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# Nevada Amends Foreclosure and Deficiency Laws

STEPHEN B. YOKEN AND ZACHARY E. REDMAN

*This article describes recent amendments to Nevada's foreclosure and deficiency laws.*

**T**he Nevada Legislature recently passed amendments to the Nevada Revised Statutes ("NRS") affecting the rights and remedies of real estate lenders in both the commercial and residential contexts. The legislative changes described in this article are in Assembly Bill 273, signed by Governor Brian Sandoval on June 10, 2011; Assembly Bill 284, signed on May 20, 2011; and Senate Bill 414, signed on June 13, 2011. Some of the amendments became effective on June 10, 2011, June 13, 2011 and July 1, 2011. Other amendments will become effective October 1, 2011. The amendments are complex and this article provides only a brief summary of selected provisions.

## AMENDMENTS EFFECTIVE JUNE 10, 2011

### Limit on Deficiency Recovery By Assignee

Under previous Nevada law, a secured lender could obtain a deficiency after foreclosure in the amount of the debt, minus either (i) the fair market value of the property at the time of sale or (ii) the amount of the successful

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bid at the foreclosure sale (whichever results in the smaller deficiency). The legislation changes this rule for an assignee which purchased the secured loan from the original lender or an intermediary. It provides that the deficiency which may be recovered by an assignee is limited to *the amount of consideration paid by the assignee*, minus the fair market value or bid amount. The legislation provided that this change became effective June 10, 2011.<sup>1</sup>

### **Action Against Guarantor Prior to Foreclosure**

Under previous Nevada law, a secured lender could sue a guarantor prior to foreclosure if the guarantor waived the Nevada one action rule. The legislation continues to allow this, but in actions filed on or after June 10, 2011, the lender's recovery is limited to the amount of the debt, minus the fair market value of the property when the action was commenced, or if a foreclosure occurs before the judgment is entered, the difference between the indebtedness and the amount of the successful bid at the foreclosure sale (whichever results in the smaller deficiency). In an environment with declining market values, this creates a disincentive for lenders to sue guarantors prior to foreclosure, since the deficiency will be measured by the value at the time of filing the action, rather than the later date on which the foreclosure sale occurs. In the rare case in which the lender does not want to foreclose on the property but instead wants to seek full recovery from a guarantor, this legislation limits the lender to recovering a deficiency rather than the full loan amount.<sup>2</sup>

### **Changes Affecting Junior Lienholders**

The legislation includes several changes affecting junior lienholders, specifically "sold out juniors" whose lien position has been eliminated upon a foreclosure of a senior lien. If a junior lienholder is an assignee, its recovery will be limited to the amount of consideration paid for the loan. Insurance proceeds will be deducted from any recovery by the junior lienholder. Under certain circumstances, the junior lienholder may not bring an action if the debt was secured by an owner-occupied single family residence. These provisions apply only to deeds of trust recorded on or after June 10, 2011.<sup>3</sup>

## **Deduction of Insurance Proceeds**

For the purposes of calculating the recoverable deficiency, the amount of any insurance received by, or payable to, a creditor will be deducted from the “amount of indebtedness” under the statute.<sup>4</sup>

## **AMENDMENT EFFECTIVE JUNE 13, 2011**

### **Response to Residential Short Sale**

If a bank or other financial institution receives an offer for a short sale or deed in lieu of foreclosure of a residential property in connection with a loan made primarily for personal, family or household use, the bank or other financial institution cannot unreasonably delay its response. Unreasonable delay will be presumed if the response is not made within 90 days of receipt of the offer.<sup>5</sup>

## **AMENDMENT EFFECTIVE JULY 1, 2011**

### **Reduced Statute of Limitations**

Under previous Nevada law, an action by a “sold-out junior” was usually subject to the six-year statute of limitations which is generally applicable to written obligations. The legislation changes this so that actions by a junior lienholder must be commenced within six months after the senior foreclosure sale, deed in lieu of foreclosure or short sale. This is effective in the case of senior foreclosure sales, deeds in lieu of foreclosure or short sales occurring on or after July 1, 2011.<sup>6</sup>

## **AMENDMENTS EFFECTIVE OCTOBER 1, 2011**

The amendments effective October 1, 2011, primarily affect the foreclosure process itself.

### **Affidavit with Notice of Breach**

The recorded notice of breach commencing a nonjudicial foreclosure must be accompanied by an affidavit of authority to exercise the power of sale stating, based on the personal knowledge of the signatory and under the penalty of perjury:

- the full name and business address of the trustee, the current noteholder, the current beneficiary of record and the loan servicer;
- full name and last known business address of every prior known beneficiary of the deed of trust;
- that the beneficiary or the trustee is in actual or constructive possession of the note secured by the deed of trust;
- that the trustee has the authority to exercise the powers of sale pursuant to the instruction of the beneficiary of record and the current noteholder;
- the amount in default, the principal amount of the secured debt, a good faith estimate of all fees to be imposed as a result of the default and the costs and fees chargeable in connection with the exercise of the power of sale; and
- a description, the date and recordation number (or other unique designation) of each assignment conveying the interest of each beneficiary.<sup>7</sup>

### **Liability of Beneficiaries and Trustees; Treble Damages and Injunction**

If a court determines that a lender or trustee failed to comply with the relevant statutory provisions governing foreclosures, including the affidavit requirement described above, the court must award the grantor or record owner of the property the greater of \$5,000 or treble the amount of actual damages. The grantor or record owner may also obtain an injunction prohibiting the foreclosure sale.<sup>8</sup>

### **Assignment Must Be Recorded**

Any assignment of the beneficial interest under a deed of trust must be recorded. Unless the assignment has been recorded, the lender will not be

allowed to enforce its rights under the deed of trust and the trustee will not be allowed to exercise the power of sale.<sup>9</sup>

### **Subordination Must Be Recorded**

Any subordination agreement affecting priority of liens on real property must be recorded.<sup>10</sup>

### **Limits on Trustees**

The trustee under a Nevada deed of trust must be a title company, a person holding a Nevada business license or fall within certain other categories. The appointment of a substitute trustee under a deed of trust is not effective until the substitution of trustee is recorded. A deed of trust beneficiary may not be its own trustee for purposes of exercising a power of sale.<sup>11</sup>

### **Expanded Criminal and Civil Liability**

Nevada law previously made it a gross misdemeanor to maliciously or fraudulently claim, sign or record a document purporting to transfer, encumber or cloud title to real property. AB 284 abrogates the malice or fraud standard and makes it a felony for any person to record, execute or notarize a document claiming or purporting to create an interest in, or a lien or encumbrance against real property if the person knows or has reason to know that the document is forged or groundless, contains a material misstatement or false claim or is "otherwise invalid." The Nevada attorney general can also recover civil penalties for such violations.

### **NOTES**

<sup>1</sup> AB 273 §5 amending NRS 40.459.

<sup>2</sup> AB 273 §5.5 amending NRS 40.495.

<sup>3</sup> AB 273 §§1-3.

<sup>4</sup> AB 273 §5 amending NRS 40.459.

<sup>5</sup> SB 414.

<sup>6</sup> AB 273 §3.3.

<sup>7</sup> AB 284 §9 amending NRS 107.080.

<sup>8</sup> AB 284 §6 amended by AB 273 §5.8; AB 284 §9 amending NRS 107.080.

<sup>9</sup> AB 284 §1.

<sup>10</sup> AB 284 §2.

<sup>11</sup> AB 284 §6 amended by AB 273 §5.8.