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Is Nevada's HOA solution just another problem for mortgage servicers?

Exercising the new right of redemption on HOA sales

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Between 2010 and 2014, loan servicers and Investors in Nevada had thousands of liens potentially wiped out by HOA foreclosures.

The reason being poorly written statutory language that, unbeknownst to just about everyone, including HOAs, loan originators and title companies. This created a super-lien for HOA dues that could wipe out an otherwise 1st position Deed of Trust at foreclosure.

In response to what could be billions of dollars in losses and the ensuing title wave of litigation over the HOA sales, the Nevada Legislature passed SB 306, which became effective on October 1, 2015. SB 306 did not provide any relief to Investors and servicers who may have already lost their liens, but it did provide some prospective relief by requiring notice to the lienholders before extinguishing their DOTs, limiting HOA collection costs, and otherwise providing more structure to the HOA lien and foreclosure process.

The crown jewel of SB 306 is the right of redemption in the event an HOA foreclosure sale slips through the cracks. On its surface, the right of redemption is a well-needed safety valve for lenders AND homeowners; however, its application may be challenging.

SB 306, codified as Nevada Revised Statute (NRS) 116.31166, provides that the homeowner or any lienholder can redeem the property within 60 calendar days following an HOA foreclosure sale by paying the following 5 points:

1. The purchase price plus 1% interest per month;
2. Any "assessments (e.g., HOA dues), taxes or payments toward liens" paid by the purchaser at the HOA sale (Purchaser) at, or after, the HOA sale;
3. If the Purchaser was a lienholder, the amount of that lien with interest;
4. Any "reasonable amount expended by the [P]urchaser which is reasonably necessary to maintain and repair the unit ..."; and

5. If the redeemer is a lienholder, any lien that is senior to its lien, i.e., if a 2nd lienholder redeems the property, it must pay off the 1st lien.

In addition to payment, the redeeming party must "serve" a Notice of Redemption on the Purchaser and the party conducting the sale, i.e., the HOA foreclosure trustee or collection agency. If a lienholder is redeeming, the Notice of Redemption must provide the original or certified copy of the Deed of Trust, a copy of any assignment establishing the redeemer's interest in the Deed of Trust along with a supporting affidavit, and a payoff statement with an affidavit showing the amount "then actually due" on the redeemer's lien

After redeeming the property, the foreclosing agent must convey title to the redeemer. The redeeming lienholder will then hold title, free and clear of any liens or the homeowner's interest.

The redemption process requires several hoops to jump through.

First, the redemption must be completed within 60 days from the HOA sale. If the servicer missed the HOA sale due to a notice defect or a deficiency in its internal process, it may not even learn about the HOA sale in time to exercise its right of redemption. Even with the full 60 days to redeem, challenges abound. Upon realization of HOA foreclosure, the servicer should immediately reach out to the foreclosing agent for sale amount and the Purchaser's contact information. Next, the servicer must determine what, if any, senior liens existed and what is owed thereunder.

The servicer must also reach out to the purchaser to find out: (1) if the purchaser was a lienholder, the amount owed on that lien at the time of the HOA sale and any interest incurred thereafter; and (2) what "reasonable" amounts expended by the purchaser that were "reasonably" necessary to maintain and repair the property.

In addition to chasing down parties, the most obvious road block is having to depend on the HOA property investors who have no incentive to timely give you anything because they have a huge upside if the redemption time period lapses.

This is what our office is experiencing in the very short period that the right of redemption has been in place.

As explained above, the redemption process necessitates certain figures and expenses that only the purchaser can provide. If the purchaser drags its heels or outright fails to respond, the servicer or homeowner is left to guess at what is owed or lose its right of redemption.

Other issues: What does "serve" mean, and how does the redeeming party "serve" both the purchaser and the HOA trustee an original Deed of Trust? What kind of affidavit is required and what does it need to state? What are reasonable amounts that are reasonably necessary to maintain and repair the property that the purchaser can add to the redemption price?

SB 306 does not provide any mechanism for the redeeming lienholder or homeowner to challenge costs that could be considered unreasonable or not reasonably necessary. As written, the redeeming party must pay the purchaser's demand or lose its ability to redeem the property.

If the servicer learns of the HOA sale shortly thereafter and the purchaser timely cooperates, redemption should not be a problem. But, if the time to redeem is about to expire, the purchaser will not timely cooperate or demands unreasonable amounts, the servicer may have to file suit to force the purchaser's cooperate and seek a TRO enjoining the HOA trustee from issuing the final deed to the

purchaser. The suit should include an allegation of tender (and an actual tender) of the amounts the servicer and its counsel reasonably believe are necessary to redeem the property.

The intent of SB 306 was to provide servicers and HOAs with clarity, structure and protections with post-October 1, 2015 HOA liens and foreclosures. In addition, it provides the framework for a tremendously valuable protection – the right to redeem the property following the HOA sale. Unfortunately, the mechanisms to redeem are not clear.

More problematic is that redemption requires timely and reasonable cooperation by the purchasers, the same purchasers that the servicers have been litigating with for the last several years. As a result, exercising the right of redemption could very well lead the servicer into quiet title litigation, again.



Robert Finlay is one of the three founding partners of Wright, Finlay & Zak. Since 1994, Finlay has focused his legal career on consumer credit, mortgage and real estate litigation and compliance matters. Finlay has authored several amicus briefs on key issues impacting the mortgage and finance industry.