BUSINESS LAW SECTION
COMMERCIAL FINANCE COMMITTEE
CREDITORS' RIGHTS SUBCOMMITTEE

DEFICIENCY LIABILITY OF COMMERCIAL LOAN GUARANTORS:

A Comparison of California, Florida, Georgia, Illinois, and New York Law

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September 12, 2014

1. May a guarantor exercise the right of redemption on property foreclosed?

California

In California, a non-judicial foreclosure on real property and personal property cuts off the trustor's equity of redemption. Thereafter, no party can exercise the right of redemption.

However prior to foreclosure of personal property, a guarantor has the right to notice of the foreclosure and has the right to pay off the secured creditor's secured claim. [Com. Cd. 9623].

As to the foreclosure on real property a guarantor does not have the right to notice of the foreclosure unless the guarantor has recorded a Request for Notice of Default or has a recorded interest in the property [Civ. Cd. 2924b; *I.E. Associates v. Safeco Title Ins. Co*. 39 Cal. 3d 281, 216 Cal. Rptr. 438 (1985). A guarantor who has no recorded interest in the real property does not have an express right to reinstate the secured creditor's claim [Civ. Cd. 2924c].

(A judicial foreclosure sale does not terminate the trustor's equity of redemption; but such equity of redemption cannot be exercised by a guarantor.)

Florida

For real estate, a guarantor has no right of redemption by statute, and, a lender can sue and recover a judgment against a guarantor without foreclosing on the property. But for practical purposes, a guarantor may be able to redeem property if it is named in or knows about the foreclosure proceedings.

Florida is a lien theory and judicial foreclosure state. Liens on real property are reflected by mortgages which must be recorded in the public records. Foreclosing a mortgage lien on real property requires judicial action in which a foreclosure judgment is entered adjudicating the amount owed under the mortgage note and secured by the mortgage, and setting a foreclosure sale of the property if the amounts owed are not paid by that date. A lender may, but is not required to, join and guarantor in the foreclosure action. If the lender sues the guarantor as well as the borrower in the foreclosure action, the judgment may adjudicate the debt owed them both. In that situation, both the borrower and the guarantor would have right to redeem the property prior to foreclosure sale. But if only the borrower is sued, the guarantor would not be in a position to or have such a right, unless it had an interest in the real estate, in which case it would have to be joined in the foreclosure action. Any redemption rights are cut off after the sale is confirmed. Redemption requires full payment if the debt, thereby leaving no deficiency. Fla. Stat. § 45.0315 (Fla).

For security interests created under Article 9 security agreements, the terms of the guaranty and Article 9 apply. If the guaranty is a guaranty of payment, is absolute and unconditional, creates independent liability on the part of the guarantor, and the guarantor has no property interest in the collateral, or right of recourse against the primary obligor, there is no such "right." Unconditional guarantees govern the rights and obligations between the parties. *Anderson v. Trade Wind Ent's. Corp.*, 241 So.2d 174, 178 (Fla. 4th DCA 1970)("Where one undertakes an unconditional guaranty of payment, he should monitor the principal's performance and not seek to impose that responsibility on the [holder of the guaranty], unless the same is expressly provided for in the contract.") [1].

The UCC affords a right of redemption to a "debtor" or "any secondary obligor" by tender of full payment of all obligations secured before the secured party has collected, disposed of, or accepted the collateral as full payment or partial satisfaction of the debt. F.S. § 679.623. The UCC defines a "debtor" to include all persons with a property interest (other than a security interest in or other lien on collateral), F.S §679.1021 (bb), and a "secondary obligor" as an obligor whose obligation is "secondary," or, "who has a right of recourse" against the debtor with respect to the obligation secured F.S. §679.1021(sss)[2]. Thus, there is no redemption right granted by the UCC unless the guarantor is also a "debtor" or a "secondary obligor" under the terms of the guaranty.[3]

Georgia[4]

Georgia is a non-judicial foreclosure and title theory state and a guarantor does not have a right of redemption when a security deed securing real property contains a power of sale provision. The foreclosure process begins with a lender accelerating the indebtedness due and making a demand for payment, which, if unmet after 10 days, triggers statutory attorneys' fees. The lender then publishes its notice of sale under power for 4 weeks prior to the sale, while ensuring that any obligors receive actual notice at least 15 days prior to the foreclosure sale. The lender's representative then conducts the sale on the first Tuesday of the month following publication on the steps of the county courthouse where the property is located. The sale is consummated by the recording of the Deed Under Power of Sale ("DUP"), which effectively merges the legal title held by the lender with the equitable title previously held by the borrower. *See FDIC v. Dye*, 642 F.2d 837 (5th Cir. 1981) (finding merger of title is complete when

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[2] The Official Comment to UCC §9-102 directs consultation with the law of suretyship to determine whether an obligation is secondary.

[3] If the guaranty language is on the note and accompanied by words indicating unambiguously the guaranty is one of collection rather than payment, then the guarantor would have recourse against the maker as an "accommodated party. F.S. § 673.4191.

[4] Georgia law provided by F. Xavier Balderas, Atlanta (xbalderas@cfjblaw.com), Carlton Fields Jorden Burt, P.A.

consideration from the sale passes to the lender and the DUP has been recorded). Thus, for real property, once the foreclosure sale occurs the lender (or highest bidder at foreclosure) holds the merged title for the property.

Legal title rights to the property may thus be retained by a borrower prior to foreclosure by way of curing any default(s), including paying any outstanding debt owed by the borrower (almost always the accelerated indebtedness due on the loan) and/or by curing any other default events outlined in the security deed, if the security so provides. A guarantor may step in the shoes of the borrower by curing such default(s) but he does not have any independent right to stop the foreclosure as the guarantor's own guaranty is considered separate and apart from the security deed. After the DUP has been recorded, no right of redemption lies for either a borrower or a guarantor since the merged title now lies with the lender.

As for personal property, Georgia's adoption of pertinent U.C.C. provisions therefore provide that "a debtor, any secondary obligor, or any other secured party or lienholder" possesses the right to redeem collateral. O.C.G.A. § 11-9-623. Redemption may occur before the secured creditor (1) has taken possession of the collateral, (2) has disposed of the collateral, or (3) has accepted the collateral to either partially of fully satisfy the obligation which it secures. *Id.*

In instances where the lender does not already have possession of the personal property or repossession is expected to be problematic, a lender may pursue a writ of possession and a turnover order to force the borrower to turnover such property to the lender. O.C.G.A. § 44-14-230. Following the receipt of a writ of possession and a turnover order, the lender may then sell the property at a foreclosure sale. O.C.G.A. § 44-14-236. After the lender obtains a writ of possession and, thereafter forecloses on the personal property, redemption rights extinguish in the same manner as what occurs with real property. O.C.G.A. § 44-14-230.

Redemption may also come into play in Georgia in a tax sale or when a federal tax lien is in place.

Illinois

Under Illinois law, there is a limited right of redemption for commercial real estate as well as residential real estate, however for non-residential property it can be (and nearly always is in the loan documents) waived. 735 ILCS 5/15-1603(a). Only an "owner of redemption" can exercise redemption. "Owner of redemption" is defined as the mortgagor or other owner or co-owner of the mortgaged real estate. 735 ILCS 5/15-1212.

New York[5]

For personal property, Article 9 of the NY UCC governs whenever a security interest is created in personal property or fixtures. NY UCC § 9-101 cmt. 1 (2014). Thus, the right of redemption found in NY UCC §9-623 applies. Section 9-623 provides that a debtor "any secondary obligor" along with the debtor and any other secured party or lienholder may redeem collateral. NY UCC §9-623(a). The collateral may be redeemed by tendering full payment of all obligations secured by the collateral and reasonable expenses and attorneys' fees. NY UCC §9-623(b).

Redemption is available until a secured party has collected collateral, disposed of collateral, or has accepted collateral in full or partial satisfaction of the obligation it secures. NY UCC §9-623(c); *see, e.g*., *Onglingswan v. Chase Home Fin., LLC*, 2010 N.Y. Misc. LEXIS 2457, 10,2010 NY Slip Op 30410(U), 8 (N.Y. Sup. Ct. Feb. 24, 2010) (noting that it was too late for redemption as the auctioneer had already contracted with the successful bidders).

