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The "Mixed Collateral" Amendments to California's Commercial Code—Covert Repeal of California's Real Property Foreclosure and Antideficiency Provisions or Exercise in Futility?

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Since California's adoption of the Uniform Commercial Code (U.C.C.) in 1965, California law has embodied two very different schemes for enforcing secured obligations. The older body of law, which arose largely in the context of real property secured transactions, is the evolving product of California's elaborate and interrelated set of antideficiency and foreclosure statutes and the more than half-century of case law interpreting these provisions—often going well beyond the literal terms of the statutes. The newer body of law set forth in the California Commercial Code is California's version of Article 9 of the U.C.C. The Commercial Code's security enforcement scheme is a more

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1. See, e.g., CAL. CIV. PROC. CODE § 726(a) (West Supp. 1987) (allowing only one action, and one form of action, for recovery of a debt or enforcement of a right secured by mortgage or deed of trust); id. §§ 726(b) and 580(a) (requiring that deficiency judgments be computed on the basis of fair market value at the time of sale); id. § 580(b) (precluding deficiency judgments under certain circumstances where mortgage or deed of trust is given to secure purchase price); id. § 580(d) (precluding deficiency judgments following nonjudicial—i.e., trustee's—sale).


systematically codified body of law which focuses primarily on commercial transactions when the security consists of liens on tangible or intangible personal property.  

4. The aims and effects of the two security enforcement schemes are very different. Conflict between the two systems arises when a single obligation is secured by consensual liens on both real and personal property. This is the so-called “mixed collateral problem.”

Until 1986, California resolved the conflict by applying the real property enforcement scheme exclusively whenever a single obligation was secured by real property, whether or not also collateralized by personal property.  

This approach, embodied in California Commercial Code section 9501(4), tracked the provisions of the U.C.C. generally. However, California’s recent “mixed collateral amendments” appear to change dramatically the traditional method of solving the mixed collateral problem. Those amendments reject the hegemony of the real property enforcement scheme where both real and personal property secure a single obligation. Yet the amendments do not explicitly reverse the prior situation by supplanting the real property system with a predominant personal property enforcement scheme. Instead, the amendments purport to strike a compromise by providing for the simultaneous application of the two security enforcement schemes to the respective real and personal property interests securing the single obligation.

This novel attempt to apply concurrently the two security enforcement systems to a single obligation secured by mixed collateral raises serious conceptual and practical problems because of the crucial interplay between the secured obligation and the means by which it is enforced. Enforcement practices that would be perfectly legitimate and safe for a secured creditor under the Commercial Code are fraught with hazards under the real property security enforcement provisions of the Civil Code and the Code of Civil Procedure. These hazards can result in limitation or destruction of the secured debt itself. Yet the mixed collateral amendments almost completely ignore this problem and make no

4. Id. The statutorily prescribed name for California's version of the U.C.C. is the "Uniform Commercial Code." Id. § 1101. However, this is something of a misnomer since California's version of the law is not entirely uniform with that of other states which have adopted it or with the model law itself. This Article will adopt the terminology “California Commercial Code” to distinguish California's version from the model U.C.C.

5. See infra text accompanying notes 11-17.


express provision for resolving the inevitable conflicts between the two concurrently applicable bodies of law.

Early commentary on the mixed collateral amendments—while providing a useful summary and internal analysis of the new law—has tended to avoid the fundamental questions of whether and how the very different real and personal property systems can be applied concurrently to the enforcement of a single obligation.\(^\text{10}\)

I

THE MIXED COLLATERAL PROBLEM AND THE NEW AMENDMENTS

A. Origin of the Problem

At the root of the mixed collateral problem are the different orientations of the two separate systems which have developed to enforce obligations secured by personal property and by real property.

The California Commercial Code is, of course, the scion of the Uniform Commercial Code, an extraordinary intellectual achievement developed and widely adopted during a period of relative prosperity, growth, and robust commercial activity.\(^\text{11}\) Article 9 was drafted with a focus on arm's-length commercial transactions between parties of relatively equal bargaining power motivated by commercial considerations.\(^\text{12}\) The Commercial Code focuses on—and does an outstanding job of advancing—predictability and certainty in commercial security transactions and the vigorous enforcement of obligations undertaken in the course of commercial activity.\(^\text{13}\)

The evolution of the real property foreclosure system has been dramatically different. Many, but by no means all, of the controlling statutory provisions are products of the Great Depression and the


\(^{11}\) The U.C.C. was developed by a Permanent Editorial Board created under the aegis of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. An original draft, approved in 1952, was enacted in Pennsylvania in 1953 but was rejected and criticized by other commercial states. As a result, the Code was substantially revised. As revised, it was enacted by all states except Louisiana, often after further state-by-state modification, between 1957 and 1967. This period of 1952 through 1967 was, in most respects, a period of notable commercial vigor in the United States. See generally, Schnader, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 U. Miami L. Rev. 1 (1967).

\(^{12}\) In this connection, it is significant that California Division 9 explicitly leaves intact state consumer protection statutes and regulations, including those pertaining to retail installment sales, small loans, etc. Cal. Com. Code §§ 9201, 9203(4) (West 1964 & Supp. 1987); cf. id. § 9501(4)(c)(v) (West Supp. 1987) (providing an exception for "personal, family, or household purposes").

\(^{13}\) See, e.g., U.C.C. § 9-501 Official Comment (1977) (emphasizing importance of certainty in commercial security transactions).
corresponding legislative abhorrence of the all too common foreclosures and forfeitures occurring during that era for reasons beyond the control of the debtors.\(^{14}\) The real property system bears the indelible stamp of cases involving security interests in both residential and business property\(^{15}\) where foreclosure can result not only in a dramatic forfeiture of most or all of the mortgagor's personal worth but also may result in a deprivation of such basic necessities as shelter and the means of earning a livelihood. Even in the context of mortgages on commercial and agricultural real property, the motivation of the parties to a real estate secured transaction is frequently other than purely commercial, and their relative bargaining power is often grossly disproportionate.\(^{16}\)

In contrast to the scholarly deliberations resulting in the U.C.C., law in the real property area has typically developed reactively as an ad hoc legislative or judicial response to real or perceived abuses by secured creditors and to threatened forfeitures often grossly disproportionate to the amount of the secured debt. The unsavory visage of the mustached mortgagee in a top hat, ready to foreclose the family homestead, has brooded over the development of the real property law,\(^{17}\) resulting in a

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\(^{15}\) What constitutes "residential"—as opposed to commercial—real property is often not easy to determine. For example, the newly enacted rent skimming statutes create civil and criminal penalties for incorrectly using "revenue received from the rental of a parcel of residential real property." Cal. Civ. Code §§ 890-895, 890(a) (West Supp. 1987) (effective from January 1, 1987 to January 1, 1992). In contrast to most uses of the term "residential" in California law, the rent skimming statutes appear to be using the term to describe the function of the property as opposed to whether it is owner occupied. Compare the provisions of the new mixed collateral amendment creating an exemption for consumer interests arising out of "a loan or credit sale made to any individual primarily for personal, family, or household purposes." Cal. Com. Code § 9501(4)(c)(v).

\(^{16}\) Many real estate secured transactions involve adhesive or near-adhesive contracts and instruments which are not in any sense the product of bargaining or commercial give and take. Adhesion contract analysis based on the disparate bargaining power of the parties is often a major factor in California decisions pertaining to the enforcement of security interests in the commercial as well as residential setting. See, e.g., Tahoe Nat'l Bank v. Phillips, 4 Cal. 3d 11, 20, 480 P.2d 320, 327, 92 Cal. Rptr. 704, 711-12 (1971); Wilson v. San Francisco Fed. Sav. & Loan Ass'n, 62 Cal. App. 3d 1, 6-8, 132 Cal. Rptr. 903, 905-06 (1976). Unfairness in the application and enforcement of adhesive provisions in security instruments—which could be enforced to further a legitimate interest of the creditor but are instead used to gain an improper advantage—also may form the basis for potential creditor liability or loss. La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 882, 489 P.2d 1113, 1124, 97 Cal. Rptr. 849, 861 (1971).

Occasionally it is the debtor who possesses the superior bargaining power and sophistication, resulting in the loss of debtor protections intended to protect the more vulnerable. See, e.g., Spangler v. Memel, 7 Cal. 3d 603, 611-612, 498 P.2d 1055, 1060, 102 Cal. Rptr. 807, 811-812 (1972).

\(^{17}\) One California work on mortgages and trust deeds is notable for its delightful sketches of the "dastardly" mortgagee in assorted avaricious poses. R. Bernhardt, California Mortgage and Deed of Trust Practice (1979). At the risk of mixing literary metaphors, another illustration of this subtle but seemingly pervasive aversion to the "foreclosing" real estate secured creditor can be found in Freedman v. The Rector, 37 Cal. 2d 16, 230 P.2d 629 (1951), arguably
system that is generously hedged about with debtor protections and potential pitfalls for the unwary secured creditor.

