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WILL SENATE BILL 306 EASE LENDERS' PAIN FROM THE *SFR v. US BANK* DECISION?

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Will Senate Bill 306 Ease Lenders' Pain From the *SFR v. US Bank* Decision? No, but it will provide safeguards against future loses. Senate Bill 306 is in direct response to Nevada's super-lien priority debacle, which culminated in the well-chronicled *SFR* decision on September 18, 2014¹. For the better part of 20 years before the *SFR* decision, lenders, loan servicers, HOAs and others believed that the foreclosure of an HOA lien would have no impact on an otherwise first priority deed of trust. In 2011, with HOAs facing increased delinquencies and traditional deed of trust holders straddled with vague and often conflicting new foreclosure laws, HOAs began to more aggressively take their liens for unpaid dues to foreclosure sale. These sales created a cottage industry of investors buying properties at the HOA foreclosure sales, often for pennies on the dollar. Slowly, the purchasers at the HOA sales started claiming that the HOA foreclosure wiped out the senior deed of trust and that they held title free and clear of all liens. At first, the mortgage industry collectively said, "No way!" and most state and federal district court judges agreed. That was, of course, until the Nevada Supreme Court decided *SFR*, holding that a properly conducted judicial or nonjudicial foreclosure of an HOA lien did, in fact, eliminate an otherwise first priority deed of trust. The mortgage servicing industry in Nevada went into a tailspin.

In the ashes of the *SFR* decision, the mortgage industry searched for legal, legislative and practical solutions. For starters, mortgage servicers began recording Requests for Notice under NRS 116.31163, NRS 116.61168 and NRS 107.090. These requests required the HOAs to furnish written notice of the foreclosure, giving mortgage servicers time to protect their deeds of trust. Meanwhile, lawsuits from all sides flooded the courts to determine, among other things, whether the HOA's foreclosure was valid, what liens remained on the property (if any) and whether the HOA was liable for the investors' loss. Against the backdrop of the battle in the courts

on *past* HOA sales, both the HOA and mortgage industries searched for a legislative solution to better define the HOA lien and foreclosure process. SB 306 is the product of those efforts.

For starters, SB 306 is not retroactive and will have no effect on HOAs sales occurring prior to its effective date. But, if passed, it will provide significant protections to lienholders and mortgage servicers going forward. Below is a list of the key proposed amendments and their corresponding section:

- Right of Redemption:** From the mortgage industry's perspective, this is probably the most important amendment. Section 6 of SB 306 proposes to amend NRS 116.61166 to provide a right of redemption to the foreclosed out owner *and* "any holder of a recorded security interest". Specifically, within 60 days following an HOA foreclosure sale, any lienholder may redeem the property for the HOA sale price plus 1% interest, HOA dues paid by the purchaser post-sale, certain specified costs of improvement and any senior liens (for example, if a second mortgage holder wanted to redeem, it would have to also pay the amount owed the first mortgage holder). Upon redemption, title would vest in the name of the redeeming lienholder. In other words, the lienholder could skip its own foreclosure and market the property as an REO. Since the redemption amount and process will be new, we suggest contacting counsel before redeeming any property following an HOA sale.

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- Pre-Sale Right to Pay Off the HOA Lien:** Section 6 of SB 306 amends NRS 116.61166(1) to provide that, if a lienholder pays the super-lien priority portion of the HOA lien "not later than 10 days before the date of sale" *and* records notice of "such payment" in the appropriate county recorder's office "not later than 5 days before the date of sale", the HOA sale will not extinguish the lienholder's interest.