The right of redemption may be waived only by an agreement entered into and authenticated after default. NY UCC §9-624(c); *see also* Leonard Lee Podair, New York Commercial Lending Law, Commercial Lending Law: A State-by-State Guide, available online http://apps.americanbar.org/buslaw/committees/CL190039pub/materials/nyc-toc.pdf.[6]

For real property, "[a] guarantor of the mortgage debt may make a tender and demand assignment of the mortgage as a subrogee of the debtor. *Fourth Fed. Sav. Bank v. Nationwide Assocs*., 183 Misc. 2d 165, 170-171, 701 N.Y.S.2d 814, 818-19 (N.Y. Sup. Ct. 1999). In *Fourth Federal,* the guarantor's right to redeem was specifically acknowledged when he offered to pay the debt and accrued interest to redeem the collateral property, and the court authorized the redemption. The guarantor will have to

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[6] By way of background, "personal guaranties are contacts governed by general principles of contract law (*see* NY Pattern Jury Instructions Civil 4:1 [Q]; Restatement [Third] of Suretyship and Guaranty § 7). Unless prohibited by the terms of a contract, contractual rights and remedies, including those in guaranties, are assignable and may be effected by a writing evincing an intent to assign the right in question is (*see* Restatement [Second] of Contracts § 324 [1981] [providing that assignment of contractual right requires obligee to "manifest an intention to transfer the right to another person]). Personal guaranties are, however, secondary obligations and the parties' rights and duties under a guaranty derive from the principal obligation *(see Midland Steel Warehouse Corp. v Godinger Silver Art Ltd.*, 276 AD2d 341, 343, 714 NYS2d 466, 468 [N.Y. App. Div. 1st Dep't 2000] ["A guarantee is an agreement to pay a debt owed by another that creates a secondary liability and thus is collateral to the contractual obligation."])." *Hayden Asset V, LLC v. JGBR*, *LLC*, 2014 N.Y. Misc. LEXIS 3550, 10-11 (N.Y. Sup. Ct. July 21, 2014)

actually pay in order to redeem as a mere offer to pay is unacceptable. *See also Chemical Bank v. Meltzer*, 93 N.Y.2d 296, 304, 712 N.E.2d 656, 661, 690 N.Y.S.2d 489, 493 (N.Y. 1999) (noting that "the purpose of the subrogation doctrine is to afford a person who pays a debt that is owed primarily by someone else every opportunity to be reimbursed in full" and thus allowed to redeem the property).

There is no statutory right of redemption in New York. Previously, New York Real Property Actions and Proceedings Law §1410 provided that the mortgagor, subordinated lienor, or holder of subordinate interests could redeem the mortgaged property "at any time before the commencement of the bidding at the sale." However, this statute was repealed as of July 1, 2009. Once real property is sold pursuant to a judgment of foreclosure or stated otherwise, through a foreclosure sale, any and all rights of redemption are thereby extinguished and terminated. NY RPAPL §1352 (2014).

2. **What impact might such right of redemption (and failure to exercise same) have on the defenses available to the guarantor?**

California

Even though a guarantor might not have the right to exercise a right of redemption under California law, there are reasons discussed below whereby a guarantor may challenge liability on the guaranty if the guarantor is not given notice of the foreclosure and not given an opportunity to pay off the secured creditor's claim. As a result it is common practice for the secured creditor to give the guarantor notice of the foreclosure and an opportunity to pay off the secured creditor's claim.

Florida

None, if the guaranty is one of payment, and is absolute and unconditional, and as is typical of commercial guaranties and enforceable under Florida law. See #1. After foreclosure, however, the lender will generally have to seek and obtain a deficiency judgment in order to obtain an executable judgment against a guarantor.

Unconditional Guarantees govern the rights and obligations between the parties. *Anderson v. Trade Wind Ent's. Corp.*, 241 So.2d 174, 178 (Fla. 4th DCA 1970) ("Where one undertakes an unconditional guaranty of payment, he should monitor the principal's performance and not seek to impose that responsibility on the [holder of the guaranty], unless the same is expressly provided for in the contract."); *Institutional & Supermarket Equipment, Inc. v. C & S Refrigeration, Inc.*, 609 So.2d 66, 68 (Fla. 4th DCA 1992)(same, quoting identical language to that in the guaranty sued upon in this action and noting that "[t]he contract between the parties is controlling … and courts cannot impose duties upon contracting parties different from the terms agreed upon"); *Sun Bank/Treasure Coast, N.A. v. Goldman*, 580 So. 2d 291-92 (Fla. 4th DCA 1991) (plain language of guaranty covered very actions guarantors claimed released them and so precluded defense – trial court judgment releasing guarantors reversed); *Champion Home Builders, Inc. v. Highridge Sales, Inc.*, 472 So.2d 836 (Fla. 5th DCA 1985)

(guarantor bound by term in guaranty permitting extensions of time in principal contract – no discharge); *U.S. Home Acceptance Corp. v. Kelly Park Hills, Inc*., 542 So.2d 463 (Fla. 5th DCA 1985 (same).

Georgia

See answer to #1, above. If the guarantor intends to assert any redemption rights that may lie, he must do so before the lender disposes of the property. Otherwise, proceeds from the foreclosure sale create a set-off right for both the borrower and guarantor. No other corollary defenses are available to the guarantor as the guarantor's redemption right involves tender of the full indebtedness due.

Illinois

Because the guarantor has no direct redemption right under Illinois law, and because redemption rights are so limited, failure to exercise redemption may have little or no impact on a guarantor. Note, too, that under Illinois law an action to recover from guarantors of a note is a separate remedy than the in rem foreclosure and sale proceeding. *DuQuoin State Bank v. Daulby*, 450 NE2d 347 (Ill. App. 1983), Ill. Jur. Commercial Law Section 6:37. See also *Freedom Mortgage Corporation v. Burnham Mortgage Incorporated*, 569 F.3d 667 (7th Cir. 2009).

New York

Failing or Choosing Not To Redeem

Generally speaking, the choice not to redeem is insufficient to create a waiver of other rights or an acceptance of guaranty liability. The simple result is that the guarantor will likely lose or be foreclosed upon any and all rights the guarantor may have had in the foreclosed collateral.

From a secured party's perspective, redemption is typically preferred as that will result in full payment of all indebtedness. Furthermore, a guarantor's redemption exercise will avoid a foreclosure sale, and, in connection therewith, remove the issue of whether the collateral was liquidated in a commercially reasonable manner out of consideration.

Thus, the guarantor's decision not to exercise his redemption rights will have an impact on what defenses may be available to the guarantor if there remains a deficiency claim. This largely will depend on the type of guaranty at issue. For example, a guaranty of payment without conditions is often referred to as an "unconditional guaranty" and is enforceable immediately upon the primary obligor's default. In contrast, a guaranty of collection is only enforceable after both the primary obligor's default and the creditor's unsuccessful exhaustion of other means to obtain payment. In addition, the guaranty may be limited to a specific amount, or could be unlimited, to account for future debts. When a guaranty is unlimited, and unconditional, it is often referred to as an "absolute guaranty." *See* John P. McCahey, Your First Guaranty

Case: Twelve Things to Know About Guaranties, ABA Section of Litigation, Commercial & Business (2014).

If the guarantor does not exercise its right to redeem the property, the guarantor's right to redeem will extinguish upon the sale of the property. Once the property is sold if it fails to recover the amount of the debt, the guarantor could become liable on a deficiency claim. In New York, the deficiency claim on real property is limited by the fair market value of the property, which is determined by the court. N.Y. RPAPL §1371(2) (2014).

Exercising Redemption Rights

If the guarantor redeems the property by paying the amount due, the guarantor is subrogated to the rights of the mortgagee. *See* Penelope L. Christophorou, *et al.*, New York State Law of Guaranties, The Law of Guaranties, ABA Commercial Finance Committee (2013).