**B. The Mixed Collateral Problem**

Despite the radically different policy orientations of the two systems of secured transactions, few problems have been created merely by their coexistence in California law. The controlling statutes were and are found in wholly different codes; the Code of Civil Procedure and the Civil Code for the real property system, and the Commercial Code for personal property and (since 1980 ostensibly, albeit ambiguously) for fixtures.\(^{18}\) Moreover, the pertinent case law and legislative histories were—until the recent amendments—so clearly distinct as to virtually eliminate the possibility of confusion or significant overlap between the two systems.\(^{19}\)

The salutary isolation of the two systems of secured transactions breaks down, and the mixed collateral problem arises, however, when a *single* obligation is secured by consensual liens on both real and personal property. This true "mixed collateral" situation is to be distinguished from the circumstance in which *separate* debts between the same parties are separately secured by real property for one of the debts and personal property for the other. Since the true mixed collateral security transaction involves both real and personal property securing a *single debt or right*, it becomes impossible to ignore the fundamental inconsistencies between the real property and personal property systems and their respective methods of enforcement. In such cases, a means of reconciling the two bodies of law is essential.

Reconciliation can be accomplished by completely subordinating California's most influential antiforfeiture decision. The court in *Freedman* referred to the creditor (a land contract vendor) as a "vivisectionist" whom the law (characterized as a disinterested "Pontius Pilate") would allow to keep his "pound of flesh if he can carve it for himself." \(^{12}\) Id., at 21, 230 P. 2d at 632 (quoting from Ballantine, *Forfeiture for Breach of Contract*, 5 MINN. L. REV. 329, 341 (1921)). Although the *Freedman* court does not use the name, the Ballantine article calls the creditor "Shylock," \(^{13}\) id. at 347, and the *Freedman* court's reference to a "pound of flesh" echoes this allusion. For a detailed analysis of *Freedman* and of Shylock's predicament, see Hetland, *The California Land Contract*, 48 CALIF. L. REV. 729, 738-41 (1960).


\(^{19}\) California courts have, however, sometimes found it useful to apply case law and analysis developed in the real property area to disputes involving security interests in collateral other than that within the real property, one-action, and antideficiency provisions. In Bank of Sonoma County v. Dorries, 185 Cal. App. 3d 1291, 230 Cal. Rptr. 459 (1986), for example, the court applied the sold-out junior and land contract vendor cases (Brown v. Jensen, 41 Cal. 2d 193, 259 P.2d 425 (1953); Venable v. Harmon, 233 Cal. App. 2d 297, 43 Cal. Rptr. 490 (1965)) to protect a debtor from a personal judgment on an obligation for the purchase price of a mobile home under CAL. CIV. CODE § 2983.8 (West 1974). The court found the language and purpose of this section to be analogous to that of CAL. CIV. CODE § 580(b). *Dorries*, 185 Cal App. 3d at 1293-94, 230 Cal. Rptr. at 461.
one system to the other in the enforcement of mixed collateral obligations. This was the expedient chosen in the model U.C.C. and upon California's adoption of the Commercial Code in 1965.\textsuperscript{20} This effectively meant that a creditor who took an interest in even a small quantity of the debtor's real property subjected the \textit{entire debt} to the protections of the real property system.

Reconciliation also could be accomplished through a painstaking process of creating a truly integrated system. Such a system would incorporate features of both the personal and real property remedial provisions and pay close attention to the impact of those provisions both on the security and on the obligation secured. This process cannot be accomplished merely by amendment of the Commercial Code but would require instead far-reaching amendment to, or repeal of, the one-action, antideficiency, antiacceleration, and other debtor protection provisions of the Code of Civil Procedure and Civil Code as well. The recent mixed collateral amendments do not purport to do this.

The amendments attempt, instead, to implement a third "alternative"—one rejected in the U.C.C. and in California's original Commercial Code—that imposes real and personal property security remedies and protections simultaneously as the enforcement mechanisms available on default of a single secured debt. Under this new regime, separate debts apparently would be created after default according to the creditor's view of what part of a \textit{single} debt might be attributable to his real property security and what part to his personal property security. While perfectly consistent with the Commercial Code in the context of purely personal property, the whole idea of converting a single secured obligation into separate obligations at the time of the default and at the creditor's election is flatly at odds with the core of the entire real property debtor protection scheme.

\textbf{C. Genesis of the Mixed Collateral Amendments}

Commercial Code section 9501(4) was revised as the result of two

\textsuperscript{20} \textit{CAL. COM. CODE} § 9501(4), prior to the 1985 amendments, provided:

If the security agreement covers both real and personal property or fixtures . . . , the secured party may proceed under this chapter [i.e., Chapter 5 of Division 9, §§ 9501-9508] as to the personal property or he may proceed as to both the real property and the personal property or fixtures in accordance with his rights and remedies in respect of the real property in which case the provisions of this chapter do not apply. \textit{CAL. COM. CODE} § 9501(4) (West 1964).

Despite some debate, it was fairly clear from the legislative history of § 9501(4) that "proceed[ing] as to both" included separate or sequential actions against the two types of security. Less clear, however, was when the creditor could free himself of the strictures of the real property scheme by some means other than satisfying the entire debt by selling or disposing of his personal property security out of court under the U.C.C. For a review of the uncertainties under the old § 9501(4), see Andrew, \textit{supra} note 10, at 8.
separate legislative enactments which have a common origin and can validly be treated as a single legislative action. The amendments are elaborate, complex, and, by their very prolixity, have the misleading appearance of being the kind of integrated mixed collateral provisions that are theoretically achievable.

The amendments are the result of the California Legislature’s adoption of the work product of a committee of the State Bar, the Uniform Commercial Code Committee, working under the auspices of the California State Bar Business Law Section. The Committee was largely composed of and dominated by attorneys whose practices revolve around U.C.C. issues, emphasizing creditor representation and a concern “to minimize . . . interference with the rights and remedies of . . . secured part[ies].” In particular, the Committee expressed concern about real and perceived interference with the rights of mixed collateral secured creditors by the substantive and procedural debtor protection provisions of the Civil Code and the Code of Civil Procedure.

The Committee’s concerns were not baseless. The imposition of the real property system on mixed collateral security transactions had the advantage of providing certainty about the controlling law and of avoiding conflicts between the two security systems. But categorical control by the real property statutes of the rights and remedies of a creditor holding both real and personal property security did not advance the policies favored by the Commercial Code. Instead, it created a potential for significant losses by poorly informed or overly aggressive creditors secured by mixed collateral.

To illustrate, posit a creditor unfamiliar with California’s real property system and holding an obligation secured primarily (at least in the creditor’s mind) by personal property. Suppose the creditor, perhaps in what he believes to be an excess of “caution,” takes an additional security interest in California land. Whatever importance the hypothetical creditor may attach to his real property security, the fact is, he secured the

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22. U.C.C. COMMITTEE REPORT ON PROPOSED AMENDMENT TO CALIFORNIA UNIFORM COMMERCIAL CODE SECTION 9501(4) [hereinafter U.C.C. COMMITTEE REPORT]. The Committee Report is apparently the only legislative history for the mixed collateral amendments and the Report appears to have been promulgated to serve as such. See Andrew, supra note 10, at 8.


24. Id.


entire obligation by a security interest in California real property; and
whatever he may believe, he did not create a separate obligation sepa-
rately secured by what he may see as an incidental real property security
interest. 27 Merely by acquiring the real property security interest, the
creditor subjects himself and the single obligation secured by both real
and personal property to the full panoply of one-action, antideficiency,
fair value, and reinstatement provisions of the California Code of Civil
Procedure and Civil Code. 28 If, for example, the creditor exercises a
banker's offset to collect even a small fraction of the secured debt—a
lawful action with no adverse consequences where there is no real prop-
erty security—he destroys any unsatisfied portion of the obligation and
necessarily destroys his lien on any property that might have secured the
now extinct obligation. 29

The amendments to section 9501(4) developed by the Uniform
Commercial Code Committee do not, as orderly law reform seems to
require, seek to reverse the polarity of section 9501(4) by providing that
the Commercial Code system, rather than the real property security
scheme, will control all rights of parties in a mixed real and personal
property security situation. To have done so would have required exten-
sive and radical changes in the real property debtor protection statutes of
the Code of Civil Procedure and of the Civil Code. Doubtless the propo-
nents of the "mixed collateral" amendments were dissuaded from pursu-
ing this more ambitious revision by the political realities—doing it right
may have meant that the necessary amendments could not have been
enacted without serious debate, possibly extending over more than one
legislative session.

