



STEIN LAW, PLC

A Real Estate & Business Deal Firm

Big Picture. Small Details. Distinct Approach.

Recent Developments - Summer, 2015

See Closed Deals & Announcements Below

Guaranteed Waives This Summer

Loan guaranties typically contain many express "waivers" by the guarantor for the benefit of the lender. By agreeing to such a waiver, the guarantor releases certain rights that could have otherwise frustrated the lender's clear path toward recovery if exercised by the guarantor. For example, waivers of notice, presentment and even statutes of limitation can be included in loan guaranties. Each lender has different standards, and each loan is different, so when we represent borrowers and guarantors, we work to limit any such waivers to ensure that guarantors have the benefit of all applicable statutes that provide protection for them. For some waivers, there is uncertainty as to whether it can be enforced. Despite this, however, negotiation with lenders regarding waivers is often an uphill battle. To address any uncertainty surrounding these waivers, when negotiating a guaranty, if a lender will not agree to strike waivers from their guaranty altogether, we aim to limit such waivers "to the extent allowed by applicable law." That way, a guarantor will not be contractually liable for a waiver that may be subsequently limited or struck down by case law.

A recent ruling by the Arizona Court of Appeals shines a spotlight on the importance of paying close attention to such waivers. In *Arizona Bank & Trust v. James R. Barrons Trust*, 713 Ariz. Adv. Rep. 25 (May 28, 2015), the Arizona Court of Appeals held that guarantors can waive the protection of the anti-deficiency statute, even though protection under the statute cannot be waived by borrowers. As is widely known, Arizona has an anti-deficiency statute that governs actions a lender can take following a trustee's sale if the price realized is less than the amount the borrower owed under the loan. The anti-deficiency statute only applies in certain limited circumstances. Specifically, the anti-deficiency statute prohibits a lender from pursuing a deficiency action "if trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling is sold pursuant to [a] trustee's...sale." *A.R.S. §33-814(G)*.

Following the decision in *Arizona Bank & Trust*, guarantors can be liable for a deficiency in Arizona even if the direct borrower is protected from liability under the anti-deficiency statute. In reaching this decision, the Arizona Court of Appeals found nothing contrary in the statute or in violation of public policy to holding guarantors liable. The Court found that, unlike borrowers, guarantors are not among the named protected class of persons in the actual statute, and relied on a general principle in Arizona that a guaranty may provide for greater liability than that of the borrower.

In the case, the guarantors argued that, as a matter of public policy, the anti-deficiency protections under the statute apply to guarantors as well as borrowers. However, the Arizona Court of Appeals ruled that guarantors are not protected by the same policy concerns that drive the anti-deficiency statute protecting a homeowner because the guarantor is not at risk of losing a home in the wake of default. The Court also noted that "[p]rohibiting a guarantor from waiving anti-deficiency protections would be inconsistent with the basic purpose of a guaranty". *Arizona Bank & Trust*, 713 Ariz. Adv. Rep. 25 6 ¶ 15. The Court concluded that a guarantor does not risk as much as the homeowner debtor so if the anti-deficiency statute cannot be waived, there would not be any financial consequence for failing to pay the amount under the guaranty. Essentially, the Court found that prohibiting a guarantor from waiving the anti-deficiency statute would nullify the guaranty without any adverse impact on the guarantor but nevertheless leave the lender with "little or no reason" to "seek loan guaranties or to proffer loans that would not otherwise be available without a guaranty." *Id.*

Stein Law routinely reviews and negotiates loan guaranties. Following this recent Arizona case, lenders in Arizona should revisit their guaranty forms to confirm that they can now include provisions waiving the protections afforded by Arizona's anti-deficiency statutes while guarantors themselves should be on the lookout for such waivers and be warned that such waivers can be enforced. For more information as to how we can be of service, please call (480) 889-8948, send an email to info@steinlawplc.com or visit www.SteinLawPLC.com.



We are thrilled to announce that Scott J. Stein is included in the 22nd Edition of The Best Lawyers in America for Real Estate Law.

Strafford

More Opinions. In a prior Stein Law Recent Development Newsletter (available [here](#)), we shared our insight on critical aspects of legal opinions. We are am pleased to announce that [Scott J. Stein](#) will be speaking in an upcoming Strafford live webinar, "Structuring Opinions of Counsel in Real Estate Finance

Transactions" scheduled for Thursday, October 8, 1:00pm-2:30pm EDT. For more information, please visit <https://www.straffordpub.com/real-estate-law>.

Stein Law, PLC is a boutique business and real estate deal firm focused on:

- Real estate acquisitions and sales, development and leasing (both tenant and landlord);
- Business transactions, operating agreements, joint venture structuring and corporate contracts;
- Loan financings, workouts and modifications; and
- Hospitality development, management and licensing matters.

The following is a link to our Stein Law, PLC Recent Developments Archives:

[Recent Developments Archives](#)

Below are some recent noteworthy Stein Law closed deals:

- Represented the buyer (Irwin Pasternack, principal) in connection with the purchase and financing of 72 acres along the Interstate 10 corridor in west Phoenix that will be developed as part of a 214-acre mixed-use industrial park called "TEN". (July, 2015) [Click here for Press Release.](#)
- Represented Seller of a 17,000-square-foot commercial building located west of Mill Avenue at 230 W. 5th Street, Tempe to YAM Properties LLC (Bob Parsons, principal) for redevelopment as a mixed-use high-rise. (July, 2015) [Click here for Press Release.](#)
- Shopping center acquisition, financing and lease-up (Phoenix, May, 2015)
- Purchase multi-family apartment with Private Equity and Fannie Mae financing (Durham NC, June, 2015)
- Shopping center CMBS Refinance and Pad Sale (Phoenix, June, 2015)

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