Thus, the exercise of the redemption rights will likely enhance rights upon the guarantor that he may or may not have had prior to the redemption. Subrogation provides for the guarantor to step into the shoes of, and the rights to exercise the same legal rights as, the secured party provided the entire underlying obligation is satisfied.

"As a surety, [the guarantor] is entitled to the rights that accompany his standing, including the right of subrogation. Rooted in equity, the purpose of the subrogation doctrine is to afford a person who pays a debt that is owed primarily by someone else every opportunity to be reimbursed in full. Ordinarily, in situations involving a party with suretyship status, 'the surety upon payment of the debt is entitled, not only to an assignment or effectual transfer of all such additional collaterals taken and held by the creditor, but also to an assignment or effectual transfer of the debt and of the bond or other instrument evidencing the debt' (*Ellsworth v. Lockwood*, 42 NY 89, 98; *see also*, Restatement [Third] of Suretyship and Guaranty §§ 18, 27–31). A surety's right of subrogation attaches at the time the surety pledges its obligation to the creditor, and the surety is entitled to insist upon priority to the proceeds of the collateral (*National Exchange Bank v. Sillman*, 65 NY 475, 479; *see also*, *U.S. Fidelity & Guaranty Co. v. Triborough Bridge Auth.*, 297 NY 31, 36 ['The equity in favor of a surety arose at the time of the giving of the bond. The right becomes available when a surety … completed that work at a loss'])." *Chemical Bank v. Meltzer*, 93 N.Y.2d 296, 712 N.E.2d 656, 690 N.Y.S.2d 489 (N.Y. 1999).

The guarantor also would be entitled to indemnification from the primary obligor. *See, e.g.*, *Leghorn v. Ross*, 384 N.Y.S.2d 830, 831, 53 A.D.2d 560 (1st Dep't 1976) ("a surety is equitably entitled to full indemnity against the consequences of a principal obligor's default").

3. **Can the borrower assert a defense to a deficiency claim based upon inadequate purchase price at foreclosure sale?**

California

Personal Property Collateral.

In California there are few defenses available to a borrower in connection with the foreclosure on personal property related to the sale price of the collateral.

Primarily these defenses involve (i) the delivery of appropriate notice of the foreclosure and (ii) the requirement that the foreclosure must be conducted in a commercially reasonable manner. [Cal. Com. Cd 9607, 9608, 9610, 9611, 9625, 9627.

If proper notice is delivered and if the sale is commercially reasonable, no defense can be asserted solely because of the price received at the foreclosure sale. The borrower remains liable for the deficiency. [Cal. Com. Cd. 9608, 9615 9612, 9626].

This is so even if the sale were not commercially reasonable. [Cal. Com. Cd. 9628].

If sale is not in accordance with requirements, any deficiency is limited to the difference between the secured obligation and the greater of (i) the sale proceeds or (ii) the proceeds that would have been obtained if the sale had been in compliance with requirements [Cal. Com. Cd. 9626].

The fact that a greater amount could have been received through a different disposition of the collateral is not of itself sufficient to show that the sale was not commercially reasonable. [Cal. Com. Cd. 9627].

Mixed Collateral.

If the personal property is foreclosed upon in a combined real property/personal property foreclosure sale, the borrower is entitled to the protections disclosed below dealing with real property foreclosures. [Cal. Com. Cd. 9604].

Real Property Collateral.

If the foreclosure is on real property there are a number of defenses available to a borrower in connection with a foreclosure. To avoid potential deficiency liability based upon unduly low prices, California has adopted certain anti-deficiency provisions.

Under CCP 580a, the secured creditor must credit against the secured obligation the "fair value" of the property, regardless of the amount received at the foreclosure sale.

Under CCP 580b a secured creditor cannot recover a deficiency on a purchase money obligation of the real property (i.e. the secured party sold the real property collateral to the borrower and took back a purchase money lien on that real property). [This discussion will not address application of CCP 580b to deficiency liability on a consumer obligation secured by residential property collateral.]

Under CCP 580d a secured creditor cannot recover a deficiency on a debt following a non-judicial foreclosure on the real property collateral.

Under CCP 726 ("One Action Rule") a secured creditor must foreclose on all real property collateral before seeking to recover from the borrower's non-collateral assets.

Florida

In Florida, the granting of a deficiency decree in a real estate mortgage foreclosure action is a matter for the sound discretion of the Court. F.S. §702.06 However, the granting of a deficiency judgment is the rule, not the exception. *Thomas v Premier Capital, Inc.*, 906 So. 2d, 1139 (Fla. 3rd DCA 2005). The deficiency is calculated based upon the amount of the debt less the fair market value of the property sold at foreclosure sale. Therefore, the borrower can assert the sale price used to calculate the deficiency was for less than fair market value, and the lender/mortgagee should be prepared to present appraisals or other evidence of the fair market value of the property at the time of its sale.

Sales of personal and other property securing a debt subject to valid security agreements under UCC Article 9, as enacted in Chapter 679, Florida statutes, are subject to that chapter's requirements relating to disposition of collateral which requires, inter alia, that "very aspect of a disposition of collateral, including the method, manner, time, place, and other terms", be commercially reasonable (F.S. §679.610), and includes requirements relating to notice of collateral sales be given to the borrower and "any secondary obligor." F.S. §679.611. See #1 re the definition of "secondary obligor."

Georgia

The short answer is a qualified, no. Prior to 2013, this area was somewhat murky. Georgia law has long-since required that in order for a lender to pursue a deficiency, it had to strictly follow the post-foreclosure confirmation procedure codified in O.C.G.A. § 44-14-161. This includes filing a report of confirmation, which is really the initiation of a suit to have the court determine if the lender followed foreclosure procedure to allow it to pursue a deficiency as part of a separately suit. If a lender failed to confirm a foreclosure based on a number of factors including, but not limited to: (1) failing to follow proper notice requirements, (2) failing to have standing to foreclose, and (3) failing to bid (or sell) for the true market value of the property as of the foreclosure date, then the court could decline to confirm the foreclosure, extinguishing a lender's ability to pursue a deficiency.

In 2013, the *HWA Properties, Inc. v. Community & Southern Bank*, 322 Ga. App. 877 (2013), breathed new life into the notion that the confirmation process applied more to a deficiency claim against the borrower than to a lender's ability to separately pursue a guarantor for all of the debt owed. The 2014, *Community & Southern Bank v. DCB Investments,* LLC, 760 S.E.2d 210 (Ga. App. 2014) case further provided that when a borrower waives legal and equitable defenses and explicitly waives confirmation (as most lender guaranties have contained for the last 10 years), then a guarantor has no recourse to insist on strict adherence to the confirmation procedure. Accordingly, a lender may pursue the full amount owed solely against the guarantor, with the lender setting off the foreclosure bid price.

Illinois

For personal property collateral, debtors are liable for deficiencies under the terms of Article 9 of the UCC as in effect in Illinois. See current 9-615(d), codified at 810 ILCS 5/9-615(d); see also *Boender v. Chicago North Clubhouse Association, Inc.*, 608 N.E.2d 207 (Ill. App. 1992 – old version of UCC Article 9); *First Galesburg National Bank and Trust Company v. Joannides* (469 N.E.2d 180 (IL 1984) (personal property, old version of UCC)). Under UCC 9-615(f), the amount of a deficiency is calculated based on the amount of proceeds that would have been realized in a disposition complying with Part VI of Article 9 to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if the transferee is such a person and the proceeds are significantly below the range of proceeds a complying disposition would have brought. 810 ILCS 5/9-615(f). Under UCC 9-626, if a secured party fails to prove the disposition sale was conducted in accordance with Part VI of Article 9 – including that it was conducted in a commercially reasonable manner – the liability for a deficiency is determined based on the greater of the actual sale proceeds or the amount that would have been realized in a proper sale. 810 ILCS 5/9-626.

