LAVERY, C. J., dissenting. I respectfully dissent from the majority opinion. I would conclude, on the basis of the facts found by the trial court, that it is inequitable and contrary to public policy to allow Robert Rossman's attorney, Andrew Buzzi, Jr., and Rossman's spouse, Catherine Rossman, to purchase the promissory note, guarantees and deficiency judgment at 10 percent of its face value for the purpose of protecting Robert Rossman from the deficiency judgment, and then to seek payment based on its face value from two of the other guarantors.

I do not quarrel with either the majority or the trial court's legal analysis of agency and how it applies to the facts in this case; rather, I am relying on equity. If Robert Rossman had himself purchased the note, guarantees and deficiency judgment, he would be subject to a contribution obligation to his fellow guarantors. Under the law of suretyship, when they guaranteed the bank's loan to Mutual Communications Associates, Inc., Guardian Systems, Inc. (Guardian), Richard T. DeMarsico, Jerome G. Terracino and Robert Rossman became cosureties.[1]

''Equity does not permit one tenant in common to

buy in an outstanding title or incumbrance, and hold it for his exclusive benefit to the prejudice of his cotenants. Such a confidential relation with respect to the common property is said to exist between such tenants that it would be inequitable to allow one of them to do with respect to the property that which would be prejudicial to the others. *Van Horne* v. *Fonda*, 5 Johns. Ch. (N.Y.) 388, 407 [1821]; *Venable* v. *Beauchamp*, 3 Dana [33 Ky.] 321 [1835]; *Coburn* v. *Page*, 105 Me. 458, 461, 74 Atl. 1026 [1909]; *Rothwell* v. *Dewees*, 2 Black (67 U.S.) 613, 618 [1862].

"A tenant in common who thus purchases an outstanding incumbrance or title is generally said to hold it in trust for all the cotenants in proportion to their respective shares of the common property. His cotenants, within a reasonable time, may elect whether they will contribute their equitable share and secure the benefit of the purchase. If they do not elect to contribute, the purchaser cannot compel them to do so, except to the extent of their interest in the common property." *Scanlon* v. *Parish*, 85 Conn. 379, 381, 82 A. 969 (1912).

I conclude that, as a result of their status as cosureties on the original note, Robert Rossman, DeMarsico, Guardian and Terracino had fiduciary duties to each other with respect to the opportunity to reacquire the note. Section 55, comment a, p. 236, of the Restatement (Third), Suretyship and Guaranty, provides in relevant part: "When secondary obligors are cosureties . . . the relationship between them is such that they should share the cost of performance of their secondary obligations." An illustration contained in the same section explains the situation more precisely: "P borrows $1,000 from C. S1 and S2 are cosureties for P. S1 and S2 agree that the contributive share of S1 is $600 and [that] of S2 is $400. . . . As between S1 and S2, S1 is a principal obligor to the extent of $600 and a secondary obligor to the extent of $400 . . . . Thus, S1 has a right of contribution against S2 to the extent that S1 has liability to C in excess of $600." Restatement (Third), Suretyship and Guaranty § 55, comment a, p. 237 (1996).

The illustration contained in the Restatement clearly shows the principle that Robert Rossman can collect contribution only from the other guarantors, Guardian, Terracino and DeMarsico,[2] and only to the extent that he paid more for the note, guaranties and deficiency judgment than his share (one third) of the original note. There being no evidence in this case that he paid in excess of that amount, I conclude that the defendants had no obligation to contribute and that the plaintiffs had no greater right to enforce the original note as against the defendants.

The trial court found that Consolidated Asset Management, LLC, was formed to protect the assets of Catherine Rossman and Robert Rossman. The shareholders of Consolidated consisted of only Catherine Rossman

and the Rossman family attorney, Buzzi.

"A tenant in common who purchases an outstanding incumbrance holds it in trust subject to the election of his cotenants to contribute their equitable share and have the benefit of the purchase under certain conditions. *Scanlon* v. *Parish*, [supra, 85 Conn. 381], and authorities therein cited. [The defendant] . . . claims that when a spouse of a tenant in common is the purchaser the same trust arises. . . . [This rule] is well recognized, *Robinson* v. *Lewis*, 68 Miss. 69, 71, 8 So. 258 [1890]; *Biggins* v. *Dufficy*, 262 Ill. 26, 104 N.E. 180 [1914]; *Abbott* v. *Williams*, 74 W. Va. 652, 82 S.E. 1097 [1914]; note, 54 A.L.R. 879; 2 Tiffany, Real Property (3d Ed.), p. 292. The rule is based upon public policy in view of 'the danger which lurks in allowing a wife to do what a husband could not, on account of his fiduciary relationship to the party affected.' *Seymour* v. *Seymour*, 120 Misc. 525, 527, 199 N.Y.S. 23 [1923]; *Robinson* v. *Lewis*, supra." *Skolnick* v. *Skolnick*, 131 Conn. 561, 564, 41 A.2d 452 (1945).[3]

I would apply this doctrine of equity not only to the wife, Catherine Rossman, but also to Attorney Buzzi, who represented both Rossmans. Buzzi represented Robert Rossman in June, 1997, in his unsuccessful attempt to purchase the note, guarantees and deficiency judgment. In July, Buzzi, as trustee, purchased the note, guarantees and deficiency judgment from JLM Services Corporation. In the same month, Buzzi sold them to Consolidated, whose officers were Buzzi and Catherine Rossman, with the full knowledge and acquiescence of Robert Rossman. Consolidated was formed solely to protect the assets of the Rossmans and stands to profit at the expense of the other sureties.

A foreclosure proceeding is an equitable proceeding. It would be inequitable for two guarantors to be held liable on the note and deficiency judgment while another escapes the obligation due to the actions of his spouse and family lawyer. The doctrine of *Skolnick* is not one of agency but of equity.

I would reverse the trial court's judgment and remand the case with an order to allow the other guarantors the right of contribution on the purchase price that Consolidated paid for the note, guarantees and deficiency judgment.

[1] Restatement (Third), Suretyship and Guaranty § 53 (3), pp. 227–28 (1996), provides in relevant part: "In the absence of agreement between or among them, secondary obligors for the same underlying obligation are cosureties . . . ."

[2] Although DeMarsico was one of the guarantors of the note, he was not named as a defendant in this case.

[3] I acknowledge that since its publication over half a century ago, *Skolnick* has not been cited in any reported case. It is, however, a decision of our Supreme Court and, as such, retains the force of precedent unless and until it is overruled by that court or by the legislature. "[T]his court will not reexamine or reevaluate Supreme Court precedent. Whether a Supreme Court holding should be reevaluated and possibly discarded is not for this court to decide." (Internal quotation marks omitted.) *State* v. *Maia*, 48 Conn. App. 677, 683 n.8, 712 A.2d 956, cert. denied, 245 Conn. 918, 717 A.2d

236 (1998).