Whatever its reasons, the U.C.C. Committee went only halfway, at
least overtly. It purported to eliminate the subordination of the personal
property system of remedies in the case of mixed collateral and provided
instead that the Commercial Code system will apply to the personal
property security interests created in mixed security transactions. An
ostensibly unchanged real property scheme, however, will still control
enforcement of the security interest in real property; the U.C.C. Commit-
tee disclaimed any intention to expand the "rights and remedies of the

29. Under California law, the creditor's exercise of the offset would be treated as an "action"
for purposes of CAL. CIV. PROC. CODE § 726. Bank of America v. Daily, 152 Cal. App. 3d 767, 773,
199 Cal. Rptr. 557, 560 (1984); accord Gnarini v. Swiss American Bank, 162 Cal. 181, 184, 121 P.
726, 727-28 (1912); McKean v. German-American Sav. Bank, 118 Cal. 334, 357, 50 P. 656, 658
(1897); Woodruff v. California Republic Bank, 75 Cal. App. 3d 108, 110, 141 Cal. Rptr. 915, 916
(1977). For a more complete list of the potential disadvantages of holding real estate, see infra text
accompanying notes 34-39.
secured party vis-a-vis the real property collateral simply because he holds personal property collateral."^30

In enacting such legislation, the California legislature appears to have been persuaded that a Solomonic solution to the mixed collateral "problem" is feasible and that the real and personal property systems can be applied by half measures to the enforcement of a single obligation. But such a solution does not work; the real and personal property enforcement schemes cannot viably be invoked concurrently to enforce a single obligation. The personal property system allows, and the mixed collateral amendments would appear to require, a division of the secured obligation at the time of default. The real property provisions, on the other hand, flatly prohibit post-origination recasting of a single obligation into several separate debts.^31 The recent mixed collateral amendments ignore this and reject the wisdom of those who, in devising and enacting the Uniform Commercial Code and the California Commercial Code, recognized that one enforcement scheme or the other had to control.^32

II

A PRACTICAL HISTORY OF THE MIXED COLLATERAL PROBLEM

A. An Integrated Real Property Scheme

Over the past half century, the courts, the bar, and the financial community have developed considerable experience with California's real and personal property security schemes as they apply to mixed collateral security transactions. California appellate opinions spanning several decades^33 have so fully explained the interrelated law in this area that the

^30. U.C.C. COMMITTEE REPORT, supra note 22, at 6 and 7.


^32. The Official Comment to the U.C.C., annexed to the California Commercial Code, provides:

'This Act does not determine whether the secured party can proceed against the real estate alone and later proceed in a separate action against the personal property in accordance with his right and remedies against the real estate. By such separate actions the secured party "proceeds as to both," and this Part does not apply in either action.

CAL. COM. CODE § 9501, U.C.C. Comment 5 (West 1964) (emphasis added).

The U.C.C. Reporter-Digest for the 1958 revision of § 9501(4) states: "The change in subsection (4) makes it clear that all rights and remedies provided by the law of real property are made applicable to personal property by this Act if the security agreement covers both real and personal property." 6A W. WILLER & F. HART, U.C.C. Rep. Dig. § 9-501, at 1-974.437 (1987) (emphasis added).

legal and financial communities generally understand that if a creditor chooses to secure an obligation with an interest in real property, he does so at a significant price. That price includes the following limitations on the creditor's rights and remedies:

1. No personal (deficiency) judgment against the debtor is allowed without first exhausting the security;\(^{34}\)

2. Any deficiency judgment is limited to the difference between the amount of the foreclosure judgment and the fair value of all of the security;\(^{35}\)

3. If the secured debt is a purchase money obligation, as defined by statute, no deficiency judgment is permitted at all;\(^{36}\)

4. No irreversible acceleration of an installment obligation is permitted pending a judicial or nonjudicial foreclosure—the debtor having the right to reinstate the obligation by paying the part of the debt past due any time prior to final judgment in a foreclosure action or until five days before sale by nonjudicial foreclosure;\(^{37}\) and

5. If nonjudicial foreclosure is elected, no deficiency judgment is allowed whether or not the debt was purchase money and regardless of the fair value of the security sold.\(^{38}\)

The key to the workability of the system of remedies for the real property secured creditor is that, despite its piecemeal enactment and accretive development, it is now unified and integrated as a workable, internally consistent system. All components of the real property system—including the deficiency prohibitions and limitations, the acceleration limitations, and the procedural alternatives available for

\(^{38}\text{CAL. CIV. CODE § 2924c(a)(1) (West Supp. 1987); see also Lupertino v. Carbahal, 35 Cal. App. 3d 742, 111 Cal. Rptr. 112 (1973).}\n
foreclosure—are identical in scope, and focus on the debt or obligation rather than upon the security. Varying terminology in different parts of the statutory patchwork—such as "purchase price,"39 "obligation,"40 and "note"41—have been construed as identical to the terms "debt" and "right" used in the one-action provision, Code of Civil Procedure section 726.42

Section 726 is the linchpin of the entire system; it is the statute which, both in its text and its decisional exegesis, most fully and vividly reflects the fundamental policy concerns and choices of the real property system. Section 726 has applied to real property and mixed collateral secured obligations for well over 100 years.43 Thus, more than a century of precedent is available to answer questions that may arise concerning its scope and impact. Since the one-action statute, section 726, delineates the policy underpinnings of California's entire system of foreclosure limitations and mortgage debtor protections, the effect of virtually any of those provisions can be discerned by reference to decisions relating to section 726.

Whether or not the limitations or prohibitions of Code of Civil Procedure sections 726, 580a, 580b, and 580d apply to a given loan has depended in large part upon whether that particular loan—as one individual debt—is secured in whole or in part by real property. If there is but a single debt secured, inter alia, by real property, all of the consequences of a creditor electing to secure a single debt by real property have followed, at least under the system existing before the recent amendments. It made no difference how many items of security there were, or that the debt was also secured by interests in personal property, or what kind of economic ratio existed between items of real and personal property security.44 Thus, at least until January 1, 1986,45 the

40. Id. § 580a (West Supp. 1987).
41. Id. § 580d (West 1976).
43. Obligations secured solely by personal property were removed from § 726 in 1965 so that the enforcement scheme of the California Commercial Code would apply without conflict with the irreconcilable one-action provision. See Walker v. Community Bank, 10 Cal. 3d 729, 518 P.2d 329, 111 Cal. Rptr. 897 (1974).
number of items of security and the classification of any of them as personal property or fixtures was irrelevant as long as there was a single debt and at least one of the items of security for that one debt was California real estate.

B. Traditional Methods of Avoiding the Mixed Collateral Problem

Because real property consequences followed only if a single debt was secured by at least some real property, the parties have always been free to choose, at the commencement of a security transaction, to structure it in such a way as to allow the creditor to obtain a personal judgment for some of the obligations created; to be solely under the Commercial Code for other obligations; and to have real property security, with all of the attendant limitations, for still other obligations. Any combination of these alternatives was possible; the freedom to select these consequences was—and still can be—achieved by breaking the single transaction into separate obligations at the outset.

A lender, for example, could finance the purchase of a hotel by breaking a single purchase price into separate debts, typically evidenced by separate notes, each a part of the total price, securing one note by the hotel, another by personal property and fixtures, and leaving still another unsecured. The result was that the real property foreclosure and deficiency limitations would apply only to the note secured by the real property, namely, the hotel. This would leave the separate note secured by the personal property and fixtures subject only to the Commercial Code, and the unsecured note fully collectible with no security-related procedural or substantive limitations on the creditor’s judicial or self-help enforcement of the debt.

Parties have also been free to secure particular obligations with selected items of security, negotiating over which of their obligations will be secured by any particular item of security. Thus, the foreclosure and

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45. The effective date of the amendments to the multiple security or mixed collateral section of the Commercial Code, § 9501(4).

46. See, e.g., Kistler v. Vasi, 71 Cal. 2d 261, 263, 455 P.2d 106, 107-08, 78 Cal. Rptr. 170, 171-172 (1969) (parties “may freely elect to arrange for the financing of the purchase price in ways that wholly or in part limit the vendee’s protection from deficiency judgments”); Roseleaf Corp. v. Chierighino, 59 Cal. 2d 35, 41-43, 378 P.2d 97, 100-01, 27 Cal. Rptr. 873, 876-77 (1963) (purchase price of hotel secured by four deeds of trust, one on the hotel and three on separate pieces of property; only the deed of trust on the hotel was a “purchase money” trust deed within the meaning of CAL. CIV. PROC. CODE § 580b); Christopherson v. Allen, 190 Cal. App. 2d 848, 851-52, 12 Cal. Rptr. 658, 660 (1961) (CAL. CIV. PROC. CODE § 580b applies only to secured debts and does not bar recovery on a separate, unsecured note).

47. See 1 H. MILLER & M. STARR, supra note 2, § 3:94; and cases cited supra note 46.

48. Under the right circumstances, the creditor could even enjoy the benefits of the statutorily implied vendor’s lien as a junior, nonpurchase-money, and purely elective remedial lien for enforcing all or part of the unsecured note against the equity in the hotel. CAL. CIV. CODE § 3046 (West 1974).
deficiency limitations and prohibitions—along with the advantages of real property security—could apply or not apply as the parties choose at the contract formation stage. This flexibility comes not by virtue of any waiver of protections by the debtor, 49 but instead, by creating separate debts at the time the loan was made or the credit extended. In this way, each of the separate debts, and the security for that debt, would have the attributes the parties agreed upon. Through this method, parties to security transactions are, and always have been, able to structure the transaction as they choose and can, therefore, avoid any mutually unintended consequences of real property secured status.

If, on the other hand, the loan created a single debt secured even in small part by real property, then the real property consequences would follow and the creditor thereafter would have no ability to avoid them. 50 This was true even if the creditor had attributed separate values to the different items of security or otherwise broke up the debt in his own accounting or contemplation. 51 Real property treatment also resulted if the debt was structured as an obligation that was not validly broken up into truly separate debts—if, for example, the nominally separate notes either duplicated each other and represented the same consideration, 52 or if one separate note was cross-collateralized or additionally secured by the real property. In the latter case the creditor would have access to the real property security for enforcement of the ostensibly separate debt secured by the personal property. 53

The technique of resolving multiple security, including mixed collateral, problems by reference to the number of separate debts carries out exactly what both debtor and creditor agreed upon at the outset. Where truly distinct debts are created and separately secured, or left unsecured, neither creditor nor debtor is allowed to accept the advantages without also being subject to the disadvantages of a particular security arrangement.

