of the power of sale  
34 in such deed of trust or mortgage, the plaintiff shall set  
35 forth in his or her complaint the entire amount of the  
36 indebtedness which was secured by the deed of trust or  
37 mortgage at the time of sale, the amount for which the  
38 real property or interest therein was sold and the fair  
39 market value thereof at the date of sale and the date of  
40 that sale. Upon the application of either party made at



1 least 10 days before the time of trial the court shall, and  
2 upon its own motion the court at any time may, appoint  
3 one of the probate referees provided for by law to  
4 appraise the real property or estate for years sold as of the  
5 time of sale. The referee shall file his or her appraisal with  
6 the clerk and that appraisal shall be admissible in  
7 evidence. The referee shall take and subscribe an oath to  
8 be attached to the appraisal that he or she has truly,  
9 honestly and impartially appraised the property to the  
10 best of his or her knowledge and ability. Any referee so  
11 appointed may be called and examined as a witness by  
12 any party or by the court itself. The court must fix the  
13 compensation of the referee in an amount as determined  
14 by the court to be reasonable, but those fees shall not  
15 exceed similar fees for similar services in the community  
16 where the services are rendered, which may be taxed and  
17 allowed in like manner as other costs. Before rendering  
18 any judgment the court shall find the fair market value of  
19 the real property or estate for years, at the time of sale.  
20 The court may render judgment for not more than the  
21 amount by which the entire amount of the indebtedness  
22 due at the time of sale exceeded the fair market value of  
23 the real property or estate for years sold at the time of sale  
24 with interest thereon from the date of the sale; provided,  
25 however, that in no event shall the amount of the  
26 judgment, exclusive of interest after the date of sale,  
27 exceed the difference between the amount for which the  
28 property was sold and the entire amount of the note  
29 secured by the deed of trust or mortgage. Any such action  
30 must be brought within three months of the time of sale  
31 under the deed of trust or mortgage. No judgment shall  
32 be rendered against the maker of such note in any such  
33 action until the real property or interest therein has first  
34 been sold pursuant to the terms of such deed of trust or  
35 mortgage, unless the real property or estate for years has  
36 become valueless.

37 SEC. 4. It is the intent of the Legislature that the  
38 repeal and enactment of Section 2856 of the Civil Code  
39 by this bill does not represent a change in, but is merely  
40 declarative of, and intended to clarify existing law. It is

1 the intent of the Legislature that the types of waivers  
2 described in Section 2856 of the Civil Code do not violate  
3 the public policy of this state. Additionally, the  
4 Legislature, by enacting subdivisions (b), (c), and (d) of  
5 Section 2856 of the Civil Code, does not intend to address  
6 the legal requirements for waivers in a guaranty or other  
7 ~~surety~~ *suretyship contract* in connection with the types of  
8 transactions described in subdivision (e) of Section 2856  
9 of the Civil Code. No inference of any kind should be  
10 drawn from the exclusion of these transactions from the  
11 application of subdivisions (b), (c), and (d) of Section  
12 2856 of the Civil Code. The repeal and enactment of  
13 Section 2856 of the Civil Code and amendments to  
14 Section 580a of the Code of Civil Procedure made by this  
15 bill are intended to remove the uncertainty; which has  
16 been caused by the (now decertified) decision in Bank of  
17 Southern California v. Dombrow, (1995), regarding the  
18 adequacy and enforceability of waivers by guarantors of  
19 the types described in subdivisions (a), ~~(b), and (c)~~ of  
20 ~~former~~ *to (d), inclusive, of* Section 2856 of the Civil Code.

