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Foreclosure of California Commercial & Investment Properties- Five Steps To Determine if Your Loan is Non-Recourse

California anti-deficiency laws provide in some cases that on foreclosure the buyer/borrower has no personal liability; only the property is at risk. The law primarily protects residential properties; but in some cases buyers of **commercial** property can be protected. What follows are five steps to determine how the anti-deficiency laws apply to your commercial or investment property. These are the most common issues that arise. For our purposes, reference to “foreclosure” includes exercise of the power of sale in the deed of trust.

Disclaimer: The content of this comment contains general information based on California law and is provided for informational purposes only, and should not be construed as legal advice on any subject matter. You will require specific legal advice and should not rely on general information provided here. You should consult with an attorney to discuss the matter and for any specific legal advice.

1. Determine if the anti-deficiency laws apply in your case.

To qualify, you must have a “purchase money” loan, meaning the money was used for the initial purchase of the property. This can include both a first and second loan obtained at the same time. Standard purchase money transactions are of two types:

First, the most common for real estate sales, involves a note and deed of trust

given by a buyer to a third-party lender (not the seller of the property) for all or part of the purchase price.

If it a residential property containing four or fewer units that is secured by the debt, and the buyer occupies it, there can be protection. If the buyer does not occupy it, or if it is five or more units, or it is NOT residential property, the buyer risks personal liability.

Best in the commercial context, but less common, involves a note and deed of trust that is executed by the buyer and payable directly to the seller (also called the vendor) for part of the purchase price and secured by the real property. If it is payable to the seller, it is non-recourse and you do not risk personal liability -it does not need to be residential or owner-occupied residential property; it can be any kind of real property.

Your situation must *exactly* fit either of the two standard transactions above; otherwise, you should see a real estate attorney to determine whether yours is a purchase money loan.

2. If you have refinanced, determine if the anti-deficiency laws still apply.

If you refinanced with the seller (or in the case of a third party loan, with the same lender), and did not take out any additional cash, and secured the refinance loan with the same property, the debt is still purchase money and the protection is in effect. You may have a problem if, in addition to paying off the original loan, you used out some cash for some other purpose.

If you refinance with a different lender, OR secure the new loan with different property, you lose the anti-deficiency protection.

3. Determine the effect of modification of the loan or waiver of the

anti-deficiency protection.

Generally, modification of the terms of the loan, such as term, interest rate, or extension, does not automatically impact the anti-deficiency protection.

You cannot waive the anti-deficiency protection at the time you buy the property. When there are substantial changes in the terms of the note with material differences in the amount of payments, and/or interest rates, and/or due dates, in effect, the new note becomes a new obligation. However, California courts have held that permitting a waiver of the protection in consideration for favorable concessions in the terms of the purchase-money note would defeat the public policy objectives of the statute.

You can, however, waive the protection by your conduct, such as subordinating the note to a construction loan.

4. Determine the effect of transfer of the property.

You may have protection if you bought the property from the seller subject to an existing loan.

If the loan was originally a purchase-money loan (prior to your buying the property), it remains a purchase-money loan after the property is conveyed when the grantee either assumes the obligation or merely takes subject to it.

5. Determine the effect of federal funding or insurance.

Anti-deficiency laws are state laws, and do not automatically bind the federal government. If the property is being foreclosed by the federal agency itself, (for example the V.A. or Fannie Mae), federal courts have found that the applicability of anti-deficiency law varies by which agency is involved. You cannot assume that you are protected.