BENJY LAW CORPORATION

FOR CALIFORNIA LENDERS

A PLAIN-ENGLISH FIELD GUIDE FOR LENDERS

War Stories *from the* Loan File

Real California court cases on commercial loans: how lenders papered them, enforced them, and defended them, where they won, where one avoidable mistake cost them, and what to do differently on your next loan.

32	6	30
REAL CASES	LESSONS	QUESTIONS ANSWERED

Benjy Law Corporation
8889 W. Olympic Blvd., Penthouse
Beverly Hills, CA 90211

(310) 203-2650
benjylaw.com
November 2026 edition

START HERE

How to use this guide

Most lenders learn California lending law the expensive way: after a loan has gone bad. This guide lets you learn it from other lenders' cases instead. Every war story in it is a real, published court decision. Some lenders won. Some lost the deficiency, the guaranty, the interest, or the collateral because of one avoidable choice.

You do not need to read it front to back. Each part stands on its own and follows the life of a loan: papering it, backing it with guaranties, working it out, enforcing it, and defending it when the borrower sues. If a loan is in trouble right now, go to the part that fits it, read the war stories, and then read the Take-Away at the end.

WAR STORY
A real court decision in plain words: what happened, what the court decided, and what to do and not do.

LESSON
A rule of the road, pulled out of the cases, that applies to almost every loan.

FAQ
Short answers to the questions lenders and loan officers actually ask.

TAKE-AWAY
The end-of-part summary. If you read nothing else, read these.

A word about scope. This guide is about **commercial and business-purpose loans secured by California real estate**, and the guaranties, workouts and lawsuits that come with them. Consumer and owner-occupied residential lending is governed by additional state and federal rules that this guide does not cover.

A word about the stories. Each story is a short summary of a court's published opinion. The facts are the facts as the court described them. A decision states a legal rule; it does not predict how your loan will turn out, because small differences in documents and facts change results. Case names and citations appear with each story and in the index at the back, so you or your lawyer can read the decision in full.

This guide is general information about California law as of November 2026. It is not legal advice, and reading it does not create an attorney-client relationship with Benjy Law Corporation. Laws, rates, and deadlines change. For advice about a particular loan, talk to a lawyer. Prior results do not guarantee a similar outcome.

INSIDE

Contents

I — Papering the loan — 4
Usury and its exemptions, late charges and default interest, prepayment, compounding, and what the paper can and cannot do.

II — Guaranties: the second way to get paid — 17
Why a guaranty stands on its own, how a foreclosure choice can release a guarantor, sham guaranties, and the limits of waivers.

III — Workouts, modifications and forbearance — 26
Late payments, side promises, and workout paper: how lenders change a loan on purpose, and how they change it by accident.

IV — Default: choosing the remedy — 36
The one-action rule, trustee's sales, deficiencies, and the first move that can cost you the collateral.

V — When the borrower sues — 47
Injunctions, wrongful foreclosure, lender-liability claims, and usury used as a weapon.

- Your first ten moves when a loan goes bad — 57
- The deadline chart — 58
- Plain-English glossary — 60
- Index of war stories — 62
- Talk to a lawyer — 63

I

PART I

Papering the loan

A loan is only as good as its paper. When a borrower stops paying, the first thing the borrower's lawyer does is read your note, line by line, looking for the clause a court will not enforce.

This part is about the clauses that get attacked most: the interest rate, the late charge, the default rate, the prepayment fee, and the compounding language. In most of these stories the lender's money was real and the borrower's default was real. The lender still lost something, because of how one sentence was written or who did the work at closing.

WAR STORIES IN THIS PART

01 The broker only filled in the blanks

02 The broker's own company made the loan, and the exemption held

03 A $100,000 fee "added to principal"

04 One missed payment raised the rate on the whole balance

05 A prepayment fee that was really a late fee

06 The note said "thereafter," so compounding started eleven years late

07 "It's a two-year extension. Just sign at the tabs."

Interest and the usury trap

WAR STORY 01 USURY: BROKER EXEMPTION

The broker only filled in the blanks

Gibbo v. Berger (2004) 123 Cal.App.4th 396 · California Court of Appeal

WHAT HAPPENED

In 1992 a private lender made a $15,000 loan at 15 percent, secured by a deed of trust on the borrowers' home. An escrow company owned by a licensed real estate broker typed the agreed terms into preprinted forms, ordered title insurance, and paid out the money, for a $100 fee. The borrowers made monthly interest payments over ten years. When the lender's daughter started foreclosure to collect the principal, the borrower sued for usury. The lender's side answered that the loan was exempt because a licensed broker had "arranged" it.

WHAT THE COURT DECIDED

The Court of Appeal reversed a judgment for the lender. To "arrange" a loan, a broker must act as an intermediary who causes the loan to be made, for example by structuring it, setting the rate, or drafting its terms. This broker did none of that. She acted like "a scribe." With no exemption, 15 percent was usurious. The lender was entitled to principal only, and the borrowers' payments had already exceeded it, so the debt was satisfied and the deed of trust had to come off.

DO

If you rely on the broker exemption, have a licensed broker actually negotiate or structure the loan, be paid for it, and put that role in the file.

DON'T

Don't assume a broker's license somewhere in the transaction, such as at the escrow company, makes the loan exempt.

The broker's own company made the loan, and the exemption held

Bock v. California Capital Loans, Inc. (2013) 216 Cal.App.4th 264 · California Court of Appeal

WHAT HAPPENED

The trustee of a family trust needed a loan. A third party put him in touch with a licensed real estate broker who was also the sole shareholder of a lending company. The broker told the borrower the terms and prepared the disclosure statements. His company lent $1.2 million at 15 percent, secured by a deed of trust. He took no commission. The borrower defaulted, the lender foreclosed and bought the property at the trustee's sale, and the borrower sued, claiming the rate was usurious and the sale was void.

WHAT THE COURT DECIDED

The lender won at trial and on appeal. The court held that a broker can arrange a loan "for another" even when the lender is a corporation he wholly owns, and that the profit his company expected from the interest can count as acting "in expectation of compensation." The evidence supported the finding that the broker acted in his own licensed capacity. The court contrasted an earlier case where the evidence showed licensed individuals were acting for an unlicensed company, and the exemption was lost.

DO

Be able to prove, with documents, which licensed person arranged the loan and in what capacity: disclosures, correspondence, and the license number.

DON'T

Don't leave the exemption to be reconstructed years later from memory. Build the proof into the closing file.

A $100,000 fee “added to principal”

Ghirardo v. Antonioli (1994) 8 Cal.4th 791 · California Supreme Court

WHAT HAPPENED

Sellers of land took back a note and deed of trust. A later buyer took the property subject to that debt. A payment dispute led to a foreclosure notice, a lawsuit, and then a settlement: the sellers cancelled the old note, and the buyer paid cash and signed two new notes. One note was at 13 percent. The other stated 10 percent, but a $100,000 fee was added to its principal, which made the effective rate 17.46 percent when the limit was 10.5 percent. The buyer paid, then sued for usury. The trial court ordered the sellers to give back the interest.

WHAT THE COURT DECIDED

The California Supreme Court reversed. Usury requires a loan or a forbearance. This was a seller’s restructuring of a credit sale, which is not a loan, and the restructuring kept that status. The court also restated the ground rules. The borrower must prove usury. But the only intent required is the intent to take the interest actually charged, and courts look at the substance of a deal, not its labels.

DO

Before closing, and before every modification, compute the effective rate with every fee, point, bonus, and discount counted.

DON’T

Don’t read this case as cover for a money loan. The sellers won because they were sellers. A lender of money that adds a fee to principal is charging interest.

LESSON

Four questions before you quote a rate

California's Constitution caps interest on a loan or forbearance unless the lender or the loan is exempt. Ask these in order.

- → **Is it a loan or a forbearance?** A true sale on credit is neither. A loan of money, or an agreement to wait on a debt in exchange for more money, is.
- → **Is the lender or the loan exempt?** Banks and several classes of licensed lenders are exempt. So is a loan secured by real estate that is made or arranged by a licensed California real estate broker.
- → **If nothing is exempt, what is the cap?** For a business-purpose loan (any loan not primarily for personal, family, or household use), the higher of 10 percent a year or 5 points over the Federal Reserve Bank of San Francisco's discount rate, measured on the 25th of the month before the loan is made or contracted for.
- → **What counts toward the cap?** Everything the lender receives for the use of the money: fees, bonuses, commissions, and discounts, not just the stated rate.

Sources: Cal. Const., art. XV, § 1; Civ. Code § 1916.1; Fin. Code § 22002; Ghirardo v. Antonioli (1994) 8 Cal.4th 791.

WAR STORY 04 DEFAULT INTEREST

One missed payment raised the rate on the whole balance

Honchariw v. FJM Private Mortgage Fund, LLC (2022) 83 Cal.App.5th 893 · California Court of Appeal

WHAT HAPPENED

Borrowers took a $5.6 million bridge loan at 8.5 percent, secured by a first deed of trust. They missed one monthly payment of $39,667. The note then imposed two charges: a one-time fee of 10 percent of the late payment, and default interest of 9.99 percent a year, on top of the note rate, on the entire unpaid principal until the default was cured. The note recited that the lender's losses from a default would be hard to estimate. An arbitrator upheld the charges, and the trial court refused to set the award aside.

WHAT THE COURT DECIDED

The Court of Appeal reversed. A charge for a late installment that is measured against the whole unpaid balance, most of which is not yet due, is an unlawful penalty. A recital in the note plus a one-word "Yes" from the lender's principal did not show a real effort to estimate the lender's loss. The court drew a line: the borrower here defaulted on a loan that had not matured. It distinguished cases where default interest began only when the whole loan came due.

DO

Tie a late charge to the late payment. If you want a default rate before maturity, be ready to show how the number relates to your actual cost of a default.

DON'T

Don't count on a "the parties agree this is reasonable" clause to carry a default rate that applies to the full balance after one missed installment.

A prepayment fee that was really a late fee

Ridgley v. Topa Thrift & Loan Assn. (1998) 17 Cal.4th 970 · California Supreme Court

WHAT HAPPENED

A developer borrowed $2.3 million for two years as a bridge loan on a house he had built to sell. The lender's form charged six months' interest on any prepayment. The developer objected, so the lender added a sentence: no prepayment charge after the first six months, provided every payment had arrived no more than 15 days late and there had been no other default. One interest payment came in late. When the house sold and the loan was paid off, the lender demanded a prepayment charge of about $113,000.

WHAT THE COURT DECIDED

The California Supreme Court held the charge was an unenforceable penalty. A true prepayment charge is lawful, because paying early is the borrower's choice and not a breach. But this charge, after month six, applied only if the borrower had paid late. In substance it punished late payment, and six months' interest on the whole principal bore no reasonable relationship to the harm caused by one late interest payment. The court refused to save it by calling it a "conditional waiver."