Because of the parties' well-recognized ability to create distinct, separately secured debts, the mixed collateral "problem" was not nearly as

49. The debtor protections for the most part are nonwaivable at the time of the loan. See Cornelison v. Kornbluth, 15 Cal. 3d 590, 125 Cal. Rptr. 557 (1975); Freedland v. Greco, 45 Cal. 2d 462, 289 P.2d 463 (1955); Salter v. Ulrich, 22 Cal. 2d 263, 138 P.2d 7 (1943); Russell v. Roberts, 39 Cal. App. 3d 390, 114 Cal. Rptr. 305 (1974); Cal. Civ. Code §§ 2953, 2889 (West 1974). The only permissible election belongs to the debtor, who may choose to waive his protections by agreement made after the loan or by failure to assert his protection as an affirmative defense. Id.; Walker v. Community Bank, 10 Cal. 3d 729, 518 P.2d 329, 111 Cal. Rptr. 897 (1974).

50. See supra note 33 and authorities cited therein; see also J. Hetland, Secured Transactions (1974), supra note 2, at 202-03; and 1 H. Miller & M. Starr, supra note 2, § 3:126.

51. See cases cited supra note 44.


troublesome as believed in some quarters. Undoubtedly, some poorly informed creditors took additional real estate security for a single debt already secured by personal property without fully appreciating the potentially adverse consequences of being a real property secured creditor. It is, after all, somewhat counterintuitive to think of holding a mortgage as, in some respects, a disadvantage. But this alone would hardly justify the ill-conceived and potentially radical mixed collateral amendments to section 9501(4). Ignorance of the law is no more a proper basis for amending it than it is a valid defense for having violated it.

C. The Mixed Collateral Amendments

The creation of distinct, separately secured obligations purportedly has been taken out of the hands of the parties and out of the bargaining process by the mixed collateral amendments without any apparent legislative consideration of the implications. The option of creating separate debts appears to have been moved by the amendments from the contract formation stage, where it is the subject of bargaining, to the time of default, where it apparently would be left to the sole and unfettered discretion of the secured creditor. The creditor seemingly can wait until default, and decide the debt should be treated as several separate debts—with real property security for some part of what had been a single obligation and either personal property or no security for other parts. The amendments, under this view, would allow the creditor, in effect, to shop around at the time of default for the optimal combination of real property security, personal property security, and no security at all.

Even more surprising than the enactment itself is that the *de facto* amendment, or repeal of the real property enforcement and debtor protection provisions of the Civil Code and Code of Civil Procedure, was attempted by way of amendment to the Commerical Code, without a single overt change in any of the real property sections of the Code of Civil Procedure or Civil Code. In fact, it appears that only the latter, the real property sections, would be effectively changed by the Commercial Code amendments. This attempt at tacit amendment of a complex, integrated, and mature body of law by making changes to an entirely

54. The remedies of creditors with debts secured *solely* by a security interest in personal property have not been changed at all. See Cal. Com. Code § 9501(4) (West Supp. 1987). The debtor protections which do exist under the Commercial Code are currently being considered by the Business Law Committee of the State Bar looking toward a possible severe limitation or elimination of those protections by way of a series of amendments to Division 9, commonly referred to as the “anti-Atlas amendments.” (“Anti-Atlas” is a reference to Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972), which held that failure to give proper notice or to conduct a commercially reasonable sale, as required, inter alia, by Cal. Com. Code § 9504(3) precludes a deficiency judgment. See to the same effect Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1120, 299 Cal. Rptr. 396, 398 (1986); Ford Motor Credit Co. v. Price, 163 Cal. App. 3d 745, 751, 210 Cal. Rptr. 17 (1985), Barber v. LeRoy, 40 Cal. App. 3d 336, 343, 115 Cal. Rptr. 272
different set of laws is an extreme and disturbing example of amendment by indirection, or misdirection. If this is what has occurred, it does no credit to the legislative process.

Perhaps most surprising of all is to find that such far-reaching, unannounced, and potentially chaotic changes were produced by a committee of the Bar and enacted under the sponsorship of the State Bar of California. Considering the potentially dramatic consequences of the amendments, which were apparently neither anticipated nor intended by the Legislature, it is not at all surprising that the “mixed-collateral” amendments are unlikely to be applied, or to operate, as the U.C.C. Committee envisioned.

III
THE MIXED COLLATERAL AMENDMENTS IN OPERATION——
INTERPLAY WITH THE REINSTATEMENT AND
ONE-ACTION STATUTES

The central axiom of the real property system, as embodied in section 726 of the Code of Civil Procedure, is that if a single obligation exists or is created at the inception of a security transaction, regardless of the variety of the items of security, this single obligation must be enforced as a single obligation. The presence of any real property security subjects the obligation itself to the one-action “affirmative defense” and “sanction” effects of section 726 as well as to the other debtor protections of the antideficiency and reinstatement statutes. The real property principles, which are invoked whenever any real property security is created, operate primarily and directly on the obligation. Fair value protection, for example, means that there is no enforceable personal obligation exceeding the difference, if any, between the debt and the fair value of the security. Similarly, the one-action sanction destroys the unin-
cluded debt, not merely the unforeclosed security interests, once the creditor has had his single action.58

The mixed collateral amendments are predicated on the idea that the debt can be fractionalized or apportioned into a "real property part," controlled by the supposedly unaltered Civil Code and Code of Civil Procedure, and a "personal property part," controlled by the Commercial Code. The objection to this predicate is not simply that there is no mechanism in California law for such a retrospective apportionment of the debt, although this is certainly true and important. The key point is that apportioning the debt grievously offends the central premise of the ostensibly unaltered real property security remedial scheme.

A detailed analysis of the impact of the mixed collateral amendments on each debtor protection provision of the Code of Civil Procedure and Civil Code is beyond the scope of this Article. Instead, the focus is on the clash of fundamental principles created by the mixed collateral amendments, as illustrated by the conflict between the amendments and two key elements of the real property scheme: the reinstatement provisions of Civil Code section 2924c and the one-action, security-first, aspect of the Code of Civil Procedure section 726.

The one-action provision has been selected because it is where the policies and philosophy of the real property provisions are most readily discernible. The one-action principle is also controversial and holds the greatest potential for causing significant loss to an ill-advised—or predatory—creditor. If the mixed collateral amendments are in fact a Trojan horse designed to undercut the real property law, then the one-action and security-first principles are the main targets.

The reinstatement provisions of Civil Code section 2924c have been chosen for the opposite reason. They are comparatively sedate and uncomplicated—they operate almost exactly as prescribed by the literal language of the statute—and while certainly providing important debtor protections, they do not prevent the ultimate collection of the secured obligation in full. Yet, because they operate on the obligation, no matter how many separate items of security may exist, these provisions also would be destroyed or severely damaged if the mixed collateral amend-

ments are allowed to undermine the unity and integrity of the single obligation secured by multiple items of security.

A. The Reinstatement Provisions

Civil Code section 2924c(a)(1) provides:

Whenever all or a portion of the principal sum of any obligation secured by a deed of trust or mortgage on real property . . . [has become due by reason of a default in any installment, the trustor or any junior creditor may reinstate by paying the installments past due and thereby cure the default] and the obligation and deed of trust or mortgage shall be reinstated . . . the same as if no such acceleration had occurred.59

Section 2924c, in other words, determines when the obligation may or may not be accelerated. Given a single debt secured by a deed of trust, mortgage, installment land contract, or other instrument creating a security interest in California real property,60 section 2924c assures the obligor the absolute right to reinstate without acceleration at any time prior to the entry of judgment if the debt is enforced by a judicial foreclosure. The obligor may also reinstate at any time prior to five days before the trustee’s sale if the debt is enforced nonjudicially. The reinstatement rights exist without regard to what other types of collateral may also secure that debt. The right to reinstate the obligation without acceleration whenever there is any real property security is fixed and cannot be waived under any circumstances at the time the loan is made or the debt created.61 There is no similar reinstatement right in the Commercial Code.

The mixed collateral amendments do not take any explicit action to amend or modify section 2924c, nor do they attempt to account for or address their impact upon the prohibition against waivers in section 2953. Nonetheless, the amendments seemingly cut a broad swath

60. See CAL. CIV. CODE § 2920(b) (West Supp. 1987).
61. The right to reinstate the entire obligation is nonwaivable “by a borrower at the time of or in connection with the making of or renewing of any loan secured by a deed of trust, mortgage or other instrument creating a lien on real property.” CAL. CIV. CODE § 2953 (West 1974). This section also expressly makes the one-action provisions of CAL. CIV. CODE § 726 and the fair-value provisions of CAL. CIV. CODE § 726(b) & 580a nonwaivable, and further provides that any agreement by which the borrower purports to waive § 2924c, § 726, or the other provisions mentioned in § 2953, “shall be void and of no effect.” § 2953. CAL. CIV. CODE § 2889, rendering void all contracts in restraint of the equity of redemption, has the same effect as to the one-action provision.

