

AMENDED IN SENATE JULY 7, 1996  
AMENDED IN SENATE JUNE 4, 1996  
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

---

---

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2 repealed.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



1 guarantor or other surety by reason of any election of  
2 remedies by the creditor.

3 (3) Any rights or defenses the guarantor or other  
4 surety may have because the principal's note or other  
5 obligation is secured by real property or an estate for  
6 years. These rights or defenses include, but are not  
7 limited to, any rights or defenses that are based upon,  
8 directly or indirectly, the application of Section 580a,  
9 580b, 580d, or 726 of the Code of Civil Procedure to the  
10 principal's note or other obligation.

11 (b) A contractual provision that expresses an intent to  
12 waive any or all of the rights and defenses described in  
13 subdivision (a) shall be effective to waive these rights and  
14 defenses without regard to the inclusion of any particular  
15 language or phrases in the contract to waive any rights  
16 and defenses or any references to statutory provisions or  
17 judicial decisions.

18 (c) Without limiting any rights of the creditor or any  
19 guarantor or other surety to use any other language to  
20 express an intent to waive any or all of the rights and  
21 defenses described in paragraphs (2) and (3) of  
22 subdivision (a), the following provisions in a contract  
23 shall effectively waive all rights and defenses described in  
24 paragraphs (2) and (3) of subdivision (a):

25  
26 ~~The guarantor or other surety irrevocably and~~  
27 ~~unconditionally waives all of the following:~~

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

36 ~~(2) All rights and defenses that the guarantor or~~  
37 ~~other surety has or may obtain as a result of any~~  
38 ~~election of remedies by the creditor, even though the~~  
39 ~~election of remedies, including, without limitation,~~  
40 ~~completion of the exercise of a power of sale~~



1 ~~contained in a deed of trust or mortgage that secures~~  
 2 ~~the principal's note or other obligation, has destroyed~~  
 3 ~~or has otherwise impaired any rights of subrogation,~~  
 4 ~~reimbursement, contribution, and indemnification~~  
 5 ~~that the guarantor or other surety has or may obtain~~  
 6 ~~against the principal.~~

7 *The guarantor waives all rights and defenses that the*  
 8 *guarantor may have because the debtor's debt is*  
 9 *secured by real property. This means, among other*  
 10 *things:*

11 *(1) The creditor may collect from the guarantor*  
 12 *without first trying to collect from the debtor.*

13 *(2) The creditor may collect from the guarantor*  
 14 *without first foreclosing on any real or personal*  
 15 *property collateral pledged by the debtor.*

16 *(3) If the creditor forecloses on any real property*  
 17 *collateral pledged by the debtor:*

18 *(A) The amount of the debt may be reduced only by*  
 19 *the price for which that collateral is sold at the*  
 20 *foreclosure sale, even if the collateral is worth more*  
 21 *than the sale price.*

22 *(B) The creditor may collect from the guarantor*  
 23 *even if the creditor, by foreclosing on the real*  
 24 *property collateral, has destroyed any right the*  
 25 *guarantor may have to collect from the debtor.*

26 *This is an unconditional and irrevocable waiver of*  
 27 *any rights and defenses the guarantor may have*  
 28 *because the debtor's debt is secured by real property.*  
 29 *These rights and defenses include, but are not*  
 30 *limited to, any rights or defenses based upon Section*  
 31 *580a, 580b, 580d or 726 of the Code of Civil*  
 32 *Procedure.*

33  
 34 *(d) Without limiting any rights of the creditor or any*  
 35 *guarantor or other surety to use any other language to*  
 36 *express an intent to waive all rights and defenses of the*  
 37 *surety by reason of any election of remedies by the*  
 38 *creditor, the following provision shall be effective to*  
 39 *wave all rights and defenses the guarantor or other*  
 40 *surety may have in respect of his or her obligations as a*



1 surety by reason of an election of remedies by the  
2 creditor:

3  
4 The guarantor waives all rights and defenses arising  
5 out of an election of remedies by the creditor, even  
6 though that election of remedies, such as a  
7 nonjudicial foreclosure with respect to security for a  
8 guaranteed obligation, has destroyed the guarantor's  
9 rights of subrogation and reimbursement against the  
10 principal by the operation of Section 580d of the  
11 Code of Civil Procedure or otherwise.

12  
13 (e) Subdivisions (b), (c), and (d) shall not apply to a  
14 guaranty or other type of suretyship obligation made in  
15 respect of a loan secured by a deed of trust or mortgage  
16 on a dwelling for not more than four families when the  
17 dwelling is occupied, entirely or in part, by the borrower  
18 and that loan was in fact used to pay all or part of the  
19 purchase price of that dwelling.

20 ~~SEC. 3. Section 580a of the Code of Civil Procedure is~~  
21 ~~amended to read:~~

22 ~~580a. Whenever a money judgment is sought for the~~  
23 ~~balance due upon a note secured by a deed of trust or~~  
24 ~~mortgage with power of sale upon real property or an~~  
25 ~~estate for years, following the exercise of the power of sale~~  
26 ~~in such deed of trust or mortgage, the plaintiff shall set~~  
27 ~~forth in his or her complaint the entire amount of the~~  
28 ~~indebtedness which was secured by the deed of trust or~~  
29 ~~mortgage at the time of sale, the amount for which the~~  
30 ~~real property or interest therein was sold and the fair~~  
31 ~~market value thereof at the date of sale and the date of~~  
32 ~~that sale. Upon the application of either party made at~~  
33 ~~least 10 days before the time of trial the court shall, and~~  
34 ~~upon its own motion the court at any time may, appoint~~  
35 ~~one of the probate referees provided for by law to~~  
36 ~~appraise the real property or estate for years sold as of the~~  
37 ~~time of sale. The referee shall file his or her appraisal with~~  
38 ~~the clerk and that appraisal shall be admissible in~~  
39 ~~evidence. The referee shall take and subscribe an oath to~~  
40 ~~be attached to the appraisal that he or she has truly,~~



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

29 ~~SEC. 4.~~

30 *SEC. 3.* It is the intent of the Legislature that the  
31 repeal and enactment of Section 2856 of the Civil Code  
32 by this bill does not represent a change in, but is merely  
33 declarative of, and intended to clarify existing law. It is  
34 the intent of the Legislature that the types of waivers  
35 described in Section 2856 of the Civil Code do not violate  
36 the public policy of this state. Additionally, the  
37 Legislature, by enacting subdivisions (b), (c), and (d) of  
38 Section 2856 of the Civil Code, does not intend to address  
39 the legal requirements for waivers in a guaranty or other  
40 suretyship contract in connection with the types of



1 transactions described in subdivision (e) of Section 2856  
2 of the Civil Code. No inference of any kind should be  
3 drawn from the exclusion of these transactions from the  
4 application of subdivisions (b), (c), and (d) of Section  
5 2856 of the Civil Code. The repeal and enactment of  
6 Section 2856 of the Civil Code ~~and amendments to~~  
7 ~~Section 580a of the Code of Civil Procedure~~ made by this  
8 bill ~~are~~ *is* intended to remove the uncertainty which has  
9 been caused by the (now decertified) decision in Bank of  
10 Southern California v. Dombrow, (1995), regarding the  
11 adequacy and enforceability of waivers by guarantors of  
12 the types described in subdivisions (a) to (d), inclusive,  
13 of Section 2856 of the Civil Code. *These amendments are*  
14 *not intended to limit or otherwise affect any rights or*  
15 *protections currently afforded to borrowers under*  
16 *Sections 580a, 580b, 580d or 726 of the Code of Civil*  
17 *Procedure.*