DO

Keep the prepayment charge and the late charge in separate clauses, each priced for the loss it covers.

DON'T

Don't offer to waive a fee "if the borrower is never late." A court will treat the fee as a late charge and test it as a penalty.

LESSON

Charges that tend to survive, and charges that do not

In a business loan, a pre-set charge for a default is presumed valid. The borrower has to show it was unreasonable when the loan was made. These cases show where borrowers succeed.

- → **Late charge on the late payment:** the ordinary design. Trouble starts when the charge is measured by the whole loan balance.
- → **Default interest before maturity, on the whole balance:** struck down in *Honchariw* after a single missed installment.
- → **Default interest after the loan matures:** treated differently in *Honchariw*, because by then the whole balance is due.
- → **Prepayment charge:** lawful as the price of paying early. It is tested as a penalty, and can fail, when it applies only because the borrower paid late or otherwise defaulted.
- → **Your evidence:** reasonableness is judged as of the day the loan was made. A short memo in the file on how each charge was set is worth more than a recital.

Sources: Civ. Code § 1671(b); Ridgley v. Topa Thrift & Loan Assn. (1998) 17 Cal.4th 970; Honchariw v. FJM Private Mortgage Fund, LLC (2022) 83 Cal.App.5th 893.

What the paper says, and what was said out loud

WAR STORY 06 COMPOUND INTEREST

The note said “thereafter,” so compounding started eleven years late

Curry v. Moody (1995) 40 Cal.App.4th 1547 · California Court of Appeal

WHAT HAPPENED

In 1981 a couple lent a homeowner $19,200. The note called for 13 percent interest, “payable at the time of sale of the house,” and added: “Should interest not be so paid it shall thereafter bear like interest as the principal.” The loan was never repaid. In 1992 the house was sold at another lender’s foreclosure sale. In later litigation, the lenders claimed compound interest from 1981, and offered evidence that they and the borrower had always intended that. The trial court agreed.

WHAT THE COURT DECIDED

The Court of Appeal cut the award back. The note gave simple interest until the house was sold in August 1992, and compound interest only “thereafter.” California law does not allow interest on interest unless an agreement to that effect is clearly expressed in a writing signed by the borrower. So testimony about what the parties meant could not fill the gap. An unclear note is read as simple interest.

DO

If you intend interest to compound, say so in the note in plain words: what compounds, how often, and starting when.

DON’T

Don’t rely on a boilerplate sentence, or on what everyone understood, to turn unpaid interest into principal.

Also: For lenders exempt from the usury limits, the California Supreme Court has held that the old usury statute’s compound-interest rule and its penalties do not apply, but an exempt lender still needs a contractual or legal basis to compound. *Wishnev v. Northwestern Mutual Life Ins. Co.* (2019) 8 Cal.5th 199.

“It’s a two-year extension. Just sign at the tabs.”

Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn. (2013) 55 Cal.4th 1169 · California Supreme Court

WHAT HAPPENED

Borrowers fell behind and signed a restructuring agreement with their lender. The written agreement gave them about three months of forbearance and listed eight parcels as added collateral. The borrowers initialed the pages describing the parcels. They later sued for fraud. They said the lender’s vice president told them, two weeks earlier and again at signing, that the deal was a two-year extension secured by two ranches. They admitted they signed at the tabs without reading. The trial court threw the case out, ruling that the written agreement barred evidence of contrary oral promises.

WHAT THE COURT DECIDED

The California Supreme Court let the fraud claims go forward and overruled a 1935 decision that lenders had relied on for decades. A written, integrated contract cannot be varied by earlier oral terms. But that rule was never meant to be a shield against proof of fraud. The court added that fraud still requires more than a broken promise, and that the borrower must show justifiable reliance. It left open whether these borrowers could show that after not reading what they signed.

DO

Send the final terms in writing before signing, and have the loan officer confirm in an email what the documents say about term and collateral.

DON’T

Don’t let anyone describe a workout in terms the documents do not match. The integration clause will not keep that testimony out.

~~MYTH~~	REALITY
We make business loans, so usury does not apply to us.	It can. The constitutional cap covers business loans too, under its own formula. What takes a loan outside the cap is an exemption, so be ready to prove yours.
~~MYTH~~	REALITY
A licensed broker touched the file, so we are exempt.	Not if the broker only prepared documents. The broker has to arrange the loan as an intermediary, for compensation (*Gibbo*).
~~MYTH~~	REALITY
The borrower agreed in writing that our default rate is reasonable.	A recital did not save a default rate charged on the whole balance after one missed installment (*Honchariw*).

~~MYTH~~	REALITY
Our integration clause blocks any claim about what the loan officer said.	It blocks attempts to add or change terms. It does not block a fraud claim (*Riverisland*).

The closing file for a commercial loan

- [ ] A signed note that states, in separate sentences, the rate, how interest is computed, whether and when it compounds, the maturity date, the late charge, any default rate, and the prepayment terms.
- [ ] A recorded deed of trust with a lender's title policy, including an assignment of rents and a due-on-sale clause.
- [ ] The borrower's signed statement that the loan is for business or investment purposes, and how the money will be used.
- [ ] Proof of the usury exemption you are relying on: the license, and for a broker-arranged loan, the broker's engagement, compensation, and what the broker actually did.
- [ ] If this deed of trust is meant to secure other loans to the same borrower, a clear statement of that in the documents for each loan.
- [ ] A short internal memo on how the late charge and any default rate were set.
- [ ] A written summary of final terms sent to the borrower before signing, matching the documents.
- [ ] Guaranties signed by people or entities that are not the borrower. See Part II.

FAQ Papering the loan

Q We are a private lender. Does California's usury cap apply to our business loans?

It applies unless the lender or the loan is exempt. The common exemptions for private lenders are a state lending license and a loan secured by real estate that a licensed real estate broker made or arranged. If neither applies, a business loan is capped at the higher of 10 percent or 5 points over the San Francisco Fed's discount rate.

Cal. Const., art. XV, § 1; Civ. Code § 1916.1; Fin. Code § 22002.

Q A broker arranged the original loan. Is our later extension or forbearance covered too?

The broker statute now speaks to this directly. As amended effective January 1, 2025, it covers a forbearance, extension, or modification of a real-estate-secured loan that a licensed broker makes or arranges. Have the broker involved in the modification itself, and document it. Cases decided before 2025 applied older wording.

Civ. Code § 1916.1 (as amended by Stats. 2024, ch. 601).

Q Can we charge a higher default rate?

After the loan matures, courts have treated default interest differently from a penalty. Before maturity, a default rate applied to the whole balance because of one missed installment was held to be an unlawful penalty. In between, expect to show that the rate reasonably relates to your cost of a default.

Civ. Code § 1671(b); *Honchariw v. FJM Private Mortgage Fund, LLC* (2022) 83 Cal.App.5th 893.

Q If we accelerate after a default, can we still collect the prepayment charge?

Only if the note says so clearly. A court enforced a prepayment charge after acceleration where the clause expressly covered involuntary prepayment, including prepayment caused by the lender's acceleration. Where the clause speaks only of the borrower's privilege to prepay, expect a court to read it against the lender. And a charge that applies only because the borrower paid late, not because of the early payoff, is tested as a penalty.

Pacific Trust Co. TTEE v. Fidelity Fed. Sav. & Loan Assn. (1986) 184 Cal.App.3d 817; *Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970.

Q Can we charge interest on unpaid interest?

If you are not exempt from the usury law, only if the borrower signed a writing that clearly says so. If the note is unclear, it bears simple interest, and testimony about what the parties intended will not change that. An exempt lender is not bound by that statute, but it still needs a contractual or legal basis to compound, so write it into the note either way.

Civ. Code § 1916-2; *Curry v. Moody* (1995) 40 Cal.App.4th 1547; *Wishnev v. Northwestern Mutual Life Ins. Co.* (2019) 8 Cal.5th 199.

Q The borrower sold the property without telling us. Can we call the loan?

If the deed of trust has a due-on-sale clause, generally yes. Federal law makes these clauses enforceable according to their terms and overrides older California limits. The federal exceptions are for certain transfers of homes with fewer than five units.

12 U.S.C. § 1701j-3.

TAKE-AWAY

Papering the loan

1. **Know your usury exemption before you quote a rate.** Then keep the proof: the license, the broker's role, and the broker's pay.
2. **Count everything.** Fees, points, and bonuses are part of the rate. Labels do not change the math.
3. **Price each charge for its own job.** A late charge for the late payment. A prepayment charge for early payoff. Do not let one do the work of the other.
4. **Be careful with default interest before maturity.** A higher rate on the whole balance after one missed installment has been struck down.
5. **Write compounding in plain words.** An unclear note earns simple interest.
6. **What your people say still matters.** The integration clause keeps out side terms. It does not keep out fraud.

II

PART II

Guaranties: the second way to get paid

In California, a lender that forecloses by trustee's sale usually cannot collect the shortfall from the borrower. A guaranty is the main exception. A true guarantor can be sued for the deficiency, and can agree in advance to give up most of the defenses a guarantor would otherwise have.

That makes the guaranty the most valuable page in many loan files, and the most attacked. Guarantors defend these cases in three ways. They say they were really the borrower. They say the lender's own conduct released them. Or they say the loan itself was illegal. Each of those has worked at least once.

WAR STORIES IN THIS PART

08 The guarantor's promise stood on its own

09 The trustee's sale that released the guarantor

10 The bank's lawyer asked for a new borrower

11 The borrowers picked the entity, so the guaranties held

12 The waivers did not cover the bank's own misconduct

13 The guarantors raised usury, and their waiver did not stop them

A separate promise, with its own rules

WAR STORY 08 INDEPENDENT OBLIGATION

The guarantor's promise stood on its own

Bank of America v. Hunter (1937) 8 Cal.2d 592 · California Supreme Court

WHAT HAPPENED

A woman guaranteed up to $4,300 of a $10,800 note that was secured by a deed of trust. The note went unpaid. The bank held a trustee's sale, bought the land, and applied its bid to the debt. A balance equal to the guaranty remained. The bank sued her more than four years after the note came due, and more than three months after the sale. The trial court ended the case at the close of the evidence. Among her arguments: the new three-month deadline for suing after a trustee's sale had passed.

WHAT THE COURT DECIDED

The California Supreme Court reversed. The three-month deadline was written for a deficiency action on the secured debt itself. It did not apply to an action on "the independent obligation of a guarantor." Two financial statements she gave the bank, which listed the guaranty as a liability, and a letter she wrote about it, were written acknowledgments that kept the four-year period alive. And the sale proceeds credited to the note did not use up her capped, continuing guaranty.

DO

Collect a signed financial statement from each guarantor every year, and make sure it lists the guaranty as a liability.

DON'T

Don't treat the guaranty as an afterthought to the foreclosure. It is a separate contract with its own clock, and the clock runs.

Still the rule: the fair-value limits that apply to a borrower after a trustee's sale do not apply to a true guarantor. *Talbott v. Hustwit* (2008) 164 Cal.App.4th 148. See also Code Civ. Proc. § 580d(b).