The prohibition against advance or contemporaneous waiver contained in the Civil Code is, in fact, merely a codification of a principle developed in the cases long before the enactment of § 2953, based on a strong public policy recognizing that necessity often drives debtors to make ruinous concessions when a loan is needed. Salter v. Ulrich, 22 Cal. 2d 263, 266-67, 138 P.2d 7, 8-9 (1943); Bradbury v. Davenport, 114 Cal. 593, 599, 46 P. 1062, 1063 (1896); Winklemen v. Sides, 31 Cal. App. 2d 387, 404, 88 P.2d 147, 155 (1939).
through both of those provisions by providing that the reinstatement provisions of section 2924c are inapplicable to “any personal property or fixtures as to which the secured party has proceeded or is proceeding” under the Commercial Code or to “the obligation secured by the personal property or fixtures.” 62

The amendments do not explain what the “obligation secured by personal property or fixtures” is, if not the same obligation secured by real property in this single debt, mixed collateral situation. Instead, they announce, rather cryptically, that they do not intend to excuse compliance with section 2924c as a “prerequisite to the nonjudicial sale of real property.” 63 Thus, the new law seems to treat reinstatement as a strictly procedural limitation on nonjudicial foreclosure rather than as a substantive right of the debtor affecting the obligation itself and applying to its judicial and its nonjudicial enforcement.

The amendments, if effective, would result in an automatic and unintended waiver of section 2924c (and of sections 726, 580a, and other debtor protection provisions) no matter how incidental the personal property security and no matter how fortuitous the creation of a boilerplate personal property or fixture lien in a printed standard form deed of trust. In any security transaction involving California real property, this would be flatly contrary to the prohibition against waivers of section 2953. The amendments would, in other words, create a result that should be “void and of no effect” under section 2953.

Against the clear and unamended mandate of both section 2953 and the cases proscribing advance and contemporaneous waiver that both antedated 64 and postdated 65 the enactment of section 2953, the U.C.C. Committee devised, and obtained enactment of, a mixed collateral amendment that would allow the creditor:

(1) To ignore the reinstatement of the “obligation” under section 2924c and to continue to sell or otherwise dispose of personal property and fixtures as if the obligation remained accelerated, even though the obligation is “cured,” i.e., reinstated and no longer in default, under section 2924c, 66 and

(2) To ignore section 2924c’s reinstatement provisions entirely with respect to any judicial proceeding, including judicial foreclosure of the real property alone in a mixed collateral situation. This results because section 9501(4)(c)(iii) states that the amendments shall not be “construed

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64. See sources cited supra note 61.
66. Once reinstated or cured, the obligation is still enforceable, but only according to its original installment terms. CAL. CIV. CODE § 2924c(a)(1) (West Supp. 1987).
to excuse compliance with section 2924c of the Civil Code as a prerequisite to the nonjudicial sale of real property. . . .”67 By negative implication the amendments would apparently prevent the reinstatement of the obligation under section 2924c whenever the creditor seeks judicial foreclosure.68

By proceeding with a judicial foreclosure of all security (real property, personal property, and fixtures, as required by Code of Civil Procedure section 726—unless it, too, is ignored), the creditor might accelerate and ignore any attempt at reinstatement entirely, despite the precise wording of Civil Code section 2924c. He would then proceed to a judgment foreclosing all of the debtor's rights in the real property—although if the real property protections are intact as the U.C.C. Committee claims, there is no longer a default—as well as in the personal property and the fixtures, and be entitled to a deficiency judgment to boot. From the one-action, security-first, section 726 standpoint, this simultaneous judicial foreclosure of all security is the correct—in fact, the only correct—procedure. But it is not a correct procedure nor is it lawful or just if the debtor has cured the default and reinstated the secured obligation, pursuant to section 2924c. At a minimum, one would expect the “obligation” secured by the real property—whatever that may be under the amendments—to remain subject to the mandate of the still extant, unamended Civil Code section 2924c.69

The amendments' apparent effort to change the section 2924c reinstatement provisions could work only (1) if they were applied exclusively to different debts separately secured—i.e., the pseudo-mixed collateral scenario (in which case the amendments have accomplished nothing vis-a-vis the true single debt, mixed collateral transaction), or (2) by breaking the debt into separate and uncertain segments according to the whims of the creditor at the time of default. In the latter case, the amendments are hopelessly irreconcilable with the nonwaiver provisions


68. Creditors commonly institute parallel judicial and nonjudicial foreclosure proceedings because those proceedings are concurrent remedies prior to the time of entry of judgment in a judicial action or sale in a nonjudicial proceeding. Flack v. Boland, 11 Cal. 2d 103, 107-08, 77 P.2d 1090 (1938). A debtor reinstating under § 2924c cures and terminates both the judicial and nonjudicial foreclosures. A debtor thus reinstating would reasonably believe that he has terminated both the nonjudicial and the judicial foreclosure at least with respect to the real property; the mixed collateral amendments, however, presumably allow the judicial foreclosure of the real property, personality, fixtures, and the potential deficiency judgment to proceed unabated.

69. It is also possible that in failing to refer to judicial foreclosures, as well as to nonjudicial foreclosures, the draftsmen of the amendment simply missed § 2924c's application to the judicial foreclosure. If it was a mistake, or if the draftsmen failed to read or understand the statute they implicitly amended, that fact offers little comfort to the debtor, creditor, or court trying to make sense out of the amendments.
of section 2953 and with the reinstatement of "obligation" provision of section 2924c.

To have a chance of functioning, the amendments must rely heavily, for enforcement purposes, on the expedient of fractionalizing a single debt or obligation into real property and personal property secured segments. Aside from its unaddressed conflict with a century of mortgage law, this fractionalization scheme is invoked by the new law without any serious attempt to explain the mechanism by which it will be implemented. For example, when a debtor who has encumbered his building and fixtures wants to reinstate the real estate "part" of his defaulted debt, how much of a reinstatement amount is he to tender? How is the debtor, the creditor, or a court, to determine whether the tender of reinstatement is complete and proper?[^70]

Consideration of the mixed collateral amendments against the background of the mundane, purely statutory reinstatement laws reveals the strikingly creditor-oriented and incomplete character of the amendments. In the absence of clear rules, it is difficult to see what will prevent the creditor from selecting an approach that will effectively deny the debtor any realistic opportunity to reinstate any part of the secured debt.[^71] It will be cold comfort for a restaurateur, shop owner, doctor, or other business debtor to reinstate the mortgage on her building only to find that she faces an imminent sale of essential fixtures, equipment, and chattels, which cannot be headed off by anything short of a full payment of the entire accelerated debt, including the part supposedly reinstated.[^72]

[^70]: A tender, in order to be valid, must be complete and unconditional. Cal. Civ. Code §§ 1486, 1494 (West 1982). It is difficult to see how a tender of any amount can be sufficient to reinstate the single obligation when the mixed collateral amendments permit the creditor to compel the debtor to pay as much as the creditor chooses to attribute, from time to time, to the "personal property obligation."

Regardless of the reinstatement and cure of the real estate secured "fraction" of the debt, the creditor could extract payment of increasing sums, up to the full amount of the accelerated obligation, as the price for not enforcing the uncured personal property-secured "part" of the same debt. If there is any mechanism in the mixed collateral amendments which would prevent such conduct, it is not apparent. There is little doubt that, if the amendments are applied at all, other than to separate debts separately secured from the outset, the courts will either create such a mechanism—as by requiring a single, irrevocable apportionment—or will police the utilization of the amendments to prevent abuse by imposition of tort damages, including the possible assessment of exemplary damages. See, e.g., KMC Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985) (lender's liability); Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979) (lender's liability); cf., Seaman's Direct Buying Serv. Inc. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984) (commercial bad faith); Commercial Cotton Co., v. United California Bank, 163 Cal. App. 3d 511, 209 Cal. Rptr. 551 (1985) (commercial bad faith).

[^71]: Parts of the amendments, Cal. Com. Code § 9501(4)(b) (West Supp. 1987), § 9501(4)(d)(i) (West Supp. 1987), and § 9501(4)(d)(ii) (West Supp. 1987), actually encourage the creditor to continually up the reinstatement ante and in fact to effectively deny reinstatement for any amount less than the full single obligation, which is, of course, indistinguishable from complete redemption.

[^72]: See supra note 71 and the sources cited therein. The fractionalization scheme also raises
B. The One-Action and Security-First Provisions of Code of Civil Procedure Section 726

The mixed collateral amendments purport to assure a mixed collateral creditor that he may judicially foreclose, sue for as much or as little of the debt as he wishes, include as much or as little of the security as he wants, and risk nothing other than the possible loss of any real property security not included in the single action. Consider what happens to a creditor who tries to do so and, as in the following example, commences a judicial foreclosure action for one-half of the debt and includes only part of the real property and part of the personal property security.

The debtor may assert his affirmative one-action defense under Code of Civil Procedure section 726 and compel the creditor to include the balance of the security for the same debt in the foreclosure action. The Commercial Code amendments presumably would recognize the affirmative defense to the extent that all of the real property would have to be included. But the amendments seemingly would allow the creditor to continue the action for any chosen portion of the debt, and refuse to include all of the personal property in the foreclosure action even in the face of the debtor’s one-action affirmative defense. The notion that personal property security for a single debt or the unincluded balance of that same debt can escape the impact of the one-action statute by the creditor’s election made at the time of the judicial proceeding ignores the sanction effect of section 726.