Continued on page 42



Featured Article

SENATE BILL 306— Continued from Page 14

- Description of the Super-Priority Amounts:** Section 2 proposes to amend NRS 116.31162 to require that the Notice of Default (“NOD”) specifically describe the (1) amount of the HOA lien that is senior to the first priority deed of trust; (2) the nature of those amounts, i.e., dues versus other items; (3) the costs of enforcing the HOA lien; and (4) that, foreclosure on these amounts will eliminate a first priority lien.
- Sets Recoverable Fees for the HOA:** Section 1 proposes to amend NRS 116.3116 by adding subsection 5, which specifically sets the collection costs that will be senior to a first priority deed of trust – demand letter (\$150); notice of delinquent assessment (\$325); intent to record a NOD (\$90); NOD (\$400); and Trustees Sale Guaranty (\$400), for a total of \$1365. No other enforcement costs, including attorneys’ fees, will be senior to a first priority deed of trust. This provision will provide some well needed clarity in what the mortgage lienholder must pay to pay off the HOA lien and protect the mortgage from extinguishment.
- Payment to HOA is Additional Debt under the Deed of Trust:** As long as it does not conflict with any other provisions of federal or state law, any payments by a lienholder of an amount due to the HOA in accordance with NRS 116.3116(1) “becomes” additional debt owed by the property owner. (Section 1 of SB 306, amending NRS 116.6116(16).)
- Nevada Mediation Protection Modified:** Under existing law, the HOA cannot foreclose between the date that a first priority lienholder records its NOD and the date the Foreclosure Mediation Program Certificate records. Section 2 of SB 306 proposes to amend NRS 116.61162 to provide an exception to the above limitation if the owner is not paying the HOA dues while the property is in the Mediation Program. Of course, that will generally be the case. Additionally, Section 8 of SB 306 proposes to amend NRS 107.086(2)(d), by requiring that the mortgage lienholder’s foreclosure trustee notify the HOA within 10 days after mailing the NOD, that the property is subject to the Mediation Program. Further, NRS 107.086(9) is amended to require that the mortgage lienholder’s fore-



Featured Article

closure trustee provide notice of the Mediation Certificate to the HOA within 10 days of receipt.

- **Notice to Lienholders:** Section 3 of SB 306 proposes to amend NRS 116.31163 specifically requires that the HOA mail a copy of the NOD to any recorded lienholder (recorded prior to the NOD) or, if applicable, its registered agent for service of process. Section 4 proposes the same require for the Notice of Sale (NRS 116.311635(1)(d).) This means that lienholders must ensure that their registered agents for service of process can recognize the NOD or NOS and know where to send it upon receipt. SB 306, section 4, also requires that the HOA post and publish the Notice of Sale (NRS 116.311635(1)(a) and (b)).
- **Sale Process Must be Commercially Reasonable:** While way too late, section 5 of SB 306 will amend NRS 3116.31164 to require that the HOA sale process must be “commercially reasonable.”
- **Clarification of the Request for Notice Process:** Section 7 of SB 306 proposes to clean up the Request for Notice provisions of NRS 116.31168. The proposed language will require that the Request for Notice provide (1) the name and address of the person requesting notice; (2) identify the recorded document that request is being made under; and (3) the names of the “unit’s owner” and the HOA. Since the name of the owner can be different than the lienholder’s borrower, this provision may continue to provide trouble for mortgage servicers. And as servicers have found since the *SFR* decision, it is often quite difficult to identify the name of the HOA or the HOAs for the given unit without paying vendors or ordering the CC&Rs for the HOA. If these procedures are followed, the HOA will be required to mail a copy of the NOD and NOS to the party requesting notice.
- **Impact on a Bona Fide Purchaser for Value:** If passed, section 6 of SB 306 will add NRS 116.31166(13), providing that, after the redemption period expires, any violation of NRS 116.3116 to 116.61168, will not affect the sale of the property to a BFP.

While SB 306 is not the cure-all that many in the mortgage servicer industry had hoped for, a retroactive solution was never

likely. While most mortgage servicers have already designed procedures to maximize the opportunity to cure a delinquent Nevada HOA lien before sale, SB 306 will provide additional security. Most importantly, in the unlikely event that a Nevada HOA sale mistakenly goes forward, the foreclosed out lienholder will have 60 days to redeem the property, taking title directly, rather than having to go through its own foreclosure.

If SB 306 – or something close to it – is enacted, the future of HOA foreclosures in Nevada should become clearer, and we can all get back to litigating all the past HOA sales.

Editor’s Note: At press time, SB 306 passed in the Nevada Senate.



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