

Lenders Strive to Maximize Recovery

In the current economic climate, creditors continue to experience difficulties in getting loans repaid. Non-performing and under-performing loans have dealt blows to the lending sector and death knells to many banks, including community and regional banks in California and the rest of the western United States. With the deterioration in real estate values and the erosion in developers' financial condition, voluntary resolutions (or workouts) have become tougher to accomplish. As a result, lenders continue to look for ways to maximize their recovery and expand their negotiating leverage with borrowers and guarantors.

A recent case in California reaffirmed the lender's right to independently pursue a guarantor in a real estate-secured loan. On Oct. 19, 2009, the California Court of Appeal issued a decision in *United Central Bank v. the Superior Court of Orange County* upholding a creditor's procedural right to pursue a writ of attachment against the guarantor of a loan secured by real property in a lawsuit for breach of guaranty. While this case is based on California law, similar procedures are available to banks in several other western states. This continues to be good news to lenders who, in those situations where the guarantor continues to be viable, wish to assert the maximum pressure to get their loans repaid.

In *United Central Bank v. the Superior Court of Orange County*, United Central Bank filed a complaint for breach of guaranty against the guarantor of three construction loans with an aggregate principal sum of about \$4 million. The guarantor had executed three separate guarantees, each containing the standard "Gradsy Waivers" waiving the right to require the bank to proceed first against the real property security provided for the loan. Shortly after filing the lawsuit, the bank filed an application with the trial court for a right-to-attach order and the issuance of a writ of attachment against the guarantor.

After a hearing, the trial court denied the application on the ground that, under California Code of Civil Procedure Section 483.010, writs of attachment are not available where the loan or loans are secured by real property, except where there is evidence that the value of the security has diminished to less than the sum due. In its denial of the application, the trial court made no finding

as to whether the bank satisfied the evidentiary threshold required for the issuance of an attachment order under C.C.P. Section 484.090.

After the denial of its application for a right-to-attach order and the issuance of a writ of attachment, the bank petitioned the Court of Appeal to review the trial court's ruling. On review, the Court of Appeal ruled that the trial court erroneously misapplied Section 483.010 in its denial of the bank's application and ordered the trial court to hold a new hearing to determine whether the bank made a sufficient evidentiary showing under Section 484.090, entitling it to a right-to-attach order and the issuance of a writ of attachment. In support of its decision, the Court of Appeal declared that, while Section 483.010 provides that an attachment may not be issued on a claim that is secured by an interest in real property, the trial court failed to realize that the bank's claim was based on unsecured guarantees.

The Court of Appeal went on to state the well-settled point of law in California that a guaranty is a separate and independent obligation from that of the principal debt. As such, the prohibition of Section 483.010 does not apply to guarantees of loans secured by real property. Accordingly, writs of attachment may issue on guarantees of loans secured by real property, so long as the guarantor waived the right to require the creditor to proceed first against the real property security for the primary obligation (the Gradsy Waivers).

The Court of Appeal decision in *United Central Bank v. the Superior Court of Orange County* upheld a powerful prejudgment tool available to creditors of real property secured obligations — the right to seek the issuance of writs of attachment against guarantors of loans secured by real property. However, it must be noted that in California a writ of attachment is only available against guarantors of real property secured loans if the guarantor waived the right to require the creditor to proceed first against the real property collateral before seeking other remedies and continuing with the litigation.

Several other western states, including Arizona, Nevada and Washington, also provide creditors with the procedural right to pursue writs of attachment against guarantors of real property secured loans. Arizona and Nevada, like California, regard guarantees as separate obligations

from the principal, real property-secured debt (*Tenet Healthsystem TGH, Inc. v. Silver* (2002) 203 Ariz. 217, 222-223; *Coombs v. Heers* (D. Nev. 1973) 366 F. Supp. 851, 854) and allow for the issuance of writs of attachment in breach of guaranty actions, so long as the guaranty is not secured by real property.

Accordingly, in Arizona and Nevada creditors may pursue writs of attachment against guarantors of real property secured loans, because state law characterize guarantees of real property-secured loans as separate contractual obligations not secured by real property.

In the state of Washington, creditors also have a procedural right to pursue writs of attachment against guarantors of real property-secured loans. In fact, a Washington creditor may also pursue a writ of attachment against the borrower of loan secured by real property. This is so because, unlike California, Arizona and Nevada, Washington law does not prohibit creditors from obtaining the issuance of writs of attachment in actions for breach of contracts secured by real property. Rather, a writ of attachment may be issued by a Washington court in any action brought to recover on a contract.

The usefulness of the writ of attachment is valuable for a creditor. First, on its issuance and its attachment to

the property of the guarantor, the creditor gains leverage for negotiating a larger and quicker settlement with the guarantor. Second, the issuance of a writ of attachment prevents a debtor from liquidating and/or assigning its assets prior to the entry of a court judgment against it.

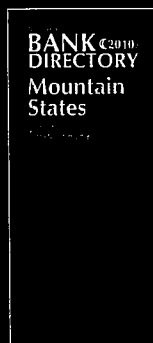
On the default of a guaranty of a real property-secured loan and the filing of a lawsuit in California, Arizona, Nevada or Washington for breach of guaranty, the creditor should seriously consider filing an application for a right-to-attach order and the issuance of a writ of attachment. Independent actions against guarantors on loans that are unsecured or secured by real and personal property or on loans secured by personal property only — such as inventory or accounts receivable — continue to be a valuable collection tool for lenders and should not be overlooked in attempts to maximize recovery. **WB**

Steven Casselberry is a partner and **Stephen R. Isbell** is an associate in the law firm Michelman & Robinson LLP, with offices in Los Angeles, Orange County, San Francisco, Sacramento, New York and New Jersey. Casselberry is chair of the financial services and bankruptcy departments for the firm. Both attorneys are headquartered in Orange County. For more information, visit www.mrllp.com.

Coming Soon!

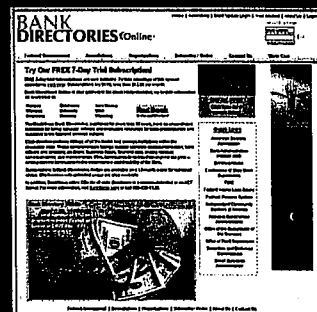
Mountain States Bank Directory 2010 Edition

Colorado • Montana
New Mexico • Utah • Wyoming



With financial data as
of December 31, 2009.

IN
PRINT
AND
ONLINE



bankdirectoriesonline.com

Order yours today at banknews.com, bankdirectoriesonline.com or call 800-336-1120.

Published by **BankNews media**