

**Regis A. Guerin Obtains Arbitration Award For Bank
In Breach Of Guaranty Action And Complete Defense Verdict
On Guarantors' Cross-Complaint In Contested Arbitration**

Regis A. Guerin obtained an arbitration award in the amount of **\$1,301,751.08** on behalf of a large financial institution client ("Bank"), in a hotly contested arbitration proceeding. The matter arose out of a \$7,200,000.00 construction loan ("Loan") to a limited liability company borrower ("Borrower"). The Loan was guaranteed by several individuals and their trust entities, as well as a corporate guarantor (collectively, "Guarantors"). After Borrower defaulted on the Loan, Bank conducted a non-judicial foreclosure on the real property that was the subject of the Loan. The foreclosure sale resulted in a deficiency of approximately \$981,643.53. Thereafter, Bank filed a lawsuit against Guarantors for breach of guaranty. The lawsuit was subsequently ordered to arbitration in the American Arbitration Association.

In the arbitration proceeding, Guarantors alleged that they were entitled to the protections of California's antideficiency laws, **based upon the so-called "sham guaranty" defense**. In this regard, Guarantors alleged that Bank precluded Guarantors from acting as the borrower under the Loan and demanded that a single asset entity act as the borrower. Additionally, Guarantors alleged a cross-complaint against Bank for several causes of action, including fraud, wrongful attachment, breach of contract, unfair business practice, unfair competition, predatory lending practice, breach of covenant of good faith and fair dealing, Interference with prospective business/economic advantage, in addition to alleging a claim for punitive damages.

At the arbitration proceeding, Bank elicited testimony from Guarantors undermining their sham guaranty defense. For example, Guarantors admitted that Borrower was formed in 2004, well before the 2006 Loan from Bank. Guarantors also admitted that the real property that was the subject of the Loan was transferred from another entity to Borrower before Guarantors ever contacted Bank about the Loan. Guarantors also admitted that they were not personally obligated to repay the Loan, absent the Guaranties, and that Guarantors enjoyed the benefits of limited liability by structuring the Loan to be made to Borrower, a limited liability company, rather than to themselves individually. Bank also defended the allegations that it did not mitigate damages by showing that rejection of the Guarantors' proposals to partially pay the Loan was reasonable under the circumstances, and by showing that the Guarantors' proposals for payment did not fully compensate Bank for its losses.

Relying on *Talbott v. Hustwit* (2008) 164 Cal.App.4th 148, the Arbitrator ruled in favor of Bank on the issue of the sham guaranty defense, stating, "...the final and perhaps the most important factor under the current state of the law [is] whether the structure of the transaction legitimately provided 'a significantly greater degree of separation' between the guarantors and their possible direct liability on the debt [¶] Here, the form of the nominal borrower excludes the individual guarantors from personal liability on the note as a matter of legal structure."

On the issue of mitigation of damages, the Arbitrator held that under *Seaboard Music Co. v. Germano* (1972) 24 Cal.App.3d 618, "[the rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights'...If there is no duty requiring the innocent party to sacrifice and surrender important and valuable rights, there certainly can be no duty to negotiate - in good faith or otherwise - with the breaching party over some settlement of their dispute that may involve a sacrifice or surrender of important or valuable rights." The Arbitrator awarded Bank the full amount of damages requested, \$1,049,400.86. After Bank filed a motion for attorneys' fees, the Arbitrator issued a Final Award for the total sum of \$1,301,751.08, in favor of Bank. Regis Guerin, while at his prior firm, Assayag Mauss, handled the matter for Bank from inception.