For real property, under the Illinois mortgage foreclosure statute, a borrower may be liable for and a confirmation order may provide for a deficiency judgment against the borrower under the mortgage. 735 ILCS 5/1508(b)(1), (2). Under Illinois real property law, it is extremely difficult to assert a defense based on an inadequate sale price. In the absence of fraud or irregularity, the sales price at a foreclosure sale is used to determine the existence/amount of a deficiency. Ill. Jur. Property Section 19:55. See also *Illini Federal Savings and Loan Association v. Doering*, 516 N.E. 2d 609 (Ill. App. 1987); *Banco Popular North America v. Ruiz*, 2012 IL App 112760-U (Ill. App. 2012); 735 ILCS 5/15-1508(b)(sale confirmed unless required notice was not given, the terms of sale were unconscionable, the sale was fraudulent or justice was "otherwise not done"). See also *Freedom Mortgage,* 2006 U.S. Dist. LEXIS at *25.

New York

With respect to personal property, NY UCC §9-626 provides the defenses that may be available to a borrower and guarantor when a deficiency claim is asserted. This section is triggered when the borrower or the guarantor places in issue the secured

party's compliance with the provisions of UCC Article 9. N.Y. UCC §9-626(a)(1). Then it will be the secured party's burden to establish that the collection, enforcement, disposition or acceptance of collateral was conducted in accordance with Article 9.

If the secured party fails to prove that their disposition of collateral complied with Article 9, the liability for deficiency is limited to the sum of the secured obligation, expenses, and attorneys' fees minus the greater amount between (A) the proceeds of the sale or (B) the "amount of proceeds that would have been realized had the non-complying secured party proceeded in accordance with the provisions of [Article 9, Part 6] ...."

The greatest protection from a deficiency claim then comes from §9-626(a)(4) which further provides that "the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than the sum." This basically reduces the secured creditor's deficiency claim to zero unless it can meet its burden to establish compliance or to establish that full compliance would have still netted an amount less than the amount owed.

With respect to real property, New York deficiency law places the burden on the creditor to seek a deficiency judgment within 90 days after the foreclosure sale on mortgaged property; if the creditor does not do so, it is barred from seeking a deficiency judgment at all. N.Y. RPAPL § 1371(3) (2014).

New York courts have likened the section 1371(3) bar to a statute of limitations, which must be timely raised by the debtor as a defense when the creditor seeks a deficiency. *See Bianco v. Coles*, 131 A.D.2d 10, 520 N.Y.S.2d 261, 262 (1987); *Voss v. Multifilm Corp. of Am*., 112 A.D.2d 216, 491 N.Y.S.2d 434, 435 (1985); *Amsterdam Sav. Bank v. Amsterdam Pharmaceutical Dev. Corp*., 106 A.D.2d 797, 484 N.Y.S.2d 217, 218 (1984); *Mortgagee Affiliates, Inc. v. Jerder Realty Corp*., 62 A.D.2d 591, 406 N.Y.S.2d 326, 327 (1978), *aff'd*, 47 N.Y.2d 796, 417 N.Y.S.2d 930, 391 N.E.2d 1011 (1979). Thus section 1371(3) is a procedural defense, not a jurisdictional bar.

Furthermore, "[a]bsent [fraud, collusion, misconduct], the mere inadequacy of price is an insufficient reason to set aside a sale unless the price is so inadequate as to shock the court's conscience." *Astoria Fed. Sav. & Loan Assoc. v. Hartridge*, 58 A.D.3d 584, 585, 869 N.Y.S.2d 921 (2d Dep't 2009) (affirming the setting aside of the foreclosure sale upon finding that the price was "unconscionably low").

> *Crossland Mortgage Corp. v. Frankel*, 192 A.D.2d 571, 572, 596 N.Y.S.2d 130, 131 (2d Dep't 1993) (holding that the sale to mortgagor's father for $55,000 should have remained as it was not so inadequate to shock the court's conscience, instead of sheriff's reopening the sale to allow for creditor's representative to bid $160,000 upon finding of mistake in authorized bid amounts).

DeRosa v. Chase Manhattan Mortg. Corp., 10 A.D.3d 317, 322, 782 N.Y.S.2d 5, 9-10 (1st Dep't 2004) (upholding sale of property for $200,000 plus outstanding maintenance despite protestations that this constituted only 45% of the market value of the property).

Harbor Fin. Mortg. Corp. v. Hurry, 277 A.D.2d 693, 693,715 N.Y.S.2d 121, 123 (3d Dep't 2000) (upholding the sale of property for $25,000 despite amount owed under judgment exceeding $74,000).

Central Trust Co. v. Alcon Developers, Inc., 93 Misc. 2d 686, 688, 403 N.Y.S.2d 396 (N.Y. Sup. Ct. 1978) (setting aside sale where the creditor bank purchased the collateral for $1 where the judgment on foreclosure was in the amount of $1,894,109.23 as the price was so unconscionably low as to shock the conscience; in addition, there were other problems with the notice of the sale as the property was a specialized and limited as a mobile home park, and the notice was not reasonably calculated to reach potential purchases of this type of property).

Alben Affiliates v. Astoria Terminal, Inc., 34 Misc. 2d 246, 249, 226 N.Y.S.2d 1007, 1010 (N.Y. Sup. Ct. 1962) (setting aside foreclosure sale of $24,000 where the credible evidence indicated the value of the property to be approximately $350,000 to $400,000) (price alone wasn't the only factor; there were other issues with whether the auctioneer should have adjourned the auction to allow the highest bidder to go and obtain a cashiers check).

4. **Can the guarantor assert a defense based on inadequate foreclosure sale price?**

California

Personal Property.

The guarantor is entitled to these same rights of the borrower since the definition of "debtor" includes a guarantor [Cal. Com. Cd. 9102(28)].

Real Property.

The foregoing anti-deficiency provisions relating to real property collateral have been held not to directly apply to benefit guarantors.

As to CCP 580a, *Talbott v. Hustwit*, 164 Cal. App. 4th 148, 152 (2008).

As to CCP 726, *Loeb v. Christie*, 6 Cal.2d 416. 57 P.2d 1303 (1936). [The Nevada Supreme Court, however, more recently applied Nevada's very similar one-action scheme to guarantors. In *Component Sys. Corp. v. Eighth Judicial Dist. Court,* 692 P.2d 1296 (Nev 1985)].

However the guarantor might have the indirect protection of some of these anti-deficiency and One Action provisions unless effectively waived (see discussion below) because the foreclosure will cutoff the guarantor's subrogation rights against the borrower. [*Union Bank v. Gradsky*, 265 Cal. App. 2d 40. 71 CR 64 (1968). *Cathay Bank v. Lee* 14 Cal. App 4th 1533 (1993)].

In addition there are several theoretical arguments for protection under statutes which expressly protect California guarantors.

California Civil Code ("CC") §2845, which allows guarantors to require that the creditor proceed against the borrower or pursue any other remedy that the guarantor could not pursue that would lighten the guarantor's burden.

CC §2809, which provides that a guarantor's obligations are not to be "more burdensome" than those of the borrower.

If the guarantor is a general partner of the borrower entity, California Courts have held that in such situations the guaranties are not True Guaranties but are instead "sham" or "purported" guaranties since the general partner is obligated for all the debts of the partnership. *Riddle v. Lushing* 203 Cal. App.2d 831, 21 CR 902 (1962); *Union Bank v. Dorn* 254 Cal. App. 2d 157, 61 CR 89(1967).

Likewise if the guarantor is the settlor of the revocable trust which is the borrower, California courts have held that the settlor's guaranty is a "sham" guaranty and not enforceable. [*Cadle Company II v. Harvey* 83 Cal. App. 4th 927; 100 Cal. Rptr. 2d 150 (4th Dist., 2000)].

Florida

No. First, in Florida, judicial foreclosure sales of property securing mortgage debt are conducted by the Clerk in a manner prescribed by statute. F.S. §45.031. Second, under Florida law, the language of the Guaranty controls the rights and duties of the parties, and courts cannot impose duties upon contracting parties different from the terms agreed upon. *Supermarket Equipment, Inc. v. C & S Refrigeration, Inc.*, 609 So.2d 66, 68 (Fla. 4th DCA 1992). Thus, if the guaranty contains language indicating it is an unconditional and absolute guaranty of payment, and language agreeing that the lender can release or grant indulgences with respect to the collateral, the guarantor cannot assert the sale price as a defense. *Id*. A lender under an unconditional guaranty may also pursue a judgment against the guarantor before and independent of foreclosing its interest in the real estate. *Syfrett v. Amsouth Bank of Florida*, 588 So. 2d 46 (Fla 1st DCA 1991); *Royal Palm Corporate Ctr. Ass'n, Ltd. v. PNC Bank, NA*, 89 So.