The trustee's sale that released the guarantor

Union Bank v. Gradsky (1968) 265 Cal.App.2d 40 · California Court of Appeal

WHAT HAPPENED

A bank made a $112,500 construction loan to a property owner, secured by a first deed of trust. The general contractor signed a guaranty. In it he waived any right to require the bank to go after the borrower first, to apply its security, or "to pursue any other remedy." The loan was not paid. The bank chose a trustee's sale and bought the property. That left $11,565.97 unpaid, and the bank sued the guarantor for it. The trial court dismissed the case.

WHAT THE COURT DECIDED

The Court of Appeal affirmed. The rule against deficiency judgments after a trustee's sale does not protect a guarantor directly. But a guarantor who pays is entitled to step into the lender's shoes and recover from the borrower. By choosing a trustee's sale, the bank wiped out that right, because nobody can get a deficiency from the borrower after such a sale. Having destroyed the guarantor's recourse by its own choice, the bank could not collect from him. The defense can be waived, the court said, but only explicitly. The general waiver in this guaranty was not enough.

DO

Before any trustee's sale on a guaranteed loan, have counsel read the guaranty's waivers. If they are weak, sue the guarantor first or foreclose in court.

DON'T

Don't assume "the guarantor waived everything." This guarantor had waived the bank's duty to pursue "any other remedy," and still won.

Since then: Civ. Code § 2856 now lets a guarantor waive this defense, and supplies wording that is sufficient. Check that every guaranty in your files has it.

LESSON

The waivers every commercial guaranty needs

After *Gradsky*, courts argued for years over how specific a guarantor's waiver had to be. In one 1993 case, the guarantor of a $5.2 million loan won outright because the bank's waiver did not spell out the defense being given up. The Legislature answered with Civil Code section 2856. Under it, a guarantor may waive:

- → **Suretyship rights:** subrogation, reimbursement, indemnification, contribution, and the other protections the Civil Code gives sureties.
- → **Election-of-remedies defenses:** including the *Gradsky* defense that arises when the lender holds a trustee's sale.
- → **Real-property defenses:** rights the guarantor would have because the debt is secured by real estate, including those based on the antideficiency and one-action statutes.
- → **No magic words required:** any language that expresses the intent to waive works, and the statute prints sample wording that is sufficient.
- → **Two limits:** the statute's shortcuts do not apply to certain purchase-money loans on owner-occupied homes of four units or fewer, and a waiver signed before 1997 is judged under the law in effect when it was signed.

Sources: Civ. Code § 2856; Union Bank v. Gradsky (1968) 265 Cal.App.2d 40; Cathay Bank v. Lee (1993) 14 Cal.App.4th 1533; River Bank America v. Diller (1995) 38 Cal.App.4th 1400.

True guarantor, or borrower in disguise?

WAR STORY 10 SHAM GUARANTY

The bank's lawyer asked for a new borrower

River Bank America v. Diller (1995) 38 Cal.App.4th 1400 · California Court of Appeal

WHAT HAPPENED

A bank lent $38 million to build an apartment complex. The notes were nonrecourse. The developer, his wife, their family trust, and their development company guaranteed 20 percent. After default, the bank sued, held a trustee's sale that came up $12.9 million short, and pursued the guaranties. According to the developer's sworn statement, the bank's lawyer had insisted that the borrower be a new limited partnership whose general partner was not the development company, so the guaranty would be "enforceable," and a shell corporation was put in that role. He also said the bank reviewed only the guarantors' finances and never asked about the shell's.

WHAT THE COURT DECIDED

The result was mixed. The guarantors' written waivers defeated their argument that they could not owe more than the nonrecourse borrower. But on that evidence, the bank could not win without a trial on whether the guaranties were shams. A guarantor is someone who answers for the debt of *another*. If a lender structures the deal so that the real borrower signs as "guarantor," that person keeps the borrower's protection against deficiency judgments, and that protection cannot be waived.

DO

Let the borrower and its advisers choose the borrowing entity, and underwrite that entity, not only the people behind it.

DON'T

Don't ask for a shell borrower to be inserted so that the principals can sign as guarantors. That request became the guarantors' best evidence.

The borrowers picked the entity, so the guaranties held

CADC/RADC Venture 2011-1 LLC v. Bradley (2015) 235 Cal.App.4th 775 · California Court of Appeal

WHAT HAPPENED

Two investors arranged a $2.1 million loan to buy land in Napa. Their corporation applied for the loan. Two days before closing, on their tax adviser's advice, they switched the borrower to a new limited liability company, for tax reasons tied to a tax-deferred exchange. The bank did not ask for the change. Both men signed guaranties that waived the antideficiency protections. After default and a trustee's sale, about $1.3 million was still owed. A jury found the guaranties were shams.

WHAT THE COURT DECIDED

The Court of Appeal reversed and ordered judgment for the lender. A guaranty is a sham when the guarantor is really the primary obligor, or when the lender structures the loan to get around the antideficiency laws. Neither was shown. The guarantors never owned the borrower directly, their corporation observed its formalities and kept separate accounts, and the structure was their idea, chosen for their own tax benefit. People who take the benefits of borrowing through an entity take the risks too.

DO

Keep the emails showing who proposed the borrowing structure and why. In this case that record mattered on appeal.

DON'T

Don't skip the borrower's own financials. The guarantors argued the bank looked only to them, and the court took the argument seriously.

Facts courts have weighed in sham-guaranty cases

QUESTION	POINTS TOWARD A TRUE GUARANTY	POINTS TOWARD A SHAM
Who chose the borrowing entity?	The borrower, for its own tax or business reasons (*Bradley*)	The lender or its lawyer, to make a guaranty "enforceable" (as alleged in *Diller*)
Is the guarantor already liable for the borrower's debt?	No. A separate entity stands between them and observes its formalities	Yes, for example a general partner guaranteeing the partnership's note
Whose finances did the lender review?	The borrower's, or its parent's, as well as the guarantor's	Only the guarantor's, with a shell as the borrower
What does the guaranty itself say?	Express waivers that track Civ. Code § 2856	Waivers do not matter if the signer is really the borrower

What a waiver cannot fix

WAR STORY 12 LIMITS OF WAIVERS

The waivers did not cover the bank's own misconduct

California Bank & Trust v. DelPonti (2014) 232 Cal.App.4th 162 · California Court of Appeal

WHAT HAPPENED

A bank made a construction loan for a 70-unit townhome project. The developer's two principals signed guaranties with broad waivers. For 18 months the project stayed on schedule. Then, with the first phase nearly done, the bank stopped funding payment applications it had already approved. Units could not be finished or sold, and the loan went into default. The bank later foreclosed. Its successor sued the guarantors for the deficiency and argued that they had waived every defense.

WHAT THE COURT DECIDED

The guarantors won at trial and on appeal. The trial court found the bank had materially breached the loan agreement and was guilty of willful misconduct, and the bank did not challenge those findings. The Court of Appeal held that a guarantor's advance waivers reach the legal and statutory defenses set out in the guaranty. They are read strictly. They do not waive equitable defenses such as unclean hands when enforcement would let the lender profit from its own fraud or willful misconduct.

DO

Fund approved draws, or document a contractual reason for stopping, before you rely on a guaranty.

DON'T

Don't treat a guaranty's waiver section as protection against your own breach of the loan agreement.

The guarantors raised usury, and their waiver did not stop them

WRI Opportunity Loans II LLC v. Cooper (2007) 154 Cal.App.4th 525 · California Court of Appeal

WHAT HAPPENED

A junior lender lent about $2.5 million, later increased to $3.2 million, to a company developing townhouses and condominiums. On top of the stated rate, the loan called for "additional interest": a percentage of each unit's sale price, with a schedule that paid the lender a set amount even if units were never built. The lender's own analysis projected a return of about 38 percent. The company's two principals guaranteed the loan and waived their defenses. When the lender sued them, the trial court entered a $6.6 million judgment without a trial.

WHAT THE COURT DECIDED

The Court of Appeal reversed. The lender argued the loan was an exempt shared-appreciation loan. It was not, because the extra interest was guaranteed, not at risk and not a true share of appreciation. And the guarantors could raise usury despite their waivers. The usurious part of a loan is illegal, a guarantor cannot waive illegality in advance, and Civil Code section 2856 did not change that. The court did not decide that the loan was usurious. It sent the case back with that defense still to be resolved.

DO

Run the usury analysis on the loan as if the guarantor will be the one raising it, because the guarantor can.

DON'T

Don't rely on a guaranty to rescue interest the borrower could not legally be charged.

FAQ Guaranties

Q After a trustee's sale, can we still sue the guarantor for the shortfall?

Yes, if the guarantor is a true guarantor and the guaranty contains the waivers the statute allows. The bar on deficiencies after a trustee's sale does not by its terms affect a guarantor's liability. Without an election-of-remedies waiver, though, the sale itself can release the guarantor.

Code Civ. Proc. § 580d(b); Civ. Code § 2856; *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40.

Q Can the owners of our LLC borrower sign as guarantors?

Yes. That is the usual arrangement, and courts enforce it when the entity is real and separate. The risk is a guarantor who is already liable for the borrower's debt, or a structure the lender imposed to get around the antideficiency rules.

CADC/RADC Venture 2011-1 LLC v. Bradley (2015) 235 Cal.App.4th 775; *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400.

Q Does a guaranty need its own consideration?

Not when it is signed along with the loan and is part of what the lender bargained for. A written guaranty is also presumed to be supported by consideration, and the guarantor has the burden of showing otherwise. A guaranty added later should recite what the lender gave for it, such as an extension or new money.

Civ. Code §§ 2792, 1614, 1615; *Glickman v. Collins* (1975) 13 Cal.3d 852.

Q How long do we have to sue a guarantor?

Generally four years on a written guaranty. The three-month deadline for a deficiency action after a trustee's sale applies to the secured debt, not to a guarantor's independent promise. Do not wait: guarantors' assets move.

Code Civ. Proc. § 337(a); *Bank of America v. Hunter* (1937) 8 Cal.2d 592.

Q Our guaranty says the guarantor "waives all defenses." Is that enough?

No. Advance waivers are read strictly and reach the legal and statutory defenses the guaranty identifies. They do not cover the lender's own fraud or willful misconduct, and they do not cover illegality, such as a usurious loan.

California Bank & Trust v. DelPonti (2014) 232 Cal.App.4th 162; *WRI Opportunity Loans II LLC v. Cooper* (2007) 154 Cal.App.4th 525.

Q Should the guarantor's spouse sign too?

Ask your lawyer before closing, not at collection. Which marital property a guaranty can reach, and whether a spouse's signature or consent is needed, depends on how the couple holds title and on the collateral. It is far cheaper to settle the question at closing than to litigate it later.