The sanction effect of section 726—as opposed to the affirmative defense—is triggered when a creditor proceeds to take a judgment or its

intriguing questions about the right of redemption, i.e., the obligor’s right to obtain a discharge of the lien by a full satisfaction of the debt. Under the new law, does the debtor have the right to redeem the real property “fraction” of the debt, separate from the personal property “fraction”? Why not let the debtor participate (subject, perhaps, to some form of arbitration or other binding conflict resolution) in the apportionment of the debt for purposes of determining a redemption price (or, for that matter, a reinstatement amount or opening bid at foreclosure sale)? If not, what rationale or policy justifies leaving this meiotic process to the sole discretion of the creditor? Is apportionment the same for purposes of reinstatement and redemption? Is an apportionment, once made, final? And if one category of security is destroyed (either literally or by foreclosure of a superior lien), what happens to “its” fraction of the single debt?


74. Any creditor doing this deliberately must understand, or be advised, that he is taking a serious risk of waiving the unincluded balance of the debt. Necessarily, therefore, he also waives any remaining security since there will thereafter be no debt for any security—real or personal—to secure. A valid security interest presupposes the existence of an obligation to secure.

equivalent\textsuperscript{76} for less than the full amount of the debt, particularly when he compounds the error by failing to include all of his security in the same foreclosure action.\textsuperscript{77}

Although the mixed collateral amendments suggest, as did the U.C.C. Committee, that the sanction for violation of the one-action provision of section 726 is merely a waiver of any real property security not included in the single action, the section 726 sanction actually is much broader. It, like everything else relating to the real property provisions, focuses on the obligation. The effect of obtaining a judgment for less than the entire debt—whether or not any part of the security has been foreclosed in the same action—is a waiver of the balance of the debt, i.e., a waiver of that part of the obligation not recovered in the single action.\textsuperscript{78} The waiver of security follows automatically.\textsuperscript{79}

Suing for the entire debt and including only the real property security in the action is equally futile, although the amendments of section 9501(4) seemingly encourage it. Under section 726 (ignoring the effect, if any, of the section 9501(4) mixed collateral amendments), the debtor may prevent this action through an assertion of the affirmative defense.\textsuperscript{80}

\textsuperscript{76} Bank of America v. Daily, 152 Cal. App. 3d 767, 772-73, 199 Cal. Rptr. 557, 559-60 (1984) (exercise of the self-help remedy of a banker's offset treated as an "action" under § 726 since the result of the offset is analogous to the enforcement of a money judgment and contradicts the purpose of the single action rule); see also Enterprise Leasing Corp., 189 Cal. App. 3d 834, 234 Cal. Rptr. 676 (private sale of collateral acquired by claim and delivery procedure held to trigger § 726 sanction).

\textsuperscript{77} In the case of an actual judicial proceeding—as opposed to out-of-court "actions" such as the exercise of an offset, see, e.g., Bank of America v. Daily, 152 Cal. App. 3d 767, 199 Cal. Rptr. 557 (1984), the creditor can do this only if the debtor does not assert § 726 as an affirmative defense to compel the creditor to include all security, Walker v. Community Bank, 10 Cal. 3d 729, 518 P.2d 329, 111 Cal. Rptr. 897 (1974), except in the rare case where the trial court ignores, or misunderstands, the debtor's assertion of the defense and allows, or compels, the creditor to proceed erroneously. See, e.g., Hall v. Arnott, 80 Cal. 348, 22 P. 200 (1889). The mixed collateral amendments may well increase the incidence of such erroneous rulings on the part of trial courts, leading to judgments that will trigger the one-action sanction.

\textsuperscript{78} The initial rationale was that if the creditor was allowed only one action, he could not have another, so anything excluded from the first judgment was necessarily waived, there being no means to enforce it. This evolved over the years into an election of remedies mixed with enforcement of a vague public policy against oppressive creditor conduct. If a creditor elects to obtain a judgment for less than the full amount of a single debt, he keeps the judgment but loses everything else. Compare Hall v. Arnott, 80 Cal. 348, 22 P. 200 (1889) (early one-action analysis), with Daily, 152 Cal. App. 3d 767, 199 Cal. Rptr. 557 (1984) (modern one-action analysis); see also, Walker, 10 Cal. 3d 729, 518 P.2d 329, 111 Cal. Rptr. 897 (election of remedies theory); J. HETLAND, SECURED TRANSACTIONS (1970), supra note 2, §§ 6.17, 6.18 at 257-60 (historical review of one-action cases).

\textsuperscript{79} Since there is no remaining debt by virtue of the one-action statute, the omitted personal property does not secure anything. Under these circumstances, there is a potential for lender tort liability and punitive damages if the creditor refuses to release his encumbrance on the property that had secured the former—but no longer extant—debt. See supra note 70 and accompanying sources.

\textsuperscript{80} However, by their supposed creation of a totally separate enforcement "track" for the personal property security and the personal property secured "part" of the debt, the amendments and the committee report imply that there is no affirmative defense to require inclusion of personal property security in the single foreclosure action.
But, assuming the debtor chooses not to do so, the creditor obtains an advance deficiency. It is the creation of this advance deficiency—i.e., the judgment and resulting judgment lien on everything the debtor owns, while the creditor still retains a consensual security interest in the real and personal property originally put up as security—which so deeply offends the policy of the one-action statute. That policy is to limit a secured creditor to the security which he voluntarily took to secure the obligation in the first instance, and to prevent him from injuring the debtor and prejudicing other creditors by augmenting his unforeclosed consensual lien with a judgment lien on potentially all of the rest of the debtor's property.

In this regard, the one-action provision and the Commercial Code reflect diametrically opposed policies. As a result of section 726, a creditor who takes a personal judgment without foreclosing all of his security because the debtor has either waived his affirmative defense or the court has failed to recognize it is deemed to have foreclosed everything he is going to; he loses his consensual lien. The judgment he obtains against the debtor will become a judgment lien with priority dating only from the recordation of an abstract of judgment.81

Where personal property alone is the security, the Commercial Code is in all respects to the contrary. The creditor may take a personal judgment for the obligation or any part of it without foreclosing any security or in conjunction with a foreclosure of only part of the personal property security. The creditor may then create a judgment lien on all the debtor's nonexempt property, whether or not encumbered by the consensual lien, and thus duplicate the consensual lien on the unforeclosed security. Moreover, the judgment obtained by the creditor is accorded the lien priority of the consensual security interest in personal property that formerly secured the debt for which the judgment was taken.82 The Commercial Code, in other words, not only allows personal judgments without exhausting the security, but rewards a creditor for obtaining one by giving his judgment the priority of his consensual security interest in the personal property and by allowing him to pursue other assets as a judgment lien creditor as well.

Were the creditor allowed to obtain such dual and overlapping liens for the same debt in the mixed collateral situation, he could smother the debtor financially by using his judgment lien to encumber or sell as much of the debtor's property not encumbered by the consensual lien as he chooses. By thus utilizing his judgment lien, while retaining his unforeclosed consensual lien for the same debt, the creditor could assure that the debtor would have no unencumbered assets with which to raise money to

pay his defaulted secured obligations. Furthermore, any other unsecured or junior secured creditors would be frozen out of a resort to any of the debtor's property whether or not that property was encumbered by the consensual lien. A principal policy underlying section 726 is to prevent this dual lien scenario.\textsuperscript{83}

It is implausible in the extreme to suppose that these fundamentally opposed principles can be applied successfully to a single obligation.

The conflict between section 726 and the mixed collateral amendments exists not only on a policy level, but in an immediate and practical sense as well. If section 9501(4) and section 726 are consistent, as the Commercial Code Committee claims and as the mixed collateral amendments assure, and if the sanction aspect of section 726 results in a waiver of the balance of the debt, many questions are posed. Most fundamentally, one must ask what debt remains to be secured by the omitted personal property? And by what procedure is the remaining portion of the debt to be determined? Will it be a judicial proceeding similar to that leading up to a deficiency judgment, i.e., a motion to determine the amount in excess of the fair value of all of the security, which is the maximum for any deficiency judgment?\textsuperscript{84} Is this determination subject to the strict three-month limitations period within which the deficiency judgment procedure must be commenced?\textsuperscript{85} Is the fair value of omitted real property security, or of omitted personal property security, or both, to be credited in computing the potential deficiency judgment?\textsuperscript{86} And, if the unincluded balance of the debt remains an obligation of the debtor by virtue of the mixed collateral amendments, why should even the real property security be lost, as section 9501(4) provides that it will be, as a result of the creditor taking a personal judgment for less than the full amount of the debt in an action that fails to include all of the security?

As became clear with regard to the reinstatement provisions, it is only by assuming that the creditor can fractionalize the obligation upon default, while enjoying a lien on \textit{all} of the property as security for the

\textsuperscript{83} For an illustration of the extent to which the policy underlying the statute controls its application, see \textit{In re Kristal}, 758 F.2d 454 (9th Cir. 1985), where the Ninth Circuit approved the Bankruptcy Court's application of § 726 to prevent a creditor from executing on his foreclosure judgment, expressed in terms of dollars, without first selling the real property that had been included in his foreclosure action. While this is a unique application of the statute to carry out its dual-lien avoidance purpose, the novel post-judgment application was compelled by the creditor's unique procedure and correctly implements the policies of § 726. \textit{See also} Felton v. West, 102 Cal. 266, 268-69, 36 P. 676, 677 (1894) (§ 726 enacted as "[a] remedy for this evil" of dual liens); Enterprise Leasing Corp. v. Epstein, 189 Cal. App. 3d 834, 234 Cal. Rptr. 676 (1987); Pacific Valley Bank v. Schwenke, 189 Cal. App. 3d 134, 234 Cal. Rptr. 298 (1987).