3d 923 (Fla. 4th DCA 2012)(affirming lower court's entry of immediately-executable money judgment against borrower and guarantors in foreclosure action, and providing that court would set date for sale of mortgaged property if creditor filed an affidavit indicating that the money judgment had not been satisfied).

A low sale price at foreclosure sale will not relieve the guarantor of all liability under an unconditional guaranty. Once a lender has foreclosed, however, it will generally need to obtain a deficiency judgment in order to have a judgment executable against a mortgagor. As a result, the lender may need to obtain an appraisal of the property in order to obtain a judgment against the guarantor where the sale price is considered grossly inadequate.

With respect to sales subject to the UCC not conducted through a real property mortgage foreclosure procedure, a guarantor could argue the price obtained was insufficient by contending that the secured party failed to comply with all obligations of Article 9 in connection with the sale. Under F.S. §679.625, a secured party may be liable to a debtor or an "obligor" for damages in the amount of any loss caused by the secured party's failure to comply Article 9. Here, the UCC uses the term "obligor," the definition of which covers persons who are liable under separate guaranties of payment and is broader in scope than the code's definition of "secondary" obligors, who additionally have redemption rights. See #1.

Georgia

See answer to #3 above.

Illinois

With respect to personal property, the deficiency rules discussed above apply to "obligors" as defined in 9-102 of the UCC, which generally would include a guarantor liable on the underlying secured debt.

With respect to real property, under Illinois law, a guarantor's liability is limited by and is no greater than the principal debtor's liability. *Riley Acquisitions, Inc. v. Drexler,* 946 N.E.2d 957 (Ill. App. 2011). Like the debtor, a guarantor remains liable for any deficiency following a foreclosure sale, but the liability is based on the note not the mortgage. *Telegraph Savings & Loan Association v. Guaranty Bank & Trust Company*, 385 N.E.25 97 (Ill. App. 1978); Ill. Jur. Property Section 19.18. The guarantor of mortgage debt remains liable for a deficiency following the foreclosure sale - liability is based on the guarantor and note, not the mortgage. Ill. Jur. Property Section 19:55

Several cases support the principle that a guarantor can be liable for a deficiency judgment. See *Freedom Mortgage Corporation v. Burnham Mortgage, Incorporated,* 569 F.3d 667 (7th Cir. 2009)(Easterbrook, J.)(analyzing various scenarios under Illinois law pursuant to which a lender could foreclose on real property collateral and then proceed to collect a remaining deficiency from the guarantor in the context of concluding

that Illinois does not have a "single action" rule), citing *Freedom Mortgage Corp. v. Burnham Mortgage Inc.*, 2006 U.S. Dist. LEXIS 10538 (N.D. Ill. 2006); *JLM Financial Investments 4, LLC v. Aktipis*, 2013 U.S. Dist. LEXIS 77939 (N.D. Ill. 2013)(guarantor not absolved of liability under Illinois law by foreclosure judgment against property); *LP XXVI, LLC v. Goldstein*, 811 N.E.2d 286 (Ill. App. 2004)(mortgage foreclosure and suit on guaranty should proceed as separate suits, either consecutively or concurrently). A guarantor's ability to challenge deficiency judgment would be limited by the mortgage foreclosure statute as described above.

Note that Illinois law gives favorable treatment to guarantors (they are, for example, "favorites of the law") although as a general matter as discussed below a properly worded waiver of defenses can limit the benefits generally provided to guarantors. See generally *The Law of Guaranties: A Jurisdiction-by-Jurisdiction Guide to U.S. and Canadian Law* (2013)(Illinois Chapter, T.Harmon et. al. authors). Note also that Illinois law protects against the double recovery that could be obtained from pursuing more than one action by providing that a creditor is entitled to "one satisfaction." See *Freedom Mortgage,* 2006 U.S. Dist. LEXIS *19, citing *Skach v. Lydon*, 306 N.E.2d 482 (Ill. 1973), In re *Linanae*, 291 B.R. 457, 460 (Bankr. N.D. Ill. 2003), *Farmer City State Bank v. Champaign National Bank¸ 486 N.E.2d 301 (Ill. App. Ct, 1985).*

Some of the most interesting Illinois decisions have arisen in the context of credit bids. Where a lender credit bids for the entire debt, under Illinois law the creditor is deemed to have received full repayment of the loan, leaving no further deficiency judgment. *Freedom Mortgage*, 2006 U.S. Dist. LEXIS at *21. For an overview of these cases, see all three decisions in *Freedom Mortgage*, a case arising from credit bids by lenders for the full debt that were allegedly induced by fraudulent or inflated appraisals on the underlying properties in an alleged mortgage flipping scam.

New York

Generally yes, as discussed in the prior section.

The issue will usually be determined by a fair market value determination or a hearing to ascertain whether, in the case of personal property, the foreclosure was conducted in a commercially reasonable manner.

Whether the guarantor would be permitted to advance the defense also depends on numerous other factors, including, without limitation, (a) whether and to what extent the guarantor was party to the underlying litigation, if any, and (b) the terms and conditions of any post-default agreements with the guarantor.

Washington[7]

Under the laws of Washington State, the guarantor has the right following a non-judicial foreclosure to have the court determine the fair value of the real property collateral and to have any deficiency calculated based upon the greater of the bid amount at the foreclosure sale or the fair value. [RCW 61.24.100(5)].

5. **Can payment of a grossly inadequate sale price by creditor through foreclosure create a fraudulent transfer claim or a defense for the guarantor?**

California

The California version of the Uniform Fraudulent Transfer Act (Civ. Cd. 3439.01 *et seq*.) provides, among other things, that a transfer made by a debtor (i) is fraudulent as to a creditor whose claim arose before or after the transfer was made if the transfer was made without receiving reasonably equivalent consideration and the debtor believed or reasonably should have believed that he or she would incur debts beyond his or her ability to repay as they became due. [Civ. Cd. 3439.04]; and (ii) is fraudulent to an existing creditor whose claim arose before the transfer without receiving reasonably equivalent consideration and the debtor was insolvent at the time of, or as a result of, the transfer [Civ. Cd. 3439.05].

The term "transfer" is defined to include any voluntary or involuntary disposing of an asset or an interest in an asset. [Civ. Cd. 3439.01(i)]. "Value" can include the satisfaction of an antecedent debt. [Civ. Cd. 3439.03], The term creditor means anyone with a "claim" which is defined as a right to payment whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.[Civ. Cd. 3439.01 (b)].

There are certain transfers are exempt from challenge as a fraudulent transfer including enforcement of a lien in a non-collusive manner in compliance with applicable law other than the retention of collateral under sections 9620 and 9621 of the Commercial Code and other than a voluntary transfer of collateral by the debtor to the lienor in satisfaction of all or part of the secured obligation. [Civ. Cd. 3439.08 (e)(2)].

A remedy of a creditor for a fraudulent transfer includes among other things, the avoidance of the transfer, an injunction on further transfers of the asset or other relief as circumstances may require. [Civ. Cd. 3439.07].

A guarantor would qualify as a "foreseeable future creditor" since the debtor will be required to reimburse the guarantor for any payments made to the lender [Civ. Cd.

[7] All Washington law references from Jeremy S. Friedberg, Brian D. Hulse and James H. Prior, Editors, *The Law of Guaranties: A Jurisdiction-by-Jurisdiction Guide to U.S. and Canadian Law* (ABA Commercial Finance Committee and the Uniform Commercial Code Committee 2013).

2847] or if the guarantor satisfies the guaranteed obligation. [Civ. Cd. 2848]. Therefore, if the secured creditor were to foreclose on the collateral under Com. Cd. 9620 or 9621 or if the debtor were to deliver a deed in lieu of foreclosure to real property to the secured creditor, the guarantor would be liable to challenge the transfer if the amount credited against the secured obligation were not reasonably equivalent to the true value of the collateral.