TAKE-AWAY

Guaranties

1. **A guaranty is its own contract.** It has its own defenses and its own deadline. Treat it as a separate file.
2. **Read the waivers before you choose a remedy.** A trustee's sale can release a guarantor whose guaranty lacks the right waiver.
3. **Use the statute's language.** Civil Code section 2856 says what a guarantor may waive and prints wording that works.
4. **Guarantor and borrower must be different.** Let the borrower pick its entity, underwrite the entity, and keep the record of who chose the structure.
5. **Waivers do not cover your own conduct.** A lender that willfully breaches the loan agreement can lose the guaranty.
6. **An illegal loan cannot be guaranteed into legality.** If the interest is usurious, the guarantor can say so.

III

PART III

Workouts, modifications and forbearance

A loan in trouble rarely goes straight to foreclosure. First come the late payments you accept, the calls asking for more time, and the "let's see where we are next month." Each one feels like patience. In court, each one is evidence.

Borrowers use that evidence to argue that you changed the deal, gave up a default, or promised not to foreclose. The cases in this part show where those arguments worked, where they failed, and what a clean workout file looks like.

WAR STORIES IN THIS PART

14 A year of short payments did not rewrite the note

15 Two years at the lower rate were gone for good

16 The branch took the payment. The trustee sold the house anyway.

17 "All we want is our money" led to a $475,000 verdict

18 The forbearance agreement only one side signed

19 The workout traded lower payments for a waiver that was void

Accepting late and partial payments

WAR STORY 14 WAIVER

A year of short payments did not rewrite the note

Hunt v. Smyth (1972) 25 Cal.App.3d 807 · California Court of Appeal

WHAT HAPPENED

A note secured by a second deed of trust called for payments of $250 a month, rising to $350 in January 1968. The borrowers kept paying $250, often late. The holder took the money for more than a year without objecting to the amount. In March 1969 he wrote that he would accept nothing less than the full $350 going forward and gave a date to catch up. The borrowers kept sending $250 checks. He recorded a notice of default and returned the checks. The borrowers sued to stop the sale, claiming the note had been changed to $250.

WHAT THE COURT DECIDED

The Court of Appeal sided with the note holder. Simply accepting part of what is due does not discharge the rest or change the payment terms. A modification or novation needs an agreement and consideration, and the borrowers had to prove it. Whatever leniency the holder had shown ended with his written demand. After that letter the short payments were not enough to cure the default.

DO

When you decide the leniency is over, say so in a dated letter: the exact amount due, the date it is due, and that you will insist on the loan terms from then on.

DON'T

Don't go straight from months of accepting short payments to a notice of default. Give the written warning first.

Two years at the lower rate were gone for good

Thompson v. Gorner (1894) 104 Cal. 168 · California Supreme Court

WHAT HAPPENED

A note carried 8 percent interest, and a higher rate of 1 percent a month if principal or interest was not paid when due. The note matured unpaid. For nearly two years the holder kept accepting monthly interest at the lower rate. Then she refused the next payment and demanded the higher rate. The borrower tendered principal plus interest at the lower rate. She sued to foreclose.

WHAT THE COURT DECIDED

The California Supreme Court split the result. For every month she had accepted the lower rate, the higher rate was waived and could not be collected later. But accepting less in the past did not change the note for the future. From the day she refused the lower payment and demanded the contract rate, she was entitled to it.

DO

Decide when a default happens whether you are charging what the note allows, and put that in writing to the borrower.

DON'T

Don't accept payments month after month as if nothing changed and expect to bill the difference later.

Note: this old case was decided under an earlier version of Civ. Code § 1698, and the whole note had already come due. The rule on when a higher rate after default is enforceable at all is covered in Part I.

The branch took the payment. The trustee sold the house anyway.

Bank of America v. La Jolla Group II (2005) 129 Cal.App.4th 706 · California Court of Appeal

WHAT HAPPENED

A $15,000 loan secured by a house in Fresno went into default, and the lender's trustee set a sale. Four days before the sale, a payment curing the default was handed to a branch employee, who accepted it and reinstated the loan. Nobody told the trustee. The sale went forward and a professional foreclosure buyer bid $15,500 for a house he valued at $115,000. He recorded his deed and refused to give it back.

WHAT THE COURT DECIDED

The sale was void. A power of sale exists only while there is a default. Once lender and borrower agreed to cure the default and reinstate, there was nothing left to foreclose on, even though the statutory reinstatement period had already ended. The buyer's deed recitals did not save him. The lender had to sue its own foreclosure buyer to undo the sale.

DO

Have one person control every loan in foreclosure. Any payment or agreement goes to that person and to the trustee the same day.

DON'T

Don't let a branch, servicer, or loan officer accept money on a loan in foreclosure without checking with whoever is running the sale.

Note: this was a home loan, but the court's reasoning rests on the deed of trust itself and is not limited to home loans.

Promises to wait

WAR STORY 17 ORAL PROMISES

“All we want is our money” led to a $475,000 verdict

Raedeke v. Gibraltar Savings & Loan Assn. (1974) 10 Cal.3d 665 · California Supreme Court

WHAT HAPPENED

A lender held a $730,000 first deed of trust on a motor hotel and restaurant and had a trustee’s sale scheduled. The owners said the lender’s agent orally agreed to postpone the sale again if they found a responsible buyer for the property, and told them more than once that the lender would cooperate. They found a buyer. The lender held the sale anyway, bought the property itself for the debt, and the owners sued for damages.

WHAT THE COURT DECIDED

A jury found that the promise was made and awarded $475,000. The trial judge set that aside. The California Supreme Court reinstated the verdict. An oral promise to postpone a sale given for nothing is ordinarily not enforceable. But here the owners gave something they did not already owe: they went out and found a buyer at the lender’s request. That was consideration, so the claim was an ordinary contract claim for a jury.

DO

If you agree to postpone a sale, put the new date and every condition in a short signed writing. If you will not postpone, say that in writing too.

DON’T

Don’t let anyone tell a borrower in default “we’ll work with you” or “bring us a buyer and we’ll hold off” unless you mean to be held to it.

Note: the court decided only that the borrowers were entitled to the jury’s verdict. It did not review the merits of that verdict. Civ. Code § 1698 has been rewritten since, and later cases apply the statute of frauds to these promises (see *Secrest*, below).

The forbearance agreement only one side signed

Secrest v. Security National Mortgage Loan Trust 2002-2 (2008) 167 Cal.App.4th 544 · California Court of Appeal

WHAT HAPPENED

Borrowers in default negotiated a new forbearance agreement by phone with the lender's representative. He faxed a draft with an obviously wrong reinstatement figure, told them to cross it out, sign, fax it back, and wire $13,422.51, and promised an audit and a corrected agreement. They signed and paid. The lender never signed. The loan was sold, the audit never happened, and years later the new holder recorded a notice of default. The borrowers sued to block the sale.

WHAT THE COURT DECIDED

The lender won. An agreement to forbear from foreclosing modifies the note and deed of trust, so it falls under the statute of frauds and must be signed by the party it is enforced against. The lender had not signed. Paying money was not enough to get around the missing signature, because money can be refunded or credited.

DO

Treat a forbearance agreement like a loan document: correct numbers, full signatures on both sides, and a copy in the file that travels with the loan.

DON'T

Don't let workout terms live in phone notes and half-signed faxes. The lender here won, but only after an injunction and years in court over a draft.

Note: this was a home loan. The court relied on general contract statutes that apply to commercial deeds of trust as well. The same rule can cut against a lender trying to enforce workout terms the borrower never signed.

The workout traded lower payments for a waiver that was void

DeBerard Properties, Ltd. v. Lim (1999) 20 Cal.4th 659 · California Supreme Court

WHAT HAPPENED

A seller sold a shopping center and carried back a note secured by a junior deed of trust. When the buyers could not keep up, the parties signed a forbearance agreement. The seller cut the monthly payment and the interest rate in half and agreed not to foreclose. In exchange, the buyers waived the antideficiency protection of Code Civ. Proc. § 580b. They defaulted again, the senior lender foreclosed, and the seller sued on the note. The trial court enforced the waiver.

WHAT THE COURT DECIDED

The California Supreme Court did not. As it then read, § 580b barred a deficiency on seller purchase-money paper "in any event." A buyer cannot waive it, at closing or later, even for real concessions. The court agreed that ruinous concessions are, if anything, easier to get from a borrower already in default. The seller gave up half its payments and got nothing enforceable in return.

DO

Before you give concessions in exchange for a waiver, have counsel confirm the waiver is one California will enforce.

DON'T

Don't price a workout on the assumption that a borrower's waiver of antideficiency protection will hold.

Scope: § 580b covers seller carry-back financing, certain home-purchase loans and, for loans made since 2013, refinancings of those home loans. It does not cover an ordinary commercial loan from a third-party lender. The statute has been reworded since *DeBerard* and no longer says "in any event." See Part IV.

~~MYTH~~

If I take a late payment, I have waived the default.

REALITY

Not by itself. Accepting late or partial payments does not rewrite the note (*Hunt v. Smyth*). But a pattern of acceptance can require you to give clear notice, best given in writing, before you enforce strictly again.

~~MYTH~~

Our note says "no oral modifications," so nothing said on the phone can hurt us.

REALITY

The clause helps, but it is not a shield. An oral promise backed by something new from the borrower supported a damages verdict in *Raedeke*, decided under an earlier version of the statute. Under today's Civ. Code § 1698, an oral change both sides have carried out, waiver, and estoppel all remain available.

~~MYTH~~	REALITY
A forbearance agreement is just a letter. It doesn't need both signatures.	It changes the note and deed of trust, so it must be in a writing signed by the party to be held to it (*Secrest*).
~~MYTH~~	REALITY
The reinstatement deadline has passed, so we can take the payment and still hold the sale.	If you accept a cure and reinstate by agreement, the power to sell on that default is gone (*La Jolla Group II*).

LESSON

What a forbearance agreement should do

A forbearance agreement buys the borrower time. It should buy the lender certainty. These are general drafting points, not a form, and each loan needs its own review.

- → **Fix the facts.** State the loan balance, the defaults, and that the loan documents are valid and unchanged except as written.
- → **Say exactly what you are giving.** A defined period, defined payments, and a clear statement of what ends the forbearance.
- → **Reserve everything else.** No waiver of any default; accepting payments during the period is not a cure unless the agreement says so.
- → **Get every signature.** Borrower, lender, and each guarantor's written consent and reaffirmation (guaranties are covered in Part II).
- → **Be realistic about releases.** A general release tucked into a forbearance agreement did not wipe out a usury claim in *Hardwick v. Wilcox* (Part V), and a waiver of § 580b was void in *DeBerard*.
- → **Tell the trustee.** If a sale is pending, the trustee gets the agreement and written instructions the same day.

Sources: Civ. Code § 1698; *Secrest* (2008) 167 Cal.App.4th 544; *Hunt v. Smyth* (1972) 25 Cal.App.3d 807; *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659; *Hardwick v. Wilcox* (2017) 11 Cal.App.5th 975.