\textsuperscript{84} \textit{CAL. CIV. PROC. CODE} § 580a, § 726(b) (West Supp. 1987).

\textsuperscript{85} Bank of Hemet v. United States, 643 F.2d 661, 668-70 (9th Cir. 1981).

single debt from the inception of the loan, that the Commercial Code amendments can work at all. Because they are flatly contrary to the mandate, tradition, and methodology of Code of Civil Procedure section 726 and Civil Code section 2924c, the 1986 mixed collateral amendments simply cannot work in the enforcement of a single debt secured by mixed real and personal property collateral without effectively repealing sections 726 and 2924c. The mixed collateral amendments can work in conjunction with sections 726 and 2924c only if their application is limited to the very different circumstance of the enforcement of separate debts, individually secured from the inception of the loan by different items of real and personal property.

IV
THE NEW MIXED COLLATERAL AMENDMENTS MEASURED AGAINST FIFTY YEARS OF PRECEDENT

The history of the major elements of California's real property debtor protections demonstrates a peculiar interplay between legislation and case law and a tenacious judicial defense of the debtor protections, regardless of statutory changes that arguably weaken them. This history provides a preview of the litigation which inevitably will arise out of the conflict between the mixed collateral amendments and the real property law and illuminates the factors that are likely to be important in determining the outcome of that litigation.

If overt assaults on the one-action, antideficiency, and fair-value statutes have been largely unavailing, it is all the less likely that the courts will permit radical changes in that same law by mistake or indirection. This is particularly true when the attack is mounted by way of amendments to an entirely separate body of laws couched in language calculated to reassure anyone not intimately familiar with the workings of the real property system that it is being left intact.

A. The Resilience and Consistency of the One-Action and Antideficiency Policies

None of California's statutes limiting or prohibiting deficiency judgments has been substantively amended since 1965, when the "mortgage on personal property" was removed from the ambit of section 726 to accommodate the application of the concurrently enacted Commercial

87. CAL. CIV. PROC. CODE § 726 changed its format in 1983 to accommodate the elimination of junior creditor post-sale redemption and the limitation on debtor post-sale redemption as part of the new Enforcement of Judgments Law of 1982. (Act of July 12, 1982, chs. 4, 7, 1982 Cal. Stat. 2153, 2158-60.) With respect to the deficiency limitations—the procedural one-action mandate, now § 726(a), as well as the pervasive fair-value limitation on the secured creditor's judgment, now § 726(b)—the change is one of form only.
Code to purely personal property security interests. For that matter, none of California's antideficiency statutes has been effectively diminished since its enactment, notwithstanding changes in statutory language by which the Legislature has responded to competing economic interests during the past century.

The language of section 726, for example, was changed by the Legislature in 1933 from "one action" to "one form of action" and it made absolutely no difference. This change of statutory language to "one form of action" might well have altered—and may have been intended to alter—section 726 so as to relieve creditors of the sanction resulting from a successful circumvention of the section 726 affirmative defense and a judgment (or its equivalent) taken against the debtor for some or all of the secured debt other than by an action foreclosing all of the security. If the creditor no longer was limited to "one-action," presumably he could have another action to foreclose on the balance of his security or to get a judgment for the balance of the debt. California courts, however, simply ignored the change in statutory language because the post-judgment sanction was required for the effective operation of the affirmative defense aspect of section 726. It was also needed for its function as the cornerstone of the then newly enacted deficiency protections of Code of Civil Procedure sections 580a, 580b, and the second paragraph of section 726 regarding fair value. In short, preservation of the sanction was necessary to perpetuate enforcement of the traditional policies against personal judgments (even as limited by the fair value of the security) without prior exhaustion of all security, against dual liens and against harassment of the debtor by multiple actions.

Had section 726 been limited to its literal language, it would have applied only to "mortgages" and not deeds of trust. Yet, again, looking to the purpose of the statute and to the functional equivalence between a deed of trust and a mortgage, the California Supreme Court in 1933 held that a "mortgage on real or personal property" does not really mean


91. The statute reads, as it has for more than a century: "There can be but one form of action for the recovery of any debt for the enforcement of any right secured by a mortgage..." CAL. CIV. PROC. CODE § 726.

92. These words reflect how § 726 then read; "personal property" was deleted by an amendment effective January 1, 1965, when the California Commercial Code became operative (approved June 8, 1963, ch. 819, § 26, 1963 Cal. Stat. 1849, 2007-09).
“mortgage,” but, instead, any security instrument designed to accomplish the same purpose as a mortgage, i.e., to secure a debt by an interest in real or personal property.93 Thus, a deed of trust became subject to section 726 even before the 1933 enactment of section 725a94 which permitted, without a special showing, the judicial foreclosure, as opposed to the nonjudicial sale under the power of sale, of a deed of trust.95

Another striking example of judicial independence in the antideficiency area can be found in connection with the companion fair value deficiency limitations of sections 72696 and 580a,97 both enacted in 1933. Through the years, the terminology varied slightly between the statutes, reading either “fair value” or “fair market value.”98 Neither variation was of much help, however, in ascertaining the precise meaning of “fair value” or “fair market value” in the deficiency limiting foreclosure context. Was “fair value” the equivalent of “fair market value” in the usual forensic sense of that phrase, i.e., value in the context of a hypothetical arm’s length sale under normal economic and motivational conditions? Or was “fair value” properly determined by taking into account the fact that the security might be sold in depressed market conditions, with title “clouded,” and by way of the inherently risky and price-suppressing process of an all-cash, auction sale?99

In order to eliminate these value reducing factors—or to shift their burden onto the creditor and thus reduce the potential deficiency—the California Court of Appeal for the Third District decided recently that “fair value” means “intrinsic value to the creditor.”100 Equating fair value with intrinsic value could readily be done without precise statutory authority since the intrinsic value rule is a reasonable construction of the statutory fair value language when it is used in a statute designed to protect debtors against excessive deficiencies. But, almost as if to assert judicial independence, the appellate court, in creating the intrinsic value

95. Flack v. Boland, 11 Cal. 2d 103, 77 P.2d 1090 (1938). Prior to 1933, the beneficiary customarily would use the power of sale to exhaust the security, and then sue for a deficiency. Between 1933 and 1939, he could follow the same procedure, the deficiency being limited, however, by the fair value provisions of § 580a. After 1939, a sale under the power resulted in a deficiency prohibition under § 580d.
96. Now CAL. CIV. PROC. CODE § 726(b) (applicable to judicial foreclosure).
97. When originally enacted, this code section was applicable to nonjudicial foreclosures (Approved June 2, 1933, Ch. 642, § 4, 1933 Cal. Stat. 1669, 1672-72); it remained so until 1939. See infra text accompanying notes 108-10.
99. This was the approach taken by California's First District Court of Appeal in Nelson v. Orosco, 117 Cal. App. 3d 73, 172 Cal. Rptr. 457 (1981).
standard, relied upon a forty-five year-old legislative hearing where an amendment adding “intrinsic value” to the meaning of fair value was considered and rejected by the Legislature.\textsuperscript{101} The development of the intrinsic value standard thus appears to reflect judicial concern for implementing the perceived purpose of a statute rather than a talismatic reverence for a “legislative intent” from a bygone era.

Judicial solicitude for mortgage debtor protection is also evident in the purchase money area. The purchase money provision, Code of Civil Procedure section 580b, was enacted along with the two fair value provisions in 1933\textsuperscript{102} and was amended in 1935 to assure that the installment land contract, when used as a security device, was included within its proscription.\textsuperscript{103} But despite strong resistance to the idea of a contract as a purchase money security device over the next 50 years,\textsuperscript{104} it was inevitable that a personal judgment on an installment, or security, land contract would be prohibited by the court’s imposition of the “security first,” or, under section 580b, the “security only,” concept so essential to the entire interrelated antideficiency scheme. Surprisingly, when this prohibition finally came, it had little to do with the formal change in the statute in 1935.\textsuperscript{105} Rather, the preclusion of a judgment on the purchase money obligation in favor of the land contract vendor, absent a foreclosure sale of the property, was based upon the underlying purpose of section 580b. The prohibition was expressed in a case prohibiting a judgment in favor of a junior creditor whose security had been sold out from under him.\textsuperscript{106}

The same judicial tendency to transcend the language of the statutes

\textsuperscript{101.} Id. at 366, 209 Cal. Rptr. at 297.
\textsuperscript{102.} Approved June 2, 1933, ch. 642, § 5, 133 Cal. Stat. 1669, 1673.

