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Here We Go Again: The Vicissitudes of Public Policy and Guarantor Liability for California Real Estate Loans

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Many real estate practitioners in California remember a time when a personal guaranty of a real estate secured loan was of dubious value to the lender. The famous case of *Union Bank v. Gradsky* and a number of other decisions suggested that enforcing a guaranty, particularly after a nonjudicial sale of the real property securing the principal debt, could be extraordinarily difficult because of the need for explicit, specific waivers of defenses raised by impairment of subrogation and reimbursement rights of the grantor due to the operation of the antideficiency laws.

The potential for successful defenses to liability often caused lenders to forego enforcement actions against guarantors. It also had the effect of causing the principals of real estate borrowers to underestimate the risks of executing such a guaranty. The most egregious example of the apparent antipathy of California courts towards enforcement of guaranties was *Cathay Bank v. Lee,* where the court found insufficiently clear some standard provisions in guaranties that purported to waive defenses based on guarantor rights of subrogation and reimbursement. *Cathay Bank* applied an exceedingly narrow—some would say artificial and strained—reading of the waiver language, suggesting a judicial attitude opposed to any enforcement of surety waivers against guarantors of real property secured debt.

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