Florida

See # 4.

Georgia

It would not create such a claim in Georgia. It would affect confirmation and the ability to pursue a deficiency against the borrower. See #3 for the effect on the guarantor. Nor would it create a separate defense, assuming there is language in the guaranty waiving all legal and equitable defenses, which is common language in most Georgia lender guaranties, and legally enforceable under Georgia law.

Illinois

For the Illinois fraudulent transfer statute, see 740 ILCS 160 (Uniform Fraudulent Transfer Act). Under the UFTA as in effect in Illinois, a transfer is not voidable if it results from an enforcement of a security interest in compliance with Article 9 of the UCC or if made pursuant to a good faith effort to rehabilitate the debtor. 740 ILCS 160/9. 160/9 does not have a similar express carveout for transfers of real property.

For defenses available to the guarantor, see above.

New York

As an initial matter, “[u]nder a procedures analysis, codified in New York's Uniform Commercial Code, the price received for the repossessed goods is only one factor in determining the commercial reasonableness of a resale. N.Y.U.C.C. § 9-504 requires reasonableness of ‘method, manner, time, place and terms,’ and sets forth certain requirements such as reasonable notification of the sale. Further, N.Y.U.C.C. § 9-507 provides that the "fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." This standard for reasonableness requires that the sale conform with ‘reasonable commercial practices among dealers in the type of property sold. *First Interstate Credit Alliance, Inc. v. Clark*, 1989 U.S. Dist. LEXIS 14523 (S.D.N.Y. 1989).

“Courts, however, have carved out a narrow exception that shifts the focus from the procedures observed during the resale to the price paid for the collateral when the price paid is much lower than the purchase price. Although under UCC § 9-507, a low price alone does not determine lack of reasonableness, ‘a wide or marked discrepancy

between the sale price and the value of the property will trigger close scrutiny even in the face of procedural propriety.' *Federal Deposit Insurance Corp. v. Forte*, 94 A.D.2d 59, 463 N.Y.S.2d 844, 850 (2d Dep't 1983). *See In re Zsa Zsa Ltd.*, 352 F. Supp. 665 (S.D.N.Y. 1972) (Pollack., J.), *aff'd*, 475 F.2d 1393 (2d Cir. 1973); *Federal Deposit Insurance Corp. v. Herald Square Fabrics*, 81 A.D.2d 168, 439 N.Y.S.2d 944, 955 (2d Dep't 1981)." *First Interstate Credit Alliance, Inc. v. Clark*, 1989 U.S. Dist. LEXIS 14523, 8-9 (S.D.N.Y. 1989).

Whether a guarantor could sustain a fraudulent conveyance action depends on his ability to sustain the elements of the claim as set forth in the New York version of the Uniform Fraudulent Conveyance Act. For instance, N.Y. D.C.L. Section 273-a "provides that 'every conveyance made ... by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made ... without a fair consideration.' N.Y. D.C.L. § 273-a. Thus, in order to state a claim under Section 273-a, [the claimant] must establish that (1) the conveyance was made without fair consideration; (2) at the time of the conveyance, the conveyor was a defendant in an action for money damages or a judgment in such action had been docketed against it; and (3) a final judgment has been rendered against the conveyor that remains unsatisfied.' *See Lippe v. Bairnco Corp.*, 229 B.R. 598, 603 (S.D.N.Y. 1999) (citations omitted); *Dixie Yarns, Inc. v. Forman*, 906 F. Supp. 929, 935 (S.D.N.Y. 1995)." *Royal Palm Senior Investors, LLC v. Carbon Capital II, Inc.*, 2009 U.S. Dist. LEXIS 57452, 15-16 (S.D.N.Y. July 7, 2009)

In addition, N.Y. D.C.L. Section 276 declares fraudulent "[e]very conveyance made ... with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors." N.Y. D.C.L. § 276. While a lender might have to defend against fraudulent transfer claims, it has not been based upon grossly inadequate sales prices at foreclosure sale.

Thus, the question of whether a guarantor could assert such a claim with respect to a foreclosure or liquidation sale of collateral is not easily answered in the abstract. Subordinated creditors and junior lienors have attempted to challenge foreclosure sales on fraudulent conveyance grounds. Whether those similar claims would inure to a guarantor's basis likely would depend on the particular facts or circumstances although the rights and remedies provided in the NY UCC, for example, with respect to a breach of the secured creditor's duties, should be sufficient to address any attempt to enforce a deficiency claim.

6. **May a guarantor escape liability on the guaranty if the lender modifies the loan without the consent of the guarantor?**

California

Whether dealing with a personal property or real property secured obligation, California law allows a guarantor to raise an exoneration defense if the lender/beneficiary, without the consent of the guarantor or a valid explicit waiver, (i) modifies the guaranteed obligation in any material manner [Cal. Civil Code 2825;

Southern California First Bank v. Olsen 41 Cal. App 3d 234 (2d Dist. 1974)]; or (ii) releases any collateral for the guaranteed obligation [*Eppinger v. Kendrick* 114 Cal. 620 (1896)]; or (iii) fails to disclose to the guarantor information reasonably believed to materially increase the guarantor's risk in excess of the amount the guarantor intended to assume [*Sumitomo Bank v. Iwasaki* 70 Cal .2d 81 (1968)].

This is true even though the alteration of the agreement was not prejudicial to the guarantor. [*Turner v. Fidelity & Deposit Co*. 187 Cal. 76 (1921)]; or whether the guarantor was aware of the collateral [Cal. Civ. Cd. 2849].

Florida

Yes, if the modification impairs the collateral, unless suretyship defenses are waived in guaranty. Generally, if a party entitled to enforce a security agreement impairs the value of its interest, the obligation of any party "who is jointly and severally liable" for the secured obligation is discharged "to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred". F.S.§ 673.6051(6). However, discharge under this section may be waived by language in the guaranty indicating that parties waive defenses based on suretyship or impairment of collateral. F.S.§ 673.6051(9). UCC Commentary to UCC §3-605 suggests that the statute only applies where the guaranty is part of the note, and that common law of guaranty will need to be resorted to where the note and guaranty are separate documents.[8]The commentary also indicates that §3-605 is based on the general suretyship principles, so this distinction may have little practical effect. For application of common law suretyship principles see *Supermarket Equipment, Inc. v. C & S Refrigeration, Inc.*, 609 So.2d 66, 68 (Fla. 4th DCA 1992); *Sun Bank/Treasure Coast, N.A. v. Goldman*, 580 So. 2d 291-92 (Fla. 4th DCA 1991) (plain language of guaranty covered very actions guarantors claimed released them and so precluded defense – trial court judgment releasing guarantors reversed); *Champion Home Builders, Inc. v. Highridge Sales, Inc*., 472 So.2d 836 (Fla. 5th DCA 1985) (guarantor bound by term in guaranty permitting extensions of time in principal contract – no discharge); *U.S. Home Acceptance Corp. v. Kelly Park Hills, Inc*., 542 So.2d 463 (Fla. 5th DCA 1985 (same).

[8] "Section 3-605 applies only to transactions in which the payment obligation is represented by a negotiable instrument, and, within that set of transactions, only to those transactions in which the secondary obligation is incurred by endorsement or cosigning, not to transactions that involve a separate document of guaranty. See Comment 2, above. Second, as provided in subsection (f), secondary obligors cannot obtain a discharge under subsection (a) in any transaction in which they have consented to the challenged conduct. Thus, subsection (a) will not apply to any transaction that includes a provision waiving suretyship defenses (a provision that is almost universally included in commercial loan documentation)…". Cmt. 4, Official UCC Commentary to §3-605.