A similar analysis recently was applied to the mobile home purchase money deficiency statute in Civil Code § 2983.8. The Legislature had not expressly prohibited waiver of the security followed by a personal judgment on the resultant unsecured obligation. The court nonetheless held that prohibiting a waiver of the security and limiting the seller’s recovery to the mobile home is essential to implement the statute’s purpose of protecting a purchaser from a deficiency judgment (or, as it turned out, any personal liability) on an obligation incurred in the purchase of the mobile home. Bank of Sonoma County v. Dorries, 185 Cal. App. 3d 1291, 230 Cal. Rptr. 459 (1986).
in order to further debtor protection policies is apparent in the application of the nonjudicial fair value limitation of section 580a, which was arguably repealed by indirection or obsolescence in 1939, and which, even when operable, applied by its express language only to the foreclosing creditor.107

Section 580a paralleled the judicial foreclosure fair-value provision and limited the creditor's deficiency judgment to the excess of the debt over the fair value of the security sold at trustee's sale.108 Like its counterpart, the section 726 fair value provision applicable in judicial foreclosures, section 580a was enacted in 1933. But in 1939,109 the Legislature prohibited deficiencies following a nonjudicial sale altogether.110

As with other deficiency protections that survived legislative erosion, reports of the demise of the fair value limitation of section 580a—like those concerning Mark Twain—were greatly exaggerated. While the nonjudicial sale deficiency bar of section 580d still leaves section 580a superfluous as to the foreclosing creditor, section 580a has been resurrected and applied to nonforeclosing, sold-out junior creditors who buy the security at the senior creditor's nonjudicial foreclosure sale. The sold-out junior's action on a note left unsecured by the senior sale not only is subject to section 580a's three-month statute of limitations but also is reduced by the fair value of the property that the junior bought at the senior's sale.111 It is doubtful that this application of section 580a was

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110. Cal. Civ. Proc. Code § 580d actually prohibited a deficiency on a "note" secured by a deed of trust or mortgage following a sale under the power of sale. But the word "note" has been construed to mean the same thing as the word "obligation" or "debt" in § 726—a point easily demonstrated by comparing the second paragraph of § 580d with the first and by looking at the purpose of the statute—as a post-sale redemption substitute, which would be inconsistent with its verbal limitation to a note. See, e.g., Roseleaf Corp. v. Chierighino, 59 Cal. 2d 35, 43-44, 378 P.2d 97, 101-02, 27 Cal. Rptr. 873, 877-78 (1963); see also J. Hetland, Secured Transactions (1970), supra note 2, § 6.15 at 251-255; Hetland, supra note 14, at 32-37.
111. See, e.g., Bank of Hemet v. United States, 643 F.2d 661, 668-70 (9th Cir. 1981); Walter E. Heller Western, Inc. v. Bloxham, 176 Cal. App. 3d 266, 221 Cal. Rptr. 425 (1985). The reasoning of Bloxham is that the purchasing junior creditor has the property, so that he has no loss or deficiency for that part of his debt covered by the fair value of the property. Id. at 273-74. This rationale could as easily be applied, and may well be applied in the future, to protect guarantors. If the sold-out junior has no loss because he enjoys the fair-market value of the property purchased at the senior's foreclosure, presumably he would have no action against a guarantor for the same reason, even though guarantors are not directly protected by the deficiency statutes. The Nevada Supreme Court recently used this analysis in holding that Nevada's counterpart to § 580a applies to protect guarantors. First Interstate Bank v. Shields, 730 P.2d 429 (1986) and Crowell v. John Hancock Mutual Life Ins., 731 P.2d 346 (1986); Cf. Connolly v. Bank of Sonoma County, 184 Cal. App. 3d
ever foreseen, much less condoned, by the Legislature, even before sec-
section 580a's tacit repeal. Yet both state and federal courts have seized
upon the statute as raw material from which a new and still expanding
debtor protection has been fashioned.112

In fine, over the past fifty years California courts have demonstrated
an insistence upon certain debtor protections, a sensitivity to problems of
adhesion in the area of security transactions, a desire to equalize unequal
bargaining power between mortgagor and mortgagee, and a highly
refined instinct for mutual fairness in enforcement procedures. A
secured creditor's ability to seek relief beyond—or different than—resort
to the security voluntarily encumbered when the loan was made will very
likely continue to be severely limited by the courts, irrespective of the
language selected by the Legislature to set the parameters of the debtor
protections in a particular legislative session, or even in a particular
decade.113

B. The Probable Limited Application of the Mixed Collateral
Amendments in the Absence of Corresponding Amendments
to the Civil Code and Code of Civil Procedure

In order to fully implement the mixed collateral amendments, the
California courts would not only have to eviscerate the one-action and
antideficiency laws, but would have to do so on the basis of legislation
which does not amend those laws directly and which professes to leave
them intact and unchanged insofar as they pertain to obligations secured
in whole or in part by real property. As demonstrated by the appellate
decisions of the last half century, it seems unlikely that the California
courts will lightly or hastily abandon the elaborate and integrated net-
work of debtor protections.

Moreover, in order to make the amendments work at all in the true
mixed collateral situation, the courts would be compelled to invent, with-
out legislative guidance, an entirely new and complex body of substantive
and procedural law specifying when and how an originally unitary debt
secured by real and personal property can be fractionalized after default

1119, 299 Cal. Rptr. 396 (1986) (extending the debtor protections of the California Commercial
Code to a guarantor upon quite similar reasoning); Union Bank v. Gradsky, 265 Cal. App. 2d 40, 71
Cal. Rptr. 64 (1968) (indirectly applying the post-trustee's sale bar of CAL. CIV. PROC. CODE § 580d
to protect guarantors by way of an estoppel).
112. See supra note 111 and sources cited therein.
113. Interestingly, this well-established and long-standing judicial stance, which has spanned
changes in both the prevailing political philosophy and the composition of the appellate courts, does
not appear to be dependent upon the political leanings of the California Supreme Court or the
Courts of Appeal. A review of the decisions reveals that moderate or conservative courts during the
past half-century have tended to be as vigilant in guarding the debtor protections as have the courts
generally considered to be more liberal.
and for purposes of enforcement. The creation of such a scheme would run contrary to virtually every judicial instinct and principle articulated—or evident—in the real property security and mixed collateral case law of the past fifty years.

To the extent the mixed collateral amendments are found somehow to have created a new freedom of action for mixed collateral secured creditors without "interference" by the real property debtor protections, the courts are likely to fashion the means to prevent abuse of the fractionalization procedure. They will most likely do so by expanding both the established notions of adhesion contract 114 and the developing principles of lender's bad faith.115

**CONCLUSION**

How, then, will the courts handle the mixed collateral amendments? Despite their inconsistency with the supposedly unamended provisions of the Civil Code and Code of Civil Procedure, the amendments are, after all, statutes validly enacted by the Legislature. Thus, the resolution probably lies in focusing on those parts of the amendments which suggest that they apply only to separate debts, separately secured—i.e., the false mixed collateral problem—and not to the true single debt, mixed collateral situation.

This suggestion is not as extreme as it might at first appear. Such a construction of the new law is at least as consistent—indeed, probably more so—with the manifest legislative intent of the amendments as is the alternative of enforcing the amendments vigorously at the expense of vanquishing the real property debtor protections in all mixed collateral transactions. The stated legislative desire to leave real property law intact cannot be accomplished while giving free play to the other provisions of the mixed collateral law. Some part of the internally contradictory amendments will have to be pruned back in the course of statutory construction and implementation; that part which presumes a *sub silento* repeal of the debt-centered real property provisions seems the most likely candidate.

There is textual support in the mixed collateral amendments for a construction limiting the application of those amendments strictly to the


false mixed collateral situation. Commercial Code section 9501(4)(b), for example, provides:

[Provisions and limitations of any law respecting real property and obligations secured by real property, including, but not limited to, Section 726 of the Code of Civil Procedure, provisions regarding acceleration or reinstatement of obligations secured by real property, prohibitions against deficiency judgments, and limitations on the right to proceed as to collateral, do not in any way apply to either

(1) any personal property or fixtures . . . or
(2) the obligation secured by the personal property or fixtures.]

In the mixed collateral context, the real property provisions enumerated in the above-quoted language do not “apply to . . . personal property or fixtures.” They apply, instead, to the debt. And there is no “obligation secured by . . . personal property or fixtures” which is any way separate or distinguishable from the identical obligation also secured by real property. It is only in the pseudo-mixed collateral situation—where separate debts exist and are separately secured by real and personal property—that there exists an isolable obligation secured only by personal property.

Advocates of a broader reading of the amendments will undoubtedly argue that the new law creates separate obligations at the time of default in the true single debt, mixed collateral situation, even though separate obligations did not originally exist. But what answer will those same advocates give when asked by courts precisely where in the new law one can find provisions expressly mandating a fractionalization of the single debt or prescribing a procedure for doing so? There are, of course, no such provisions, or any evidence in the new law or in its dubious “legislative history,” that the Legislature was aware that such provisions would be required in order to implement the mixed collateral amendments.

In these circumstances, California courts will very likely seize upon the separate obligation language of the amendments in order to construe them in the only way that will give the new law some effect while preserving the reinstatement, antideficiency, and one-action laws in their application to debts secured by both real and personal property. That solution is to apply the real property provisions in their entirety to a single debt secured by combined real and personal property security—in effect, to apply section 9501(4) as it read before the recent amendments—and to apply the amended Commercial Code provisions in their entirety only to debts segregated at the outset and separately secured by personal property.