

## **Guarantor Waivers of the Fair Market Value Hearing**

by

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In Section 5.5 of Assembly Bill 273, the 2011 Nevada Legislature provided that if the creditor of a real estate secured debt elects to pursue the guarantor of that debt prior to foreclosing, the guarantor is entitled to (i) a hearing on the fair market value of the real estate collateral, and (ii) a limit on any adverse judgment to the difference between such fair market value and the amount of the guaranteed indebtedness. A Section 5.5 hearing would not come about unless the subject guarantor has previously provided a valid waiver of rights under NRS 40.430 (commonly referred to as the “one-action rule”). This raises an interesting question. If a guarantor can waive the “one-action rule,” can a guarantor also waive the right to a Section 5.5 fair market value hearing?

To support the notion that a Section 5.5 hearing may be waived, one might point out that such a waiver would arise most likely in the context of a commercial loan transaction. (Most residential loan transactions will not involve a guarantor waiver of the “one-action rule” because (1) the borrower is the same party on whose credit the loan is underwritten and no guaranty is required, (2) the principal balance in the relevant transaction never exceeds \$500,000, and thus the “one-action rule” cannot be waived under NRS 40.495(5)(b), or (3) the real property security is essentially the owner’s principal residence, and thus the waiver is prohibited under NRS 40.495(5)(d)). Commercial parties are presumed to be sophisticated enough to weigh the risks and rewards of waiving statutory rights, and laws governing commercial transactions are often conceived so as to allow the parties—who are best suited to allocate the costs and benefits of a particular regulation—to determine their importance and value in a transaction. If one assumes that Section 5.5 was drafted with commercial transactions in mind, one might also reasonably assume that it was drafted with the understanding and intent that its terms might be waived by sophisticated parties apportioning risk and reward in a commercial loan transaction (particularly if the parties have already been allowed to waive the “one-action rule”).

In response to the foregoing, a party arguing against the validity of a Section 5.5 hearing waiver might argue that, whatever the benefits of allowing parties to apportion risk in commercial transactions, the statutory scheme of NRS 40.430 and 40.495 simply does not allow for that type of waiver. Such an argument might take root in the text of NRS 40.495, which, in expressly identifying certain statutory provisions that a guarantor may waive, makes no provision for the waiver of a Section 5.5 hearing. So this thinking goes, had the legislature intended to allow for the waiver of a Section 5.5 hearing, it would have explicitly said so and

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described the terms for such a waiver, as it did for guarantor waivers of NRS 40.430, 40.475, and 40.485.

The strength of the foregoing arguments (with others), and the permissibility of Section 5.5 waivers, will be decided eventually in court or in a future legislative session. In the meantime, attorneys counseling lenders will advise their clients to include a waiver of Section 5.5 in the hope that such waivers will ultimately be found enforceable. Attorneys counseling borrowers and guarantors, on the other hand, will advise their clients that there may be some risk to waiving the benefits of Section 5.5, and may seek to have such provisions stricken from loan documents, or included at the expense of other lender concessions.