Georgia

Not if the guaranty states that it is "absolute" and "unconditional" and applicable to any future debts incurred by the borrower with regards to the referenced loan, which is common and enforceable language under commercial guaranties. *Reece v. Chestatee State Bank*, 260 Ga. App. 136, 139, 579 S.E.2d 11 (2003); *see also Ramirez v. Golden*, 223 Ga. App. 610, 611, 478 S.E.2d 430 (1996). Where guaranties are absolute, the guarantor becomes liable upon non-payment by the principal, and the person in whose favor the guaranties run has no duty to first pursue the principal before resorting to the guarantor. *E.g., Johnson v. First Nat. Bank of Atlanta*, 143 Ga. App. 384, 385, 238 S.E.2d 747 (1977).

Typically if this defense gains any traction based on a later modified loan, it is based on a lack of consideration.

Illinois

To the extent a guaranty constitutes a contract between a guarantor and an obligee, absent contractual terms to the contrary the guaranty could not be modified without the consent of both parties. Under Illinois law, a material change in a guaranteed obligation—if it increases a guarantor's obligations—is a defense and may discharge the guaranty entirely, unless the guarantor consents. An immaterial change in an underlying guaranteed obligation that does not increase the guarantor's risk generally does not lead to discharge. *Roels v. Drew Industries, Inc.,* 608 N.E.2d 411, 414 (Ill. App. Ct. 1992), *McLean County Bank v. Brokaw*, 519 N.E.2d 453, 457 (Ill. 1988); *see also* 17 IL Jurisprudence-Business Relationships (MB) Commercial Law 6:30.

New York

Modification of underlying obligation without the guarantor's consent may release the guarantor from liability. *See* John P. McCahey, Your First Guaranty Case: Twelve Things to Know About Guaranties, ABA Section of Litigation, Commercial & Business (2014) ("An alteration, modification or change agreed to between the creditor and primary obligor as to the guaranteed debt, such as where the creditor extends the time for payment or releases the primary obligor, may discharge the guarantor in whole or part when made without the guarantor's consent.").

The traditional rule and predominantly prevailing view has been that "neither the materiality of the change nor the presence of any injury to the guarantor is relevant" to finding alteration of the obligation such that the guarantor is released. Penelope L. Christophorou, *et al.*, New York State Law of Guaranties, The Law of Guaranties, ABA Commercial Finance Committee (2013).

> *Becker v. Faber*, 280 N.Y. 146, 150,19 N.E.2d 997, 999 (N.Y.1939) ("A surety is none the less discharged by a change in the terms of the principal's contract, for the performance of which the surety has

bound himself, when the change might not be thought disadvantageous to him.").

Congregation Ohavei Shalom, Inc. v. Comyns Bros., Inc., 123 A.D.2d 656, 656-57, 507 N.Y.S.2d 28 (N.Y. App. Div. 2d Dep't 1986) ("surety's rights are accorded the jealous protection of the law, and any alteration of the contract to which his guarantee applies, whether material or not, will serve to discharge the surety's obligation") (finding that execution of the extension agreement altered the original obligation, without the guarantor's consent, and thus discharged her from her obligations).

White Rose Food v. Saleh, 99 N.Y.2d 589,788 N.E.2d 602,758 (N.Y.2003) (noting that the extension of time was no doubt a modification, but that the guarantor's consent was found in the modification agreement and thus guarantor was not released from its obligations).

However, some cases suggest that only "material" alterations can serve as the basis for the guarantor's discharge from its obligations. "Any material or substantial alteration of the terms of a contract, for whose performance a surety is bound, when made without the surety's consent, releases the surety from his or her obligations as surety." *Cent. Fed. S&L Ass'n v. Pergolis*, 173 A.D.2d 587, 589-590, 570 N.Y.S.2d 170, 172 (N.Y. App. Div. 2d Dep't 1991) (finding that the modifications were substantial, changing the nature of the agreement between the lender and borrowers, effectively reducing the collateral for the loan from a mortgage on the entire fee to a mortgage on the commercial leasehold only, thereby increasing the risk to the guarantors).

Bier Pension Plan Trust v. Estate of Schneierson, 74 N.Y.2d 312, 315, 545 N.E.2d 1212, 1214, 546 N.Y.S.2d 824, 826 (N.Y. 1989) (reversing grant of summary judgment to guarantor as there were issues of fact as to whether there had been modification of the underlying debt obligation or if the creditor had merely allowed additional time to pay without changing the underlying contract).

Washington

Under laws of the State of Washington, any material change to the surety's obligations without the surety's consent will discharge the surety [*Kenney v. Read* 100 Wash. App 467, 997 P.2d 455 (2000). However the material change must be adverse to the surety.

Under the laws of the State of Washington a release of collateral without the surety's consent will exonerate the guaranty. [*Warren v. Washington Trust Bank* 92 Wash. 2d 381, 598 P.2d 701 (1979)]. However for complete exoneration the value of the collateral must exceed the secured obligation [*Seattle Discount Corp. v. Hollywood Investment Co.* 184 Wash. 14, 49 P.2d 440 (1935)].

Under the laws of Washington State, where a creditor knows that certain facts are unknown to the surety that materially increase the risk to the surety, the creditor's failure to disclose the facts provides a defense to the surety. [*Peoples National Bank of Washington v. Taylor* 42 Wash. App. 518, 711 P.2d 1021 (1985).

7. **May the above defenses be waived by a Guarantor at the time the loan is made?**

California

To the extent that the guarantor is a "debtor" under Article 9 the guarantor may not waive in advance any defenses provided under Article 9 [Cal. Com. Cd. 9602].

The guarantor may waive all of the foregoing defenses available to guarantors under California non-UCC law. [Cal. Civ. Cd. 2856].

And as for the obligation of the Lender/Beneficiary to keep the guarantor informed of all material facts regarding the borrower, (while the provisions of Civ. Cd. 2856 do not expressly address this particular defense, this defense is dealt with by customarily including in the guaranty a covenant by the guarantor to keep informed of all material facts relating to the borrower.

Although Civ. Cd. 2856 permit general language in waivers. The customary practice is for the waiver to expressly state the particular statutory sections whose benefits are being waived.

The degree of specificity of the waiver is still a practical issue. A recent California Appellate Court ruling has confirmed that the protection afforded guarantors by the anti-deficiency statutes may be waived by guarantors where a clear intention to waive exists. *Gramercy Investment Trust v. Lakemont Homes Nevada, Inc.*, 198 Cal. App. 4th 903, 912 (2011) (authorizing guarantors to waive "any rights or defenses that are based upon, directly or indirectly, the application of Section 580a, 580b, 580d, or 726 of the Code of Civil Procedure to the principal's note or other obligation.").

Florida

Yes, in the terms of the Guaranty. See # 4 – 6.

Georgia

Yes. A guarantor “may consent in advance to a course of conduct which would otherwise result in his discharge,” including the waiver of potential defenses. *Bobbitt v. Firestone Tire & Rubber Co.*, 158 Ga. App. 580, 581, 281 S.E.2d 324 (1981); *see also Bowden v. Russell*, 200 Ga. App. 239, 240, 407 S.E.2d 467 (1991) (enforcing the express waiver of defenses contained within a guaranty). The waiver of legal and

equitable defenses in a guaranty is enforceable against the guarantor as a matter of law if such waiver is "plain, unambiguous, and capable of only one reasonable interpretation." *Hanna v. First Citizens Bank & Trust Co., Inc*., 744 S.E.2d 894, 899 (Ga. App. 2013). Furthermore, "Georgia law is clear that creditors are entitled to summary judgment in a suit on an unconditional guaranty when the guarantor has waived all of his defenses." *Core LaVista, LLC v. Cumming*, 308 Ga. App. 791, 795, 709 S.E.2d 336 (2011).

