

BACK STORY

SANDPOINTE: A DIVIDED DECISION

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One of the more important real property decisions from the Nevada Supreme Court in the past half-century was published in November 2013. *Sandpointe Apartments, LLC v. Eighth Judicial District Court*, (120 Nev. Adv. Op. 87 November 14, 2013). With the 2011 Legislature's limitation of successor creditors' deficiency claims in the cross-hairs, the court delivered an opinion that divided the court and the consequences.

The Holding

In a 5 - 2 decision, the court concluded that NRS 40.459(1)(c) (limiting successor creditors' deficiency to the amount of consideration they paid for such rights), constitutionally applies to any deficiency claim where the judicial foreclosure or trustee's sale occurred on or after June 10, 2011. As a result, any borrower or guarantor who faces a deficiency claim arising from a judicial foreclosure or trustee's sale that occurred before June 10, 2011, is denied the statutory protection. Determining that the statute's application to a pre-enactment judicial foreclosure or trustee's sale was unintentionally retroactive, the court denied the petition at issue in *Sandpointe*, but made clear that the law constitutionally limits any post-enactment deficiency claim. What's more, the court concluded that successor creditors are deprived of interest, costs and fees under NRS 40.459(1)(c).

The Effect

In the wake of *Sandpointe*, any successor creditor who proceeded to a judicial foreclosure or trustee's sale, on or after June 10, 2011, was limited to the amount of consideration it paid for the rights to pursue that deficiency. Put differently, if a successor creditor paid \$2 million for the right to enforce a \$10 million loan secured by real property with a fair market value of \$5 million, as of the date of the judicial foreclosure or trustee's sale, there is no deficiency.

During the period that the *Sandpointe* decision was considered by our overworked Supreme Court, multiple district courts took different approaches with respect to deficiency claims, some staying cases, some entering and staying judgments, and others entering and enforcing judgments. Even further, some cases were appealed and some were not. Thus, all the deficiency claims that proceeded to judgment and beyond (without NRS 40.459(1)(c)), where the judicial foreclosure or trustee's sale occurred on or after June 10, 2011, must now be reconsidered and resolved.

As a result of the decision, the simple timing of a judicial foreclosure or trustee's sale renders many borrowers and guarantors relatively defenseless. *Sandpointe*'s widowed guarantor is left to fend for herself, without the protections of the 2011 law, to the delight of successor creditors; but the majority of other similarly situated borrowers and guarantors whose judicial foreclosure or trustee's sale coincidentally occurred on or after June 10, 2011, are protected. To that end, the decision's logic is strained. Neither borrowers nor guarantors control the date of the judicial foreclosure or trustee's sale. And, contrary to the motivating policy, the decision benefits those quintessential profiteers who quickly foreclosed and refused to work with debtors, but punishes those cooperative creditors who explored work-outs with debtors and delayed foreclosure.

The Future

There is too much at risk for this debate to end anytime soon. For successor creditors who are seeking to enforce billions of dollars in defaulted debt, and for those borrowers and guarantors still struggling to survive the downturn of the great recession, both sides are certain to challenge or limit the court's ruling. Because the Supreme Court determined that the Legislature did not intend for the law to apply retroactively, despite the contrary intent voiced in the Legislature's Amicus Brief, filed at the Supreme Court's sua sponte Order, rehearing has been sought. Moreover, the court added a footnote, reserving a relatively minor issue in the case of whether or not the FDIC constitutes a person under Nevada law. Given that most deficiency claims subject to the statute's limitation arise from failed banks, successor creditors generally acquired their rights somehow from an FDIC related transaction. Consequently, whether or not the FDIC is a "person" (regardless of its humanity), will have to be resolved by the court in a subsequent opinion.

Conclusion

In spite of all that the court decided in *Sandpointe*, many issues remain to be decided by future legal wrangling. *Sandpointe* is a divided opinion, resulting in mixed feelings on both sides. Taken together, the opinion and dissent suggest the decision was probably much more divided than the opinion indicated, which resulted in compromise. Undoubtedly, the decision raises more questions, guarantees more billable hours and swells the anxiety of the district court judges. ■

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