FAQ Workouts and modifications

Q Can a written loan be changed by a conversation?

Sometimes. A written contract can be modified by another writing, by an oral agreement to the extent both sides have carried it out, or, unless the contract says otherwise, by an oral agreement supported by new consideration. If the modified contract is one the statute of frauds covers, the modification must satisfy it too. Waiver and estoppel are preserved.

Civ. Code § 1698, subds. (a)–(d); *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544.

Q Does accepting a late or partial payment waive my right to call a default?

Not by itself. Accepting part of what is due does not discharge the rest or change the terms. But the months you accepted at a lower figure may be gone, and after a pattern of leniency you should give clear written notice before enforcing strictly.

Hunt v. Smyth (1972) 25 Cal.App.3d 807; *Thompson v. Gorner* (1894) 104 Cal. 168.

Q The borrower says our dealings created a "new deal" that replaced the note. Is that a novation?

Only if it clearly appears that both sides intended to extinguish the old obligation and substitute a new one, with consideration. The party claiming a novation has the burden of proving it.

Civ. Code §§ 1530–1532; *Hunt v. Smyth*, 25 Cal.App.3d 807.

Q Is an oral promise to postpone a trustee's sale binding?

A bare promise given for nothing ordinarily is not. A promise the borrower paid for with something new, such as finding a buyer at your request, has supported a damages verdict. An agreement to forbear from foreclosing must also satisfy the statute of frauds. The safe practice is to make no oral promises about a sale at all.

Raedeke v. Gibraltar Savings & Loan Assn. (1974) 10 Cal.3d 665; *Secrest*, 167 Cal.App.4th 544.

Q Can we accept a reinstatement payment after the statutory deadline?

Yes, lender and borrower may agree to cure and reinstate after the statutory period. But once you accept it, you cannot foreclose on that default, and a sale held anyway is invalid.

Bank of America v. La Jolla Group II (2005) 129 Cal.App.4th 706; Civ. Code § 2924c, subd. (e).

Q Can the borrower waive foreclosure and antideficiency protections in a workout?

It depends on the protection and the timing. A borrower's waiver of the notice, reinstatement, fair-value, and one-action protections made when the loan is made or renewed is void by statute. The borrower cannot waive the purchase-money bar of § 580b at any time. Have counsel review any waiver before you give value for it.

Civ. Code § 2953; *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659.

TAKE-AWAY

Workouts and modifications

1. **Patience is fine. Silence is not.** If you accept late or short payments, say in writing that you are not changing the loan.
2. **End leniency with a letter.** State the amount, the date, and that strict performance is required from then on.
3. **No oral promises about a sale.** Postponements and conditions go in a signed writing or they are not made.
4. **Workouts are loan documents.** Right numbers, both signatures, guarantor consents, and a copy to the trustee.
5. **Take the cure or hold the sale.** You cannot do both on the same default.
6. **Check the waiver before you pay for it.** Some borrower waivers are void no matter what you gave in exchange.

IV

PART IV

Default: choosing the remedy

When a California loan is secured by real estate, the lender does not get to collect any way it likes. It must go to the real estate first, in one proceeding. And the way it forecloses decides whether it can ever collect the shortfall.

These rules punish the wrong first move. Lenders in this part lost a deed of trust over a few thousand dollars taken from a deposit account, and lost real estate collateral by suing on the equipment first. Others kept a deficiency claim that looked lost. The difference was the order in which they acted.

WAR STORIES IN THIS PART

20 A $2,804 setoff cost the bank its deed of trust

21 The bank sued on the equipment and lost the land

22 A note secured by someone else's land was not "real property security"

23 A notice mailed a week early did not undo the sale

24 They bid the full debt, and the insurance money was no longer theirs

25 The junior lender wiped out by someone else's sale could still sue

26 One lender, two deeds of trust, and the junior note survived

Security first, and only one action

WAR STORY 20 ONE-ACTION RULE

A $2,804 setoff cost the bank its deed of trust

Security Pacific National Bank v. Wozab (1990) 51 Cal.3d 991 · California Supreme Court

WHAT HAPPENED

A company owed its bank more than $1 million on a credit line. The owners had guaranteed the debt and later gave the bank a deed of trust on their home to secure the guaranties. Worried about a bankruptcy, the bank swept the deposit accounts, including $2,804.82 from the owners' personal accounts. The owners said the setoff had waived the deed of trust. The bank reconveyed it and sued on the guaranties for the remaining $976,000. The trial court ruled the bank had lost the debt too.

WHAT THE COURT DECIDED

The California Supreme Court held that the setoff broke the security-first rule of Code Civ. Proc. § 726. A lender with real estate security may not help itself to the debtor's deposit accounts first. The price was the security: the deed of trust was gone. But a divided court refused to wipe out the debt as well, calling that a penalty 300 times the amount of the setoff. The bank could sue as an unsecured creditor.

DO

Flag every real-estate-secured loan in your deposit system so that no one can set off against that borrower's or pledgor's accounts without legal review.

DON'T

Don't sweep accounts, apply held funds, or grab other assets to pay down a loan secured by California real estate before you have foreclosed.

Note: the court left open what happens when a setoff is inadvertent and promptly returned. If it happens, reverse it immediately and call counsel.

The bank sued on the equipment and lost the land

Walker v. Community Bank (1974) 10 Cal.3d 729 · California Supreme Court

WHAT HAPPENED

A bank made one loan secured two ways: a chattel mortgage on the borrower's equipment and trucks, and a deed of trust on real property. After default the bank filed a court action to foreclose on the equipment only. It sold the equipment and took a deficiency judgment of about $93,000. The real property was never mentioned in that case. The bank also started a trustee's sale on the real property, which the borrower had by then sold to a new owner.

WHAT THE COURT DECIDED

The new owner won, and the bank's lien on the real property was gone. A lender gets one action on a debt secured by real property, and it must include all of the security. By taking a deficiency judgment without foreclosing on the land, the bank chose its remedy and waived the deed of trust, against everyone. It did not matter that the borrower never raised the rule in the first case.

DO

List every piece of collateral securing the debt before you file anything, and have counsel map the order of enforcement.

DON'T

Don't take a money judgment against the borrower while real estate collateral for the same debt sits unforeclosed.

Note: the Commercial Code now lets a lender with both kinds of collateral proceed against the personal property and the real property in any sequence (Com. Code § 9604). But once a money judgment on the debt is entered in an action that left the real property out, the borrower may still assert that the deed of trust is unenforceable. That is what happened here.

A note secured by someone else's land was not "real property security"

Bank of California v. Leone (1974) 37 Cal.App.3d 444 · California Court of Appeal

WHAT HAPPENED

A borrower owed the bank on an unsecured $13,500 note. To get more time, he handed the bank, as collateral, a $17,600 note that a third party owed him. That third party's note was secured by a fourth deed of trust on land. The borrower defaulted on his own renewed note. The bank sued him directly without first foreclosing on the pledged note or the land behind it. The borrower argued the one-action rule required the bank to go after the collateral first.

WHAT THE COURT DECIDED

The Court of Appeal disagreed. The borrower's own debt was secured by a note, which is personal property, not by a mortgage on real property. The one-action rule did not apply, and the bank could take a judgment on the borrower's note without first enforcing the pledged paper.

DO

Know exactly what secures each obligation: a deed of trust on the obligor's real estate, or a pledge of someone else's paper. The enforcement rules differ.

DON'T

Don't assume this result if you later end up owning the land behind the pledged note. Get advice before you foreclose the underlying deed of trust.

WAR STORY 23 NOTICE

A notice mailed a week early did not undo the sale

Knapp v. Doherty (2004) 123 Cal.App.4th 76 · California Court of Appeal

WHAT HAPPENED

Homeowners defaulted and the lender's trustee recorded a notice of default. The trustee mailed the notice of sale a few days before the three-month waiting period had run. The borrowers filed bankruptcy, the sale was postponed more than a dozen times, and it finally took place almost a year after the date first noticed. A third party bought the property. The borrowers then sued to set the sale aside, pointing to the early mailing and a low price.

WHAT THE COURT DECIDED

The sale stood. The notice had gone out slightly early, but the borrowers received more than the required 20 days' notice and did nothing to cure during the year the sale was pending. A minor procedural slip that causes no harm does not undo a trustee's sale. Even a low price is not enough unless an irregularity contributed to it or otherwise hurt the borrower.

DO

Use an experienced trustee, calendar every statutory date, and keep proof of each recording, mailing, posting, and publication.

DON'T

Don't count on a court to forgive a notice defect. This lender won because the borrowers could show no harm at all.

Note: this was a home loan, decided before later homeowner-protection statutes. The no-prejudice reasoning is the part that carries over to commercial loans.

They bid the full debt, and the insurance money was no longer theirs

Caruso v. Great Western Savings (1991) 229 Cal.App.3d 667 · California Court of Appeal

WHAT HAPPENED

A house was badly damaged by land movement, and about $190,000 of insurance money sat in dispute between the owners and the senior lender. The junior lienholders foreclosed and took the property at their own trustee's sale with a full credit bid of $131,580, the entire amount owed to them. Then they tried to block the senior lender's foreclosure, arguing the insurance money should have been applied to shrink the senior debt.

WHAT THE COURT DECIDED

They had no standing to make the argument. A full credit bid means the lender has been paid in full. Its debt is satisfied and its lien is extinguished, so it has no remaining claim to insurance proceeds or other recoveries tied to the debt. The senior lender also had a lesson: fees for carrying out a foreclosure are capped by statute, and only fees for protecting the security can be added to the debt under the loan documents. Its fee award of more than $32,000 was sent back to be sorted.

DO

Set your credit bid deliberately. If you may still have insurance, rents, or damage claims to pursue, talk to counsel about bidding less than the full debt.

DON'T

Don't tell the trustee to "bid the debt" out of habit, and don't lump foreclosure fees and protective legal fees into one number.

Two ways to foreclose in California

	TRUSTEE'S SALE (NONJUDICIAL)	COURT FORECLOSURE (JUDICIAL)
How it works	The trustee records a notice of default, waits the statutory period, gives notice of sale, and sells at public auction. No lawsuit is needed.	The lender files a lawsuit, obtains a decree of foreclosure, and the property is sold under court supervision.
Deficiency against the borrower	Barred. No deficiency may be collected after a sale under the power of sale (Code Civ. Proc. § 580d).	Available unless another rule bars it, but limited to the debt minus the property's fair value, and the lender must apply for the fair-value hearing within 3 months of the sale (§ 726, subd. (b)).
Borrower's right to redeem after the sale	None.	Yes, if the lender keeps its right to a deficiency judgment. The property is then sold subject to a statutory right to redeem for a period after the sale (§ 726, subd. (e)). That is the trade-off for the deficiency.