Illinois

Illinois courts generally enforce clear and unambiguous waivers of defenses contained in guaranties. *Douglas v. Tonigan*, 830 F. Supp. 457, 462 (N.D. Ill. 1993); *BA Mortgage & Int'l Realty Corp. v. Am. Nat. Bank & Trust Co.*, 706 F. Supp 1364, 1376 (N.D. Ill. 1989). "Under Illinois law, a guaranty is regarded as 'a legally enforceable contract that must be construed in accordance according to its terms, so long as they are clear and unambiguous.'" *Gen. Elec. Bus. Fin. Servs. v. Silverman*, 693 F. Supp. 2d 796, 800 (N.D. Ill. 2010) (quoting *F.D.I.C. v. Rayman,* 117 F.3d 994, 998 (7th Cir. 1997)); *see also PNC Bank, National Association v. Djurin*, No. 10 C 3785, 2011 U.S. Dist. LEXIS 91831 (N.D. Ill. 2011). "This remains the case even where a guaranty contains broad statements of guarantor liability, including waivers of all defenses." Id. (citing *Chem. Bank v. Paul*, 614 N.E.2d 436 (Ill. App. Ct. 1993)). "The exception to this rule is that every contract, absent express language to the contrary, has an implied covenant of good faith and fair dealing. Thus, courts should take into account public policy concerns in determining the effect and extent of such waivers." *Id.* at 800-01.

Guaranty agreements containing waivers of all defenses have been upheld as validly binding. *Chem. Bank*, 614 N.E.2d at 442. While the duty to act in a commercially reasonable manner may be waived, the duty of good faith cannot. *Id*.; *see also Bank of Am., N.A. v. 108 N. State Retail LLC,* 928 N.E.2d 42 (Ill. App. Ct. 2010) (In contract of guaranty, waiver of all defenses is enforceable under Illinois law; when waivers contained in a guaranty are clear and unambiguous, Illinois courts consistently enforce them); but see *AAR Aircraft & Engine Group, Inc. v. Edwards,* 272 F.3d 468, 473 (7th Cir. 2001) ("Although we held in other contexts that Illinois law permits absolute waivers to defeat all of a guarantor's defenses, those cases did not involve U.C.C. § 9-501(3)'s express prohibition on waivers of commercial reasonableness … Because state law prohibits waivers of commercial reasonableness, especially ones drawn up by creditors themselves, the defense survives even guaranties purporting to be absolute and unconditional." (citations omitted).

New York

The guarantor may permissibly waive defenses to material modifications of the loan by providing an unconditional and absolute guaranty or agreeing to provisions that specifically permit modification of the underlying obligation without notice to the guarantor.

American Bank & Trust Co. v. Koplik,87 A.D.2d 351, 352,451 N.Y.S.2d 426, 427 (N.Y. App. Div. 1st Dep't 1982) (finding that "[t]he guarantees provided that [creditor] could, without notice to defendants, change the terms of payment of the underlying obligation, including the manner and time of payment, without releasing [guarantors] from their obligations.").

Sterling Natl. Bank v. Biaggi, 2006 N.Y. Misc. LEXIS 9404, 17-19, 2006 NY Slip Op 30685(U), 12-13, 2006 WL 6349200 (N.Y. Sup. Ct. Sept. 28, 2006) (the guaranties expressly provided that the loan could be increased, modified or transformed without notice to, or the consent of the guarantors).

Banque Worms v. Andre Café Ltd., 183 AD2d 494, 583 N.Y.S.2d 438 (N.Y. App. Div. 1st Dep't 1992) (guarantor bound by anticipatory agreement in undertaking that he will not be relieved of liability by modification of the principal contract)

Country Glen. L.L.C. v. Himmelfarb, 4 Misc3d 1015[A], 798 N.Y.S.2d 344, 2004 NY Slip Op 50886[U] (N.Y. Sup Ct NY Cty 2004) (guarantor not relieved of obligations if the guaranty permits changes and expressly waives notice to guarantor of such changes).

Where a guaranty is unconditional and absolute, the guarantor will have difficulty avoiding liability even if the lender and borrower modify the loan without the guarantor's consent.

White Rose Food v. Saleh., 292 AD2d 377, 738 N.Y.S.2d 683 (N.Y. App. Div. 2nd Dep't 2002), *aff'd* 99 NY2d 589, 788 N.E.2d 602, 758 N.Y.S.2d 253 (N.Y. 2003) (rejecting co-guarantor's claim that he was relieved from obligations as co-guarantor on a promissory note by a subsequent agreement, made without his consent, which modified the original terms of the promissory note).

Certain defenses are not permitted to be waived in the loan documentations. For example, the defense that the secured creditor failed to conduct a liquidation sale in a commercially reasonable manner is not permitted to be waived pre-default. Accordingly, a guarantor may not waive the defense of commercial reasonableness because the NY UCC § 9-504(3) provides that the right to a commercially reasonable disposition does not arise until default occurs. *See Marine Midland Bank, N. A. v. Kristin Int'l, Ltd*., 141 A.D.2d 259, 262-263, 534 N.Y.S.2d 612, 614-615, (N.Y. App. Div. 4th Dep't 1988) (finding that there were sufficient issues of material fact whether the disposition of the collateral had been commercially reasonable to deny summary judgment).

The Fourth Department, after surveying other court treatments of guarantors under Article 9, rejected the Appellate Division, Third Department's conclusion in *First City Div. of Chase Lincoln First Bank v Vitale,* 123 A.D.2d 207 (N.Y. App. Div. 3d Dep't 1987), that a guarantor may waive the defense of commercial reasonableness. The court found that a guarantor is a "debtor" within the definitions of Article 9 and as concluded by the Court of Appeals, and therefore, a guarantor may not waive the defense of commercial reasonableness. This is now the prevailing view throughout New York courts. Note that a failure to act in a commercially reasonable manner can have material and adverse consequences on the ability to pursue guarantor liability. *See, e.g., ESL Fed. Credit Union v. Bovee*, 9 Misc 3d 256, 801 N.Y.S.2d 482 (N.Y. Sup. Ct. 2005) (where the secured creditor released the collateral to the borrower and mishandled the collateral, the guarantor was released from liability as the waiver did not operate to waive the guarantor's right to have the collateral handled in a commercially reasonable manner).

Washington

Waivers of guarantor defenses are generally enforced in Washington. [*Warren v. Washington Trust Bank* 92 Wash. 2d 381, 598 P. 2d 701 (1979)].

Under the laws of Washington State, secondary obligors, including guarantors can waive certain of the UCC defenses. RCW 62A.9A-602 and -604].

8. **Is your state a "mortgage" or "deed of trust" state? (Briefly describe your state process).**

California

California is a Deed of Trust state.

There are 3 parties to the transaction the trustor (party with title to the collateral), the beneficiary (secured party) and the Trustee.

The Trustor executes and records a Deed of Trust to the property in favor of the Trustee. The Trustee holds the title for the benefit of the Beneficiary. If there is a default at the request of the Beneficiary, the Trustee follows a specified procedure (providing the required notices) to conduct a non-judicial foreclosure sale (auction) of the property. The Trustee transfers title to the property to the prevailing bidder. Alternatively, the Beneficiary may file a lawsuit and have a court judicially foreclose on the property.

Florida

Florida is a lien theory state. See response to #1.

Georgia

Georgia is a security deed state. A security deed follows very closely with a mortgage. The clear distinction is that it outlines the separation of title interests in which the borrower holds legal title to the secured property, with the lender holding equitable title. Pursuant to a now common "power of sale" provision, a non-judicial foreclosure sale may occur if certain procedural steps are undertaken, which are also usually outlined in the security deed. The security deed further provides a mechanism for the merging of titles should a default event occur that results in foreclosure.

Illinois

Generally speaking, Illinois is a mortgage state, although deeds of trust are occasionally used. Illinois has a unique land trust, often used in transactions. Foreclosure of a debtor's interest in a land trust is generally treated as a foreclosure of personal property.

New York

New York is generally a mortgage state. New York also is a judicial foreclosure state, which means that the lender must bring an action to enforce their rights under the mortgage and note (although there are non-judicial foreclosure options).

Speaking generally to New York's foreclosure process, the lender will file a summons and complaint to begin the process. Once a lender obtains a Judgment of Foreclosure and Sale, the sale usually occurs at least four months after the court ruling. Notice of the public auction must be published in a local newspaper once a week for at least four weeks prior to the sale. The sale usually occurs at a county courthouse.

The average foreclosure should take about 12-18 months from the date of the first missed monthly payment, subject to the court's docket and the extent of counterclaims, defenses, and material collateral issues.

Foreclosure laws are found in NY RPAPL §1300 et seq.

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