	TRUSTEE'S SALE (NONJUDICIAL)	COURT FORECLOSURE (JUDICIAL)
Borrower's right to reinstate before the sale	Until 5 business days before the sale date (Civ. Code § 2924c, subd. (e)).	Until entry of the decree of foreclosure (Civ. Code § 2924c, subd. (a)(1)).
Guarantors and other collateral	The bar on a deficiency does not, by itself, release a guarantor or other pledged collateral (§ 580d, subd. (b)). See Part II.	Guarantors can be joined in the action. See Part II.
Best suited to	Loans where the property will cover the debt, or where speed and clean title matter more than the shortfall.	Loans where the shortfall is large, the borrower can pay a judgment, and the time and cost of a lawsuit are worth it.

After the sale: who can still be sued

WAR STORY 25 — SOLD-OUT JUNIOR

The junior lender wiped out by someone else's sale could still sue

Roseleaf Corp. v. Chierighino (1963) 59 Cal.2d 35 · California Supreme Court

WHAT HAPPENED

A company sold its hotel and took, as part of the price, three notes secured by second deeds of trust on other parcels the buyer owned. Other lenders held the first deeds of trust on those parcels. They foreclosed by trustee's sale. The seller's second deeds of trust were wiped out and it received nothing. It sued the buyer on the three notes. The buyer said the antideficiency statutes barred the suit.

WHAT THE COURT DECIDED

The California Supreme Court allowed the suit. A junior lender whose security is destroyed by a senior lender's sale has nothing left to foreclose, so the one-action rule does not apply. The fair-value limits and the three-month deadline did not apply either, and § 580d did not bar the claim, because the junior never sold under its own deed of trust. The purchase-money bar did not apply because the land securing these notes was not the property being bought.

DO

When a senior lender forecloses ahead of you, decide early whether to bid, to cure the senior loan, or to let the sale go and sue on your note.

DON'T

Don't assume a junior loan is worthless once the senior's sale wipes out your lien. Have the note reviewed before you write it off.

One lender, two deeds of trust, and the junior note survived

Black Sky Capital, LLC v. Cobb (2019) 7 Cal.5th 156 · California Supreme Court

WHAT HAPPENED

A bank made a $10.3 million loan secured by a first deed of trust on commercial property in Rancho Cucamonga. Two years later it made the same borrowers a separate $1.5 million loan secured by a second deed of trust on the same property. An investor bought both loans, foreclosed on the first by trustee's sale, and acquired the property for $7.5 million. It then sued on the second note. The trial court held § 580d barred the suit because the same creditor held both liens.

WHAT THE COURT DECIDED

The California Supreme Court disagreed. Section 580d bars a deficiency on a note when the property was sold under the deed of trust securing *that* note. No sale had occurred under the second deed of trust, so the statute did not bar a judgment on the second note. The court warned that the answer could differ if a lender splits what is really one loan into two notes to get around the statute. These loans were separate deals made two years apart.

DO

Document a second loan as a truly separate transaction: its own purpose, underwriting, note, and deed of trust, at a different time.

DON'T

Don't split one loan into a first and second deed of trust to manufacture a deficiency claim. The court flagged exactly that as an open question.

Note: the court decided only the § 580d question. It did not decide whether the one-action rule or another statute limits recovery in this situation.

LESSON

Pick the remedy before you touch anything

The first thing a lender does after default often decides what it can collect. Before anyone acts, answer these.

- → **What secures this debt?** Every deed of trust, every pledge, every account. The one-action rule looks at all of it.
- → **Is the property worth more or less than the debt?** If less, a trustee's sale ends your claim against the borrower for the shortfall.
- → **Who else can pay?** Guarantors and other collateral may survive a trustee's sale, but only if you have not damaged those rights (Part II).
- → **Is this purchase-money paper?** Seller carry-back notes and certain home-purchase loans carry no deficiency at all.
- → **What will you bid?** A full credit bid says you were paid in full.
- → **Has anyone already taken money?** A setoff or applied deposit on a real-estate-secured loan needs to be reversed and reviewed at once.

Sources: Code Civ. Proc. §§ 580a, 580b, 580d, 726; *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991; *Walker v. Community Bank* (1974) 10 Cal.3d 729; *Caruso v. Great Western Savings* (1991) 229 Cal.App.3d 667.

FAQ Default and remedies

Q What is the "one-action rule"?

A lender whose debt is secured by California real property has one form of action to collect it: foreclosure. It must look to the real property first, and it must include all of the real property security in that one action. A lender that sues on the note, takes a judgment, or helps itself to other assets first risks losing the security.

Code Civ. Proc. § 726, subd. (a); *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991; *Walker v. Community Bank* (1974) 10 Cal.3d 729.

Q Can we collect a deficiency after a trustee's sale?

Not from the borrower on the note that was foreclosed. After a sale under the power of sale, no deficiency may be owed or collected on that note. The statute says this does not, by itself, affect a guarantor's liability or other pledged collateral, and it does not bar a suit on a truly separate note whose deed of trust was not the one foreclosed.

Code Civ. Proc. § 580d, subds. (a), (b); *Black Sky Capital, LLC v. Cobb* (2019) 7 Cal.5th 156; *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35.

Q If we foreclose in court instead, how much can we recover?

No more than the debt minus the fair value of the property as the court finds it, and never more than the debt minus the sale price. The application for the fair-value hearing must be filed within three months after the foreclosure sale.

Code Civ. Proc. § 726, subd. (b); *Black Sky Capital, LLC v. Cobb* (2019) 7 Cal.5th 156.

Q What is a purchase-money loan, and why does it matter?

It is a loan tied to buying the property: a note taken back by the seller for part of the price, or a lender's loan used to buy a one-to-four unit dwelling the buyer occupies. No deficiency may be owed or collected on these, and the protection cannot be waived. The rule also covers a refinance of a purchase-money home loan made on or after January 1, 2013, except for new money advanced. A seller who subordinated to a construction loan for commercial development was allowed to recover in one narrow line of cases.

Code Civ. Proc. § 580b; *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659; *Spangler v. Memel* (1972) 7 Cal.3d 603.

Q What can we charge the borrower to reinstate?

The amounts actually in default plus allowed costs. Costs of the foreclosure itself are limited to the listed items, and trustee's or attorney's fees for the foreclosure are capped by a statutory schedule based on the unpaid principal. Other legal fees spent protecting the security may be added to the debt if the loan documents allow it, but keep them separate.

Civ. Code § 2924c, subds. (a), (c), (d); *Caruso v. Great Western Savings* (1991) 229 Cal.App.3d 667.

Q Can we get a receiver or an attachment while the foreclosure is pending?

A receiver may be available, especially where the deed of trust assigns rents or the property is at risk, but only on the grounds the statutes list. Attachment is generally not available on a claim secured by real property unless, without any act of the lender, the security has become valueless or has dropped below the amount owed. Ask counsel before filing either, so the request is framed in a way that does not create a one-action problem.

Code Civ. Proc. §§ 564, 483.010, subd. (b), 483.012; Civ. Code § 2938.

Before you record a notice of default

- [ ] Every piece of collateral for this debt is listed, with its lien position and current value.
- [ ] No setoff, sweep, or application of the borrower's other funds has occurred. If one has, it was reversed and counsel was told.
- [ ] You have decided between a trustee's sale and a court foreclosure, and you know what that choice does to the deficiency.
- [ ] Guaranties have been reviewed for their waivers (Part II) before any sale date is set.
- [ ] The default amounts in the notice are accurate and documented, and foreclosure fees are tracked separately from other legal fees.
- [ ] One person controls communications with the borrower and the trustee, and knows about every payment and promise.
- [ ] The opening bid and the maximum credit bid have been set on purpose, with any insurance, rents, or damage claims in mind.

TAKE-AWAY

Default and remedies

1. **Real estate first.** Do not sue on the note, set off deposits, or take other assets before foreclosing. The penalty is the lien.
2. **One action, all the collateral.** Map every piece of security before filing anything.
3. **A trustee's sale ends the deficiency on that note.** If the shortfall matters and the borrower can pay, consider court foreclosure.
4. **A sold-out junior can still sue.** Section 580d does not bar a lender's suit on a truly separate second loan either. Loan-splitting to evade the rule is another matter.
5. **A full credit bid is a receipt.** Bid on purpose.
6. **Procedure protects the sale.** Small notice errors may be forgiven. Do not plan on it.

V

PART V

When the borrower sues

Borrowers in default have lawyers too. The lawsuit usually arrives just before the sale date, asking a court to stop it, or just after, asking a court to undo it. It tends to come with claims that the lender was careless, broke a promise, or charged an unlawful rate.

Many of these claims fail, and the cases in this part show why. Others succeed, usually because of something in the lender's own file. Know which is which before you answer the complaint.

WAR STORIES IN THIS PART

27 A hope of refinancing was not a tender

28 The lender foreclosed after the borrower had paid everything he legally owed

29 A borrower in default could still challenge an assignment as void

30 The lender's appraisal was for the lender

31 A decade of interest became principal payments

32 Exempt from usury did not mean any rate would do

Stopping or undoing the sale

WAR STORY 27

TENDER RULE

A hope of refinancing was not a tender

Karlsen v. American Savings & Loan Assn. (1971) 15 Cal.App.3d 112 · California Court of Appeal

WHAT HAPPENED

A lender held a trustee's sale and bought the property for the $312,650 then owed. The borrower said the property was worth $1 million. He sued to set the sale aside, alleging the lender had lulled him with continuing negotiations and an oral promise not to sell without telling him. He said he had tendered the full debt days after the sale. In fact he had no money and no loan commitment, only a hoped-for sale of part of the land and a hoped-for refinancing. Later he asked the court to undo the sale on condition that he pay whatever the court found due.

WHAT THE COURT DECIDED

The lender won on the pleadings. To cancel a voidable trustee's sale, the borrower must make a valid tender of the debt, and an offer to pay means nothing from someone who cannot perform it. A request that the court set terms was not a tender either. The court noted that otherwise a lender would have no real security at all. The oral promise was unenforceable, and without a tender the remaining claims fell too.

DO

When a borrower sues over a sale, ask first: where is the money? Demand proof of funds behind any claimed tender.

DON'T

Don't ignore a real tender. A full, unconditional payment of what is owed changes everything, as the next case shows.

The lender foreclosed after the borrower had paid everything he legally owed

Winnett v. Roberts (1986) 179 Cal.App.3d 909 · California Court of Appeal

WHAT HAPPENED

Private lenders made a $7,000 loan at 40 percent, secured by a deed of trust. The borrower happened to hold a real estate broker's license. The lenders did not, and no broker arranged the loan. After default and a notice of sale, the borrowers offered in writing to pay the principal plus 10 percent interest. The lenders refused. A court then paused the sale on condition that the borrowers pay the $7,000 principal, which they did. The trial court then ruled the loan exempt and declined to block the sale further. The lenders held the sale and bought the property for $4,415.

WHAT THE COURT DECIDED

The Court of Appeal ordered the sale, the trustee's deed, and the deed of trust cancelled. The loan was usurious, so the lenders were entitled to principal only and no interest at all. Once the principal was paid, there was no debt left to secure and nothing to foreclose. The borrowers were also entitled to their attorney fees under the note's fee clause.

DO

If a borrower raises usury before a sale, stop and have the loan's exemption checked. If the principal is tendered on a loan with a rate problem, take it.

DON'T

Don't press a foreclosure to collect interest you may not be entitled to. You can lose the sale, the lien, and the fee fight.

Note: this loan was for personal expenses. Which loans and lenders are exempt from the usury limits is covered in Part I.

A borrower in default could still challenge an assignment as void

Yvanova v. New Century Mortgage Corp. (2016) 62 Cal.4th 919 · California Supreme Court

WHAT HAPPENED

According to the complaint, a homeowner's lender went bankrupt in 2007 and was liquidated in 2008. In 2011 a document was recorded in which that defunct lender purported to assign her deed of trust to a securitized trust, years after the trust's closing date. The property was then sold at a trustee's sale. She sued to undo the sale. The trial court dismissed her case, and the Court of Appeal held she could not add a wrongful foreclosure claim: she was not a party to the assignment, so she had no standing to complain about it.

WHAT THE COURT DECIDED

The California Supreme Court reversed on that one point. Only the true holder of the beneficial interest, or its agent, may direct a trustee's sale. A borrower who has lost property to foreclosure may claim that the assignment to the foreclosing party was void, not merely voidable. The court called its ruling narrow. It did not allow suits to block a sale in advance, and it did not decide that this assignment was actually void.

DO

Before you start a foreclosure on a loan you bought, confirm the chain: endorsements on the note, recorded assignments, and the authority of everyone who signed them.

DON'T

Don't create or back-date "clean-up" assignments on the eve of foreclosure without counsel. A void one can hand the borrower a claim.

Note: this was a home-loan case from the securitization era. For a commercial lender the practical point is loan-purchase diligence: you can only foreclose what you can prove you own.

“The lender owed me a duty”

WAR STORY 30 DUTY OF CARE

The lender’s appraisal was for the lender

Nymark v. Heart Federal Savings & Loan Assn. (1991) 231 Cal.App.3d 1089 · California Court of Appeal

WHAT HAPPENED

A homeowner applied to refinance. The lender had the property appraised for its own underwriting, and the borrower paid the appraisal fee. The report said the roof, foundation, and systems appeared sound. Four years later the county red-tagged the house for construction defects costing more than $50,000 to fix. The borrower stopped paying and sued, claiming the lender had been negligent in the appraisal. The lender cross-complained for judicial foreclosure and moved for summary judgment.

WHAT THE COURT DECIDED

The lender won. As a general rule, a financial institution owes no duty of care to a borrower when its involvement in the loan does not exceed its conventional role as a lender of money. An appraisal done to satisfy the lender that its collateral is adequate is done for the lender’s protection, not the borrower’s. Negligence liability arises only when a lender actively participates in the borrower’s enterprise beyond the usual role of a lender.

DO

Say in your application and disclosures that appraisals, inspections, and underwriting are for the lender’s use only and may not be relied on by the borrower.

DON’T

Don’t advise the borrower on the deal, vouch for the property or the project, or take control of the borrower’s business decisions.

Also: the California Supreme Court later held that a lender owes no negligence duty to process, review, and respond carefully to a borrower’s loan-modification application, because the economic loss rule bars that claim. *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905.

LESSON

How a lender takes on duties it did not have

The no-duty rule protects a lender that acts like a lender. These habits, pulled from the cases in this guide, are how lenders step outside it. They are general guidance, not rules of law.

- → **Giving advice.** Telling the borrower the project is sound, the property is fine, or the numbers work.
- → **Making promises.** "We'll extend." "We won't sell." "We'll fund the next draw." If you mean it, write it and sign it. If you don't, don't say it.
- → **Running the business.** Choosing the borrower's contractors, tenants, or managers, or directing day-to-day decisions.
- → **Speaking with two voices.** A workout officer negotiating while the foreclosure desk proceeds, with neither telling the other.
- → **Leaving it out of the file.** A short written record of what was and was not agreed is the best answer to most borrower claims.

Sources: *Nymark v. Heart Federal Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089; *Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665; *Bank of America v. La Jolla Group II* (2005) 129 Cal.App.4th 706.

Usury as a weapon

WAR STORY 31 USURY

A decade of interest became principal payments

Hardwick v. Wilcox (2017) 11 Cal.App.5th 975 · California Court of Appeal

WHAT HAPPENED

Over ten years an individual lender made a series of loans, secured by commercial properties, at 11 or 12 percent. The notes were extended, rolled over, and combined through fifteen notes and amendments. When the borrower fell behind in 2012, the lender started foreclosure and, on his lawyer's advice, had the borrower sign a forbearance agreement with a general release. The borrower later sued for usury. The lender argued the release and the statute of limitations barred most of the claim.

WHAT THE COURT DECIDED

The borrower won. Every note in the chain carried a usurious rate, so the interest terms were void and the interest paid over the years was credited against principal. He also recovered $227,235.83 in interest paid during the two years before suit. The release did not help: the forbearance agreement settled no dispute, neither side knew of the usury claim, and reading it as a waiver of usury would violate public policy. Renewing a usurious loan carries the problem forward.

DO

Confirm the usury exemption for every loan before you fund, and again before you extend, roll over, or forbear. An extension is a new chance to get it right or wrong.

DON'T

Don't count on a general release in a forbearance agreement to cure a rate problem neither side has identified.

Exempt from usury did not mean any rate would do

Carboni v. Arrospide (1991) 2 Cal.App.4th 76 · California Court of Appeal

WHAT HAPPENED

A licensed real estate broker lent $4,000 for three months at 200 percent a year, secured by a fourth deed of trust on a house. Over the next four months he kept advancing money under the same note until the principal reached $99,346, all at 200 percent. By trial the claimed balance was nearly $390,000. The lender's own loan agreement recited that the borrower had tried and failed to get a loan anywhere else. The lender sued for judicial foreclosure.

WHAT THE COURT DECIDED

Because a licensed broker made the loan and real property secured it, the usury limits did not apply. The courts cut the rate anyway. The rate was about ten times the market rate for similar loans by the lender's own testimony, and the borrower had no real alternative. That made the interest term unconscionable. The trial court allowed interest at 24 percent instead, and the Court of Appeal affirmed.

DO

Price for risk, but be able to show how the rate compares to the market for similar loans and that the borrower had choices.

DON'T

Don't write into your own documents that the borrower was desperate and had nowhere else to go. That recital was used against the lender.

Note: the court relied in part on evidence that the money was for family medical bills. A negotiated commercial rate between business parties is a much harder target.

~~MYTH~~	REALITY
The borrower is in default, so the borrower cannot sue us.	Default does not close the courthouse. A defaulting borrower was allowed to sue over an allegedly void assignment (*Yvanova*) and to recover usurious interest (*Hardwick*).
~~MYTH~~	REALITY
The borrower signed a release in the forbearance agreement, so we're covered.	A release helps with ordinary disputes. It did not waive a usury claim that neither side knew about and that the agreement did not settle (*Hardwick*).
~~MYTH~~	REALITY
A borrower can always tie up a sale by filing suit.	To undo a voidable sale the borrower must make a real tender of the debt, backed by the ability to pay (*Karlsen*).

~~MYTH~~	REALITY
We are exempt from usury, so the rate is beyond challenge.	An exempt rate can still be attacked as unconscionable in an extreme case (*Carboni*).

FAQ Borrower lawsuits

Q Does a lender owe its borrower a duty of care?

Generally no, as long as the lender stays within its conventional role as a lender of money. A lender that actively participates in the borrower's venture beyond that role can take on a duty.

Nymark v. Heart Federal Savings & Loan Assn. (1991) 231 Cal.App.3d 1089.

Q What does a borrower have to show to set aside a trustee's sale?

More than a low price. A minor notice error that caused no harm is not enough. To cancel a voidable sale the borrower ordinarily must tender the debt and be able to pay it. But a sale held after the default was cured, or after the debt was lawfully paid, has been set aside.

Karlsen v. American Savings & Loan Assn. (1971) 15 Cal.App.3d 112; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76; *Bank of America v. La Jolla Group II* (2005) 129 Cal.App.4th 706; *Winnett v. Roberts* (1986) 179 Cal.App.3d 909.

Q What happens if a court finds our rate usurious?

The interest terms are void. You are entitled to the principal only. Interest already paid is credited against principal, and the borrower may recover interest paid within two years before suing, or seek three times the interest paid within one year before suing. If principal is still unpaid after maturity, you may recover prejudgment interest on it at the legal rate, which was 7 percent for a note secured by a deed of trust.

Hardwick v. Wilcox (2017) 11 Cal.App.5th 975; *Soleimany v. Narimanzadeh* (2022) 78 Cal.App.5th 915.

Q The borrower says our loan officer promised an extension. Is that fraud?

It can be pleaded that way. A fraud claim based on a promise requires proof that the promise was made, that the person making it did not intend to perform it at the time, and that the borrower reasonably relied on it and was harmed. Your defense is usually in the file: what was actually said, in writing, and what the signed documents provide.

CACI Nos. 1900, 1902, 1908.

Q Can a borrower use the "implied covenant of good faith" to change the loan terms?

The implied covenant protects the benefits of the contract the parties actually made. A borrower must show that the lender's conduct unfairly kept the borrower from receiving those benefits. Enforcing a default the way the documents allow is ordinarily not a breach.

CACI No. 325.

Q How long does a borrower have to sue?

It depends on the claim. Claims on a written contract: four years. Fraud: three years from discovery of the facts. Recovery of usurious interest: payments made within two years before suit, though a usury offset against principal can reach back through the whole chain of renewed loans.

Code Civ. Proc. §§ 337, subd. (a), 338, subd. (d); *Hardwick v. Wilcox* (2017) 11 Cal.App.5th 975.

TAKE-AWAY

When the borrower sues

1. **Act like a lender.** Lend, document, collect. Do not advise, vouch, or manage.
2. **Ask where the money is.** A borrower who wants a sale undone must ordinarily tender the debt. Demand proof.
3. **Take a real tender seriously.** A sale held after the debt is cured or lawfully paid can be cancelled.
4. **Check the rate every time the loan changes.** Usury follows renewals, and the remedy reaches back years.
5. **Prove your chain of title.** Before foreclosing a purchased loan, confirm every endorsement and assignment.
6. **The file is the defense.** Most borrower claims are answered by what was written down at the time.

CHECKLIST

Your first ten moves when a loan goes bad

Nearly every war story in this guide turns on one of these habits. Keep this page with the loan file.

THE TEN MOVES

Do these, in roughly this order

1. **Freeze the self-help.** No setoff, sweep, or application of the borrower's other funds to a loan secured by California real estate until a lawyer has looked at it. If one has happened, report it the same day.
2. **Pull the whole loan file.** Note, deed of trust, every guaranty, every modification and extension, the payment history, and all correspondence, including texts and emails with the borrower.
3. **Inventory every piece of collateral and every person who owes.** Then choose the remedy, and its order, on purpose. A trustee's sale and a court foreclosure lead to different places.
4. **Read every guaranty before you choose a remedy.** Check its waivers, and confirm each guarantor is truly someone other than the borrower.
5. **Re-check the interest math.** Compute the effective rate with every fee and point, confirm the usury exemption for the loan and for each extension, and look hard at how default interest and late charges are triggered.
6. **Put one person in charge of borrower contact and payments.** No payment is accepted and no promise about a sale date is made without that person.
7. **Send a written reservation of rights.** State the default, the amount, and the cure date, and say that past leniency does not change the loan.
8. **Put every workout in a signed writing.** Extensions, forbearance, and rate changes need the borrower's signature and each guarantor's consent. Nothing oral.
9. **Check title and the chain of the loan.** Confirm who holds the note and deed of trust, what is senior and junior to you, and whether taxes and senior loans are current.
10. **Calendar the deadlines and call a lawyer before you record or file.** Some lender mistakes cannot be undone after the sale or the first lawsuit.

DON'T WAIT

The deadline chart

These are common California deadlines in commercial lending disputes as of November 2026. Loan documents, bankruptcy, and the facts of a particular loan can change the answer. Treat every date as a reason to act early.

WHAT	HOW LONG YOU HAVE	LAW
Late charges, default interest, and other pre-set default charges in a business loan	Judged as of **the day the loan was made.** The borrower must show the charge was unreasonable under the circumstances then, so the lender's reasons for the number should be in the file at closing.	Civ. Code § 1671(b)
Compound interest	**Before any interest compounds:** the agreement to compound must be clearly expressed in a writing the borrower signed. Lenders exempt from the usury law are not subject to this statute, but still need a contractual or legal basis to compound.	Civ. Code § 1916-2; *Curry v. Moody* (1995) 40 Cal.App.4th 1547; *Wishnev v. Northwestern Mutual Life Ins. Co.* (2019) 8 Cal.5th 199
Suing a guarantor on a written guaranty	Generally **4 years.** The **3-month** deadline for a deficiency action after a trustee's sale applies to the secured debt, not to a guarantor's independent promise. A signed written acknowledgment of the debt by the guarantor can extend the period.	Code Civ. Proc. § 337(a); *Bank of America v. Hunter* (1937) 8 Cal.2d 592
Guarantor waivers	**At signing.** Waivers are judged by what the guaranty says. A waiver signed before **January 1, 1997** is judged under the law in effect when it was signed.	Civ. Code § 2856(f)
Reinstating a loan in nonjudicial foreclosure (borrower's right to cure the default)	From recording of the notice of default until **5 business days** before the sale date in the notice of sale; the right can revive if the sale is postponed	Civ. Code § 2924c, subd. (e)
Rescinding the notice of default after a cure	Lender delivers a notice of rescission to the trustee within **21 days** after reinstatement; trustee records it within **30 days** of receipt	Civ. Code § 2924c, subd. (a)(2)
Asking the court to fix fair value and enter a deficiency judgment after a judicial foreclosure sale	Application within **3 months** after the foreclosure sale	Code Civ. Proc. § 726, subd. (b)

WHAT	HOW LONG YOU HAVE	LAW
Suing for the balance of a debt after a trustee's sale under that deed of trust (where a deficiency is not otherwise barred)	Within **3 months** after the sale	Code Civ. Proc. §§ 580a, 337, subd. (a)
Suing the borrower on a promissory note or other written loan agreement	**4 years** from the breach	Code Civ. Proc. § 337, subd. (a)
Borrower's claim to recover usurious interest already paid	Interest paid within **2 years** before suit (older usurious payments can still be credited against principal)	*Hardwick v. Wilcox* (2017) 11 Cal.App.5th 975

REFERENCE

Plain-English glossary

Compound interest. Interest charged on unpaid interest as well as on principal.

Continuing guaranty. A guaranty that covers a course of dealing or future credit, not just one loan, usually up to a stated limit.

Default interest. A higher interest rate that applies after the borrower defaults or after the loan matures unpaid.

Deficiency. The part of the debt still unpaid after the collateral is sold. California limits or bars a judgment for it in several situations.

Dragnet clause. A clause in a deed of trust saying the property also secures other debts the borrower owes the lender, now or later.

Due-on-sale clause. A clause letting the lender demand full payment if the borrower sells or transfers the property without consent.

Exempt lender. A lender, or a type of loan, that the Constitution or a statute places outside the usury cap, such as a bank, certain licensed lenders, or a real-estate-secured loan made or arranged by a licensed real estate broker.

Forbearance. An agreement to hold off collecting a debt that is already due, usually in exchange for something from the borrower.

Full credit bid. A bid by the foreclosing lender equal to everything it is owed. It treats the debt as paid in full.

Gradsky waiver. A guarantor's agreement to stay liable even if the lender's choice of a trustee's sale destroys the guarantor's right to recover from the borrower. Named for *Union Bank v. Gradsky*.

Guaranty. A promise to answer for someone else's debt. The person who makes it is the guarantor. California law treats guarantors and sureties the same.

Integration clause. A sentence saying the written documents are the complete agreement. It keeps earlier side promises from changing the written terms, but it does not bar a fraud claim.

Judicial foreclosure. Foreclosure by lawsuit. Slower and costlier, but it can preserve the right to a deficiency judgment, subject to a fair-value limit.

Liquidated damages. An amount set in the contract in advance as the price of a breach, such as a late charge. If it is unreasonable, a court calls it a penalty and will not enforce it.

Nonrecourse loan. A loan the lender has agreed to collect only from the collateral, not from the borrower personally.

Novation. Replacing an existing obligation with a new one, with the intent to extinguish the old one. The party claiming it must prove it.

One-action rule. California's rule that a lender secured by real property has one form of action to collect the debt, a foreclosure that includes all of the real property security (Code Civ. Proc. § 726).

Prepayment charge. A fee for paying a loan off early, meant to make up for the interest the lender will not earn.

Promissory estoppel. A rule that can make a promise binding without a formal exchange, when the other side reasonably relied on it to their harm.

Purchase-money loan. A seller carry-back note, or a lender's loan used to buy a one-to-four unit dwelling the buyer occupies. No deficiency is allowed on it (Code Civ. Proc. § 580b).

Reinstatement. Curing a default by paying the amounts in arrears plus allowed costs, which stops the foreclosure and puts the loan back in good standing.

Security-first rule. The part of the one-action rule that requires the lender to exhaust its real property security before reaching the debtor's other assets.

Setoff. A bank's applying money in a customer's deposit account to a debt the customer owes the bank.

Sham guaranty. A guaranty signed by someone who is in substance the borrower. Courts treat that person as the borrower, with the borrower's protections against deficiency judgments.

Sold-out junior. A junior lienholder whose deed of trust is wiped out by a senior lender's foreclosure sale.

Statute of frauds. The rule that certain agreements, including those affecting interests in real property, must be in a writing signed by the party to be held to them.

Subrogation. A guarantor's right, after paying the debt, to step into the lender's shoes and pursue the borrower and the collateral.

Tender. An unconditional offer to pay what is owed, made by someone actually able to pay it.

True guarantor. A guarantor who is genuinely a different person or entity from the borrower and is not already liable for the debt.

Trustee's sale. A nonjudicial foreclosure: the trustee named in the deed of trust sells the property at public auction after the required notices, without a lawsuit.

Unconscionable. So one-sided, and reached with so little real choice for the weaker party, that a court will refuse to enforce the term as written.

Usury. Charging more interest on a loan or forbearance than California's Constitution allows, when no exemption applies.

Waiver. Giving up a known right, expressly or by conduct, such as accepting payments at a lower rate without objection.

Wrongful foreclosure. A borrower's claim that a foreclosure sale was unlawful, for example because the foreclosing party had no right to sell or the default had been cured.

REFERENCE

Index of war stories

Each case below is a published court decision summarized in this guide. Citations are provided so the decisions can be found and read in full. A later court or a new statute can change a decision's force; check before relying on any case.

01 *Gibbo v. Berger* (2004) 123 Cal.App.4th 396

02 *Bock v. California Capital Loans, Inc.* (2013) 216 Cal.App.4th 264

03 *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791

04 *Honchariw v. FJM Private Mortgage Fund, LLC* (2022) 83 Cal.App.5th 893

05 *Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970

06 *Curry v. Moody* (1995) 40 Cal.App.4th 1547

07 *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169

08 *Bank of America v. Hunter* (1937) 8 Cal.2d 592

09 *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40

10 *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400

11 *CADC/RADC Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775

12 *California Bank & Trust v. DelPonti* (2014) 232 Cal.App.4th 162

13 *WRI Opportunity Loans II LLC v. Cooper* (2007) 154 Cal.App.4th 525

14 *Hunt v. Smyth* (1972) 25 Cal.App.3d 807

15 *Thompson v. Gorner* (1894) 104 Cal. 168

16 *Bank of America v. La Jolla Group II* (2005) 129 Cal.App.4th 706

17 *Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665

18 *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544

19 *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659

20 *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991

21 *Walker v. Community Bank* (1974) 10 Cal.3d 729

22 *Bank of California v. Leone* (1974) 37 Cal.App.3d 444

23 *Knapp v. Doherty* (2004) 123 Cal.App.4th 76

24 *Caruso v. Great Western Savings* (1991) 229 Cal.App.3d 667

25 *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35

26 *Black Sky Capital, LLC v. Cobb* (2019) 7 Cal.5th 156

27 *Karlsen v. American Savings & Loan Assn.* (1971) 15 Cal.App.3d 112

28 *Winnett v. Roberts* (1986) 179 Cal.App.3d 909

29 *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919

30 *Nymark v. Heart Federal Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089

31 *Hardwick v. Wilcox* (2017) 11 Cal.App.5th 975

32 *Carboni v. Arrospide* (1991) 2 Cal.App.4th 76

TALK TO A LAWYER

If one of these stories sounds like your loan

Benjy Law Corporation represents private, hard-money, and institutional lenders in California: documenting commercial loans, modifications and forbearance agreements, and enforcing them through foreclosure, guaranty actions, receiverships, and lender-liability defense. The best time to call is before you sign the workout, before you choose a remedy, and before a deadline passes.

(310) 203-2650

Statewide California.
benjylaw.com/lender-resources/ · info@benjylaw.com
8889 W. Olympic Blvd., Penthouse, Beverly Hills, CA 90211

More guides for lenders: **benjylaw.com/lender-resources**

© 2026 Benjy Law Corporation. All rights reserved. This guide is for general informational purposes only and does not constitute legal advice or create an attorney-client relationship. The court decisions summarized here involved other parties and are described for educational purposes. Prior results do not guarantee